









Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

A

NEW

Abridgement of the Law.

BY MATTHEW BACON,

OF THE MIDDLE TEMPLE, ESQ.

THE SEVENTH EDITION, CORRECTED;

WITH LARGE ADDITIONS, INCLUDING THE LATEST STATUTES AND AUTHORITIES.

VOLUMES II. III. AND IV. (EXCEPT THE ADDENDA,)

By SIR HENRY GWILLIM,

OF THE MIDDLE TEMPLE, KNIGHT;

LATE ONE OF THE JUDGES OF HIS MAJESTY'S SUPREME COURT
AT MADRAS.

VOLUMES I. V. VI. VII. AND VIII. AND THE ADDENDA TO THE
OTHER VOLUMES,

By CHARLES EDWARD DODD,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

IN EIGHT VOLUMES.

VOL. V.

255457
b. 6. 31

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. AND W. T. CLARKE; LONGMAN, REES, ORME, BROWN, AND GREEN;
T. CADELL; J. RICHARDSON; J. M. RICHARDSON; R. SCHOLEY; C. J. G. AND F.
RIVINGTON; BALDWIN AND CRADOCK; W. WALKER; SAUNDERS AND BENNING;
A. MAXWELL; S. SWEET; H. BUTTERWORTH; STEVENS AND SONS; G. WILSON;
E. HODGSON; R. PHENEY; J. RICHARDS; E. NUNN; AND A. AND R. SPOTTISWOODE.

1832.

RECEIVED OF THE



AT THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

LEGACIES AND DEVISES.

[A WILL and testament may be considered in two very distinct lights, according to the different subjects upon which it operates, either as it disposes of real, or of personal property. A will of lands is a conveyance or donation *mortis causá*, a limitation of the testator's estate by a revocable act: it constitutes no heir, creates no representation, but passes the estate merely of itself without any further act. On the contrary, the constitution of an heir is essential to a will of personal estate; for if there be no heir constituted, the instrument is not strictly and properly a will; and as no testamentary disposition of personal property can be administered without the interposition of the representative, the law, upon the deceased's omitting to appoint a representative, or the appointee's refusing to act, takes upon itself to nominate one. The instrument in the latter case was borrowed from, and is framed upon, the *Roman* law: the instrument in the former case has no reference to that law; and, not having the form of a will properly so termed, it has therefore been called a *devise*. However, as the restraint which the feudal law imposed upon testamentary alienations of lands, and which occasioned the above distinctions, is now taken off; and as the statutes of H. 8. have enabled mankind to dispose of real estates by will and testament, the term "will" seems now sufficiently comprehensive to be used in a general sense; and therefore the word "devises" may rather be applied to those parts or clauses of the will which convey a title to real estate, whilst those parts which relate to personal chattels may be distinguished by the name of "bequests." Not that, though it be now allowed to convey both species of property by an instrument nominally the same, the old distinctions are therefore entirely obliterated; for the will is still in effect a distinct instrument, as it relates to the one or to the other species. To a bequest or legacy the assent of the representative is required; not so to a devise, for a devise creates no representative. So far as respects the personalty there is a probate of the whole instrument; and the probate is evidence for every legatee: but as to

Domat. lib. 3.
§ 1.

* * It was the intention of the Editor of the fifth edition of this work to reduce the whole doctrine relating to wills under the head of "Wills and Testaments;" and, with that view, the learning of Devises was omitted in the second volume. But it has since occurred to him, that an objection might possibly be made to this change in the arrangement, inasmuch as it would be blending that part of the book which is generally attributed to the Chief Baron Gilbert with the labours of later compilers. He therefore thought it better to abandon the scheme he had formed. It was proper, however, to take notice of it here, in order to account for the introduction of the Law of Devises under the head of Legacies.

the real estate there is no probate, the spiritual court having no cognizance of the instrument as a devise; the will may be void as to one devise, and good as to the others; and every several devisee must make out his title in a distinct cause. Nay, so distinct and independent on each other are the several parts of the will considered with reference to these different kinds of property, that a person may affirm the will as to one, and disaffirm it as to the other; he may impeach the will *quoad* the devises, and yet insist upon taking a benefit under it *quoad* the personalty. Again, the will, as to personals, does not speak till after the testator's death; whilst, as to real estate, it refers to the date. Hence, it will pass after-gotten property of the former sort, but not of the latter.

We shall first treat of Devises, and under that head we shall consider,]

- (A) Who may devise Lands, and to whom.
- (B) Of what Estate or Interest in the Devisor he may dispose.
- (C) What Words pass a Fee in a Will.
 - ¶ I. Expressions which are equivalent to the word "Heirs."
 - II. Word "give" or "devise" not requisite.
 - III. Devises which carry the Fee by Implication.
 - 1. *To Trustees for Purposes which require the Fee.*
 - 2. *Where the Devisee is described as an Heir.*
 - 3. *Where the Devisee is in respect of the Premises devised charged with the Payment of a Sum of Money.*
 - 4. *Expressions which are considered as sufficient to pass a fee, as "Estate," "Property," &c.*¶
- (D) What Words create an Estate Tail or for Life.
- (E) Of Terms for Years, and uncertain Interests by Devise.
- (F) Of Devises for Payment of Debts.
- (G) Of Devises by Implication.
- ¶ (G g) When Words of Recommendation, Desire, &c. raise a Trust, see *Legacies*, (B) 1. *post.* ¶
- (H) Of the Disposition of Goods and Chattels by Will, by what Description, and to whom good.
- (I) Of Executory Devises of Lands of Inheritance: And herein of contingent Remainders, and cross Remainders as far as they relate to this Place.
- (K) Of Executory Devises of Leases for Years: And herein of the Limitation of the Trust of a Term, as far as it relates to and agrees with a Devise thereof.
- (L) Of

(L) Of void Devises: And herein,

1. *By devising what the Law already gives, or what the Policy of the Law will not admit.*
2. *By Incertainty in the Description of the Thing devised.*
3. *By Incertainty in the Description of the Person to take.*
4. *By the Devisee's dying in the Lifetime of the Devisor.*

What Circumstances are necessary by the 32 H. 8. c. 1. and 34 & 35 H. 8. c. 5. and 29 Car. 2. c. 3. What shall be a Revocation and a new Publication, *vid. tit. Wills.*

(A) Who may devise Lands, and to whom.

|| See Com. Dig. *Devise* (G) (H) (I) (K). ||

THE (a) statutes of 32 H. 8. c. 1. and 34 & 35 H. 8. c. 5. give this power to all persons, except infants, idiots, femes covert, and persons of (b) *non sane* memory; and every person may be a devisee within these statutes, except bodies politick and corporate; and these were excepted because they never answered the feudal services, and were restrained from purchasing any lands by the statute of *mortmain*. 6 Co. 16. b. Roll. Abr. 608. (a) A conveyance by will was a privilege anciently allowed by the civil law only to persons in *extremis*, who had not time or assistance necessary to make a formal alienation, and was chiefly intended for military men, who were always supposed to be under those circumstances, and therefore the ceremonies and number of witnesses required of others were dispensed with as to soldiers, though now the rules for military testaments are allowed in most cases; but as to lands and houses, our law gave no liberty of disposing thereof by will, except in certain boroughs and places where such custom had obtained time out of mind. Show. P. Cases, 147. Sir Edward Hungerford v. Nosworthy. (b) That it is not sufficient that they be able to answer to familiar and usual questions. Cro. Jac. 497. 6 Co. 23. a.

Yet, since the (c) statute of charitable uses, it has been held, that a devise to the principal, fellows, and scholars of *Jesus College* in *Oxford*, and their successors, for maintenance of a scholar, is good, though such devise had been *mortmain* by the statute of *wills*. (c) 45 Eliz. c. 4. for which vide head of *Charitable Uses and Mortmain*. Lev. 284. S. P.

Hob. 156. Flood's case.

Although a wife, by reason of the subjection she is under to her husband, cannot make a will; yet a woman, whose husband is banished for his life by act of parliament, may make a will, and act in every thing as a feme sole. || 2 Br. C. C. 585. || 2 Vern. 104. Countess of Portland and Progers; for this vide tit. *Baron and Feme*.

Also, a husband may bind himself by covenant or bond to permit his wife, by will, to dispose of legacies, &c.; and this will be such an (d) appointment as the husband will be bound to perform. Cro. Eliz. 27. Cro. Car. 219. 576. 597. 1 Vern. 244-5. 2 Vern. 329. 2 Ves. 141.

[When a feme covert is empowered to make a writing in nature of a will, a writing executed during the coverture will operate as such. *Cotter v. Laver*, 2 P. Wms. 624. *Oke v. Heath*, 1 Ves. 139. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 75. *Southby v. Stonehouse*, *id.* 612.] (d) But it does not operate as a will, neither ought it to be proved in

in the spiritual court; for the property passeth from him to her legatee, and it is his gift. 1 Mod. 11. [But although it may not operate strictly as a will, but as an appointment, yet it is of a testamentary nature, and therefore must be proved in the spiritual court, else the legatee cannot entitle himself to the bequest in a court of law. *Stevens v. Bagwell*, 15 Ves. 139. 154. *Stone v. Forsyth*, Dougl. 707. *Ross v. Ewer*, 5 Atk. 156. *Jenkin v. Whitehouse*, 1 Bur. 431. *Cothay v. Sydenham*, 2 Br. C. C. 392.] Pre. Ch. 84.—If he once assents, he cannot after dissent; and where he is bound by agreement to let her make a will, his consent shall be implied till the contrary appears; and what shall be sufficient evidence of an assent, *vide* 2 Mod. 172, 173. *Eq. Cas. Abr.* 66.

Stevens v. Bagwell, 15 Ves. 139. 2 East, 552. || But though a feme covert survive her husband, her will made during the coverture with his assent will only pass such personal estate as he could dispose of, not such as is acquired after his death. ||

Roll. Abr. 608. A feme covert executrix cannot devise any of the goods which she hath as (a) executrix without the (b) assent of the husband, or his agreement after.

(a) Of things in action, or of what she hath as executrix, by her husband's consent, she may make a will; and this is properly a will in law, and ought to be proved in the spiritual court. 1 Mod. 211, 212. || If she died in the lifetime of her husband, she might, with his consent, bequeath choses in action. 2 Br. C. C. 543. || (b) That a feme covert executrix may make an executor without his assent, *vide* *Moor*. 340. 2 And. 92. *Roll. Abr.* 608. 912. 1 Mod. 211, 212. || 2 East, 556. ||

Fettiplace v. Gorges, 1 Ves. jun. 46. S. C. 3 Br. C. C. 8. || If personal estate of any kind is settled upon a feme covert, whether by a contract to which her husband is a party, or by the settlement or gift of other persons, she has the same power over it in equity as if she were a feme sole; she takes it with all its incidents, of which the *jus disponendi* is one. And where she has this power over the principal, she by consequence has it over its produce and accretions. ||

Gore v. Knight, 2 Vern. 555. *Slanning v. Style*, 3 P. W. 338; *sed vid.* 5 Ves. 79. 2 Swanst. 62. 1 Freem. 304.

Plow. 344. 11 Mod. 157. If a feme covert makes and publishes her will, and devises land by it, and her husband dies, and then she dies, the devise is void, because the consummation is founded upon the making and publishing, which are void acts.

Peacock v. Monk, 2 Ves. sen. 191. *Wright v. Cadogan*, 1 Br. P. C. 486. S. C. 2 Eden, 239. *Doe v. Staple*, 2 T. R. 684. S. C. nom. *Hodsdon v. Lloyd*, 2 Br. C. C. 533. *Rippon v. Dawding*, Amb. 565. *Dillon v. Grace*, 2 Sch. & Lef. 456. *Roper, Husband and Wife*, vol. i. 179. || But if a feme covert before marriage reserve a power to dispose of real estate by her will, — either by a power over a use, which is effectual at law, or through the medium of a trust, or even by an agreement in her marriage articles, — it will be enforced by a court of equity: and this reservation may comprise not only the real estate she then has, but all that may devolve upon her during the coverture. After marriage, a feme covert can only acquire a power to devise her real estate by levying a fine, or suffering a recovery thereof. ||

Com. Dig. tit. Devise, (H. 3.) [It is said by Lord C. B. *Comyns*, that, by the custom of London, a feme covert may devise to her husband, but without citing any authority.]

Co. Lit. 112. *Roll. Abr.* 610. [This was allowed for A wife may be a devisee, though not a grantee to the husband, for as the grant had been void, because the husband and wife are but one person in law, so the devise is good, because it does not take

take effect till after the death of the husband, and then they are no more one person. settled law so early as the time of

Ed. 2. 4 Ed. 2. Fitz. tit. *Devise*, pl. 23.]

An infant cannot devise his (a) lands; and therefore if one under the age of 21 makes his will, and thereby devises his lands, and after attains the age of 21 years, and dies without making any new publication thereof, this devise is void. Sid. 162. Herbert and Forbale, agreed *per Cur.* on a

trial at bar. 11 Mod. 157.; for this *vide* Dyer, 143. Raym. 84. 1 Ves. 299. 3 Atk. 695. || But a special custom in a particular place for an infant to devise lands is good. Perk. 221. § 504. 3 Atk. 711. Rob. Gav. 225. || (a) An infant male at the age of 15, or female at 12, if proved to be of discretion, may make a will, and dispose of personal estate. 2 Vern. 469.— Other books mention 17 or 18, at which years an infant may make his testament and constitute his executors for his goods and chattels. Co. Lit. 89. b.— But as the common law has appointed no time, and as this is a matter properly cognizable in the spiritual court, which proceeds according to the civil law, by which law a will at 14 is good, it seems agreed, that a will made by an infant at the age of 14 of his personal estate will not be controlled in Chancery, or the temporal courts. 2 Mod. 315. 2 Jon. 210. See tit. *Infancy and Age*, A.

If there be two joint-tenants of lands, and one of them devise that which belongs to him, and die, this is a void devise, and the devisee takes nothing; because the devise does not take effect till after the death of the devisor, and then the surviving joint-tenant takes the whole by a prior title, *viz.* from the first feoffment. But in this case, if the devisor survive (b) the other joint-tenant, then the devise is good for the whole, because he being the surviving joint-tenant has the whole by survivorship, and then the words of the will are sufficient to carry the whole estate: besides, at the time of making the will, though he was not sole tenant, yet he was seised *per my et per tout*; and it is impossible to fix upon any particular part which he meant to devise, because he could not then call one part of the land more his own than another, and the most genuine construction seems to give the whole land, since he was seised *per tout* of it at the time of the devise. Litt. § 287. Perk. § 500. [(b) But it is now settled, that a subsequent determination of the jointure, whether by partition or by the death of the companion, will not effectuate a devise made during the jointure; for the statute of 34 & 35 H. 8. c. 5. § 4.

requires that the devisor should have a sole estate in fee-simple, or should be seised in fee in coparcenary or in common, at the time of making the will, in order to be capable of devising. Even at common law such a will would have been bad; for before the statute a man could only devise lands which he was then seised of: and a will cannot operate as a severance of the jointure. Swift v. Roberts, 3 Burr. 1488. || 1 Bl. Rep. 476. || Butler and Baker's case, 3 Co. 50. b. Poph. 87. S.C.]

It has been much doubted, whether a devise to an infant *in ventre sa mère* be good, because it is not in being to take at the time of the death of the devisor; and since by the devise the person is to take (c) immediately after the death of the devisor, the freehold cannot be put in abeyance by the act of the parties. That such a devise is not good seems to be supported by the following authorities:

Dyer, 303. 11 H. 6. 13. Bro. Devise, 30. Salk. 231. pl. 10. Moor, 637. 12 Mod. 278. (c) It is said by *Finch*, Lord Keeper, that at common law, without all question, a devise to an infant *in ventre sa mère* is good of lands devisable by custom; but the doubt arises upon the statute, which enacts, that it shall be lawful for a man by will in writing to devise to any person or persons, 2 Mod. 9. — * Posthumous children are now enabled to take a contingent remainder which hath no trust-estate to preserve it; see 10 and 11 W. 3. c. 16.

Others (c), of as good authority, hold, that such devise is good, though the infant be not *in esse* at the death of the devisor, and that (c) As Moor. 177. Lev. 135. Sid. 153.

Raym. 163.
Keb. 851.
2 Bulst. 275.
Freem. 244.

that the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time.

Sid. 155.
Snow and
Cutler.
Lev. 135.
S. C.

But all agree in this, that a devise to an infant, *when he shall be born*, or when God shall give him birth, is a (a) good devise, and that the freehold shall descend to the heir at law in the mean time.

Raym. 162. Freem. 244. [The universal concurrence in this point must close the question; for a devise to an infant *in ventre sa mère* necessarily implies a future disposition to take effect at its birth, as much as if the words "*when he shall be born*" were added; for surely it cannot be imagined, that the child should take the estate before it was born. Fearne's Conting. Rem. 428. And that a devise to an infant *in ventre sa mère* is good, see Taylor v. Bydal, 1 Freem. 243. Anon. *Id.* 295. Gulliver v. Wicket, 1 Wils. 106. Chapman v. Blisset, Ca. temp. Talb. 145. And that an infant *in ventre sa mère* is within the description of "*children living at the time of the testator's decease*," see Doe v. Clark, 2 H. Bl. 599.] || And the statute 10 & 11 W. 3. c. 16. has been said to put posthumous children upon the same footing, to all intents and purposes, with children actually born. 4 Ves. 354. 1 T.R. 654. || (a) So of a devise to an infant *in ventre sa mère*, with a new publication of the will after his birth. Cro. Eliz. 423.

Moor. 637.
Church and
Wiat.
3 Lev. 408.
4 Mod. 359.
Salk. 227.
Carth. 309.
Reeve

So, it is out of doubt, that if land be devised for life, the remainder to a posthumous child, that this is a good contingent remainder, because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate, or *eo instanti* that it determines, it is sufficient.

and Long.

Vide 10 & 11 W. 3. c. 16. 8 Vin. Abr. 87. pl. 12. tit. *Remainder and Reversion*.

1 Mer. 141.
2 Mer. 419.
and cases
cited.

|| A bastard cannot be a devisee until he has gained a name by reputation, or can be otherwise certainly described. The term children *primâ facie* means legitimate children. ||

[(b) The devise to an alien, it seems, would not be void;

A devise to an alien (b), so to the heir of an alien, is void, because an alien, according to the policy of our law, can have no heir, either to (c) inherit or take by purchase.

for there does not appear to be any rule of law to prevent an alien from taking by devise: the only consideration would be for whose benefit he may take. Knight v. Du Plessis, 2 Ves. 360. Godfrey v. Dixon, Godb. 276. Noy, 137.] Lev. 59. (c) A bastard may be a devisee of land, though he cannot take by descent. Dyer, 325. But a monk cannot be a devisee of land. *Id. ibid.* As to religious persons who are disabled from making a will, or taking by devise, *vide* Roll. Abr. 608.

Plowd. 261.
Swinb. 106.
At Rome,
suicide did not

[The will of a *felo de se* (though void as to his personal estate, because that is forfeited to the king) seems to be effectual as to lands.]

invalidate a will; and it was common with those who were apprehensive of being exposed to capital punishment, to prevent the confiscation of their property by a voluntary death. "*Eorum qui de se statuebant, humabantur corpora, manebant testamenta, pretium festinandi.*" Tacit. Annal. lib. 6. § 29. But this *pretium festinandi*, this temptation to suicide, was taken away by the laws of the later emperors, and the will was allowed to be good only where the party destroyed himself from impatience of pain, or derangement of mind. *Quod si futura pœne metu voluntariâ morte supplicium antevertit, ratam voluntatem ejus conservari leges vetant.* Cod. l. 2. *Qui testam. fac.*

(B) Of what Estate or Interest in the Devisor he may dispose.

BY the common law, no lands or tenements were devisable, except by particular custom; neither could they be transferred from one to another but by solemn livery and seisin, or matter of record: the (a) true reason hereof seems to be owing to the nature of the feudal tenures; for by these, though the lord had given lands to his tenant and his heirs, which were words of limitation, and appropriated to measure out the length and continuance of the estate, yet as they were understood the heirs of the present tenant who came in by the donation of the lord, the tenant could not devise them even to his own heir, thereby to make him a purchaser, and so deprive the lord of the profits of wardship, marriage, and relief, which were incident to the feudal tenure; much less could he devise them to a stranger, who, perhaps, might not have ability of mind, or strength of body, though the one was requisite to assist his lord in his courts, and the other to defend his person in the field.

than at other times.

But an estate for years might have been devised at common law; for this, as now, was only considered as a chattel, and formerly was of a very short duration.

The statute of 32 H. 8. c. 1. which first introduced this disposition of lands by will, requires that the devisor should have a proper title and interest in them for that purpose; and therefore if a man devises land in which he has nothing, and after purchases them, such a devise is void, not being within the statute of wills, for he is not a person *having* (b) as the statute speaks.

will's being in nature of a conveyance; an appointment of the specific estate. Cowp. 90.]

So, where a man devised to his wife all such sums of money, lands, tenements, and estate whatsoever, whereof at the time of his decease he should be possessed, and after the making of the will he purchased lands in gavelkind, and died without making any new publication, it was holden that those new purchased lands did not pass; for they were not *sua* at the time of making the will, and the constant form of (c) pleading is, that the testator was seised, and being so seised, &c. which at least is an evidence of the law: and there is no difference as to lands devisable by custom, or by statute. But such devise of things personal is good, though the testator had them not at the time of making his will, because they go to the executor, to whom the will is only directory.

chattel real, acquired after the making of the will, would pass by it; but that doubt seems to have been since done away; for in *Wind v. Jekyll*, P. Wms. 575., Lord Parker held, that such an interest would clearly pass, and stated the difference between freehold and personal interests, acquired subsequent to the making of the will, to be "that with regard to the real estate, bought after the making of the will, supposing that not to pass, "still

Co. Lit. 111. Abr. Eq. 174. (a) Because it was presumed that the testator would do that in *extremis* which he would not do in his health; that it proceeded from the distemper of his mind by the anguish of his disease, or by sinister persuasions, to which he was more liable in his illness Roll. Abr. 608.

50 Ass. 1. Roll. Abr. 609.

Plow. 343. [(b) The rule of law in this case does not depend upon the word "having;" but upon the 2 Ves. jun. 427.

Salk. 237. pl. 16. Holt, 248. pl. 14. 11 Mod. 129. Fitzgib. 231. Bunter and Cook, adjudged in C. B. and affirmed in B. R. [In this case of Bunter v. Cook, the court of King's Bench doubted, whether a

"still there is one in law capable of taking it, viz. the heir; but with regard to the personal estate, if the executor, though made before the acquiring thereof, does not take it, it is uncertain who shall." (c) That in pleading a devise, it must be shewn of what estate the devisor was seised at the time of making the will; Cro. Eliz. 530.; and that he died seised of that estate. Mod. 217. [3 Burr. 1496.] || 8 Ves. 282. ||

1 Rob. on
Wills, 30.
3d edit.

|| If a husband possessed of a chattel real in right of his wife dispose of it by his will made during the coverture, and then survive his wife, the chattel will pass by such will. But if he do not survive, and he makes no other disposition of the chattel, the wife will have it by survivorship.

Attorney-Gen-
eral v. Vigor,
8 Ves. 284. and
cases cited.

The statutes of wills do not extend to copyholds; but the uses to which they shall go may be directed by a will. And it has been decided that copyholds purchased after the making of a will, will not pass thereby, though it contain a general devise sufficient to comprise them, unless they be surrendered by the purchaser in such terms as to republish the will, and make it speak from the date of the surrender. Since this has been so decided, the stat. 55 G. 3. c. 192. has removed the necessity of a surrender to the use of a will; in ordinary cases at least. ||

5 Barn. & A.
492.

39 H. 6. 18. b.
Mod. 217.
S. P.

If *A* makes his will, and thereby devises lands, and is afterwards disseised and dies (*a*) before re-entry, the devise is (*b*) void.

[*Qu.* Whether this point would not be differently determined since the reasoning of the court in *Jones v. Perry*, 3 Term. Rep. 95.?] (*a*) But if he re-enters, the devise shall be good, for he was seised *ab initio*. Salk. 238. (*b*) But if the father devises lands to his youngest son, and the eldest son knowing thereof enters into the land, and disseises the father, and so continues till the death of the father, by which the will is void, yet because it was made void by deceit and covin, it shall be made good in Chancery. Roll. Abr. 378. *per* Lord Chancellour, in the case of *Boswell and Emery*.

8 East, 566.
1 Taunt. 600.
604.

|| Whether a right of entry to avoid a fine be devisable, is not quite settled; but if it be, it is clear the devisee must enter within the time within which the devisor must have entered. ||

Chan. Ca. 39.
Ca. Darcy and
Beardsham.
2 Chan. Ca.
144. *Prideux*
v. Gibben.

|| 3 Atk. 73.
Car v. Elli-
son. ||

[This point,
that lands
contracted for
at the time of
making the
will, will pass
by the will,
and under ge-
neral and
sweeping
words, is es-
tablished by
several cases.

A. agrees with *B.* for the purchase of copyhold lands, which were surrendered out of court to the use of *A.*, but before admittance *A.* dies: *A.* was seised of other copyhold lands, and after the said contract with *B.* had made his will, and devised all his copyhold lands to *J.S.* It was ruled, that the copyhold lands agreed for passed by the will; for after the agreement, the purchaser might, in equity, recover the land, and oblige *B.* to execute a conveyance, and till such conveyance executed, the vendor stood seised in trust for the purchaser, as he should appoint; and therefore if, after articles agreed on for a purchase, the purchaser devises the land, and dies before a conveyance executed, yet the land passeth in equity; for though according to the strict notions of law the devisor has not lands within the statute till a conveyance be executed, and he thereby become seised of them, yet after articles of purchase, the purchaser only is considered as master of the land, and therefore in (*c*) equity will be allowed to dispose of them.

Milner v. Mills, Mosel. 125. *Allen v. Allen*, *Id.* 262. *Potter v. Potter*, 1 Ves. 437. *Gibson v. Lord Montfort*, *Id.* 424. || 10 Ves. 613. || Nor will it make any difference, though the day agreed upon for the execution of the contract be subsequent to the date of the will, *Greenhill v. Greenhill*, Pre. Ch. 320., if the articles were actually entered into before the making

making of the will, 2 P. Wms. 629., and they be such as a court of equity would enforce in specie. *Potter v. Potter*, 1 Ves. 437.] (c) That an equitable interest is as well devisable as a legal estate. 2 Vern. 679. adjudged. [*Potter v. Potter*, 1 Ves. 437.] || Thus an equity of redemption in copyholds. 5 P. W. 359. 1 Br. C. C. 481. ||

Again a treaty of marriage articles was entered into, whereby the sum of 700*l.* being the wife's portion, and 700*l.* more added to it on the part of the husband, in all 1400*l.*, was agreed to be laid out in the purchase of lands, to be settled on the husband for life, remainder to the wife for life, remainder to trustees, to support contingent remainders, &c.; the marriage took effect, the husband died without issue, and before any purchase made pursuant to the articles, having first devised all his personal estate to the defendant, who was his wife, and all his real estate to the plaintiffs, who were his nephews, and one of them his heir at law, and made his wife executrix, but having taken no manner of notice of the 1400*l.* On a bill brought by the plaintiffs to have this 1400*l.*, as they would have the land if the purchase had been made pursuant to the articles (for the wife took more by the devise than she would be entitled to under the settlement, had it been made), it was argued, that if it were to be considered as lands, she could not have both; the devise of the personal estate being more than an equivalent, and therefore a satisfaction; and it was holden by my Lord Chancellor, that, as this case is, if a purchase had been made even after making the will, though at law such lands would not pass, yet in this court there could be no question but the plaintiffs would have the benefit thereof by the relation to the articles; and though no purchase was made, yet by the agreement the 1400*l.* is to be looked upon in a court of equity as real estate, and as such must go the plaintiffs.

Abr. Eq. 175. pl. 5. *Gillb. Eq. Rep.* 91. *Pre. Ch.* 400. *Will. Rep.* 172. pl. 42. 2 *Eq. Abr.* 353. pl. 7. 10 *Mod.* 39. 528. *Lingen and Souray*, decreed by Lord *Hardcourt*, and affirmed by Lord *Cowper*, || 1 Ves. jun. 201. ||

|| 8 Ves. 256. ||

A guardian by knight's service might have devised the ward of the body and land; so, of a guardian in (a) socage.

26 *E. 3.* 65. *Fitz. Gard.* 159. *Roll.*

Abr. 609. (a) But a special guardian appointed pursuant to the statute 12 Car. 2. c. 24. cannot transfer the custody of the ward, by deed or will, to any other. *Vaugh.* 179.

Tenant (b) in tail to him and the heirs of his body, with reversion expectant in fee (c), cannot devise the land in fee to another, though he dies without issue, because it is but a mere (d) possibility, and not grantable or assignable. (e)

(b) But tenant in tail may devise to a charity, and such devise shall be good

by the statute of charitable uses, by way of appointment. *Duck. Charitable Uses*, 110. 2 Vern. 453. (c) 31 Ass. 3. adjudged, but a *Q. rationem* added. — Whether such a reversion could be devised by parol within the custom, *Styl.* 409, 410., *dubitatur.* (d) But a remainder after an estate-tail may be devised. 2 Ass. 60. *Bro. Devise*, 42. *Fitz. Assise*, 259. || (e) It is now quite clear, that a reversion after an estate-tail may be devised. *Badger v. Lloyd*, 1 Salk. 232. *Sanford v. Irby*, 5 Barn. & A. 654. 8 Ves. 256. ||

A man seised in fee devised his lands in trust, to sell part for payment of his debts, and till his debts were paid, to pay 100*l.* per ann. to his natural daughter M. and after the debts paid, 300*l.* for her life; and if she have children, to convey successively to those children; but if she die without issue, then to convey to the eldest son and heir of J. S. his nephew, and the heirs of his eldest son; but if he claim any thing during the life of M., then both

3 *Lev.* 427. *Bishop and Fountaine*, decreed in Chancery by the assistance of *Treby C. J.* and *Power J.* [This case of

Bishop and Fountaine is now not law : It seems to be finally settled, that a possibility clothed with an interest, is not only descendible, but devisable. || So also contingent and executory estates are devisable. || Selwin v. Selwin, 2 Burr. 1151. 1 Bl. Rep. 222. 251. 605. || Moor v. Hawkins, 2 Eden, 342. || Roe v. Jones, 1 H. Bl. 30. 3 Term. Rep. 88. || 1 Ves. jun. 251. 7 Ves. 500. 17 Ves. 175. || The person designated must be certain. 2 Maul. & S. 165. But a bare possibility or hope of succession is not devisable. 3 T. R. 93. ||

both father and son to be excluded from having any thing out of his estate. The eldest son of *J. S.* was *A.*, who had two sisters, *B.* and *T.* *A.* died, leaving issue *J.*, who in the life of *M.* devised the lands in question to *J. S.* and died without issue, and after the death of *M.* without issue, the trustee conveyed to the sisters of *A.* and their heirs; and it was held, that this being but a mere possibility during the life of *M.* the devise was void, and the lands well conveyed to the sisters of *B.*

Baker v. Hacking, Cro. Car. 387. 403.

[An estate that is turned to a right, as a reversion discontinued, is not within the purview of the statutes of wills. Thus *A.* being tenant in tail, the reversion to *B.*, they joined in a lease for life by deed: *B.* afterwards, during the lease for life, devised the reversion, and died, and then tenant in tail died without issue. The question was, Whether this devise were good or not?—and this depended upon, Whether, if tenant in tail join with him in reversion in a lease for life, not warranted by the statute, so that it be a greater estate than tenant in tail can make, it be a discontinuance of the tail only, or a discontinuance of the reversion also? It was holden to work a discontinuance in both, and then, the devisor having nothing more than a right in the reversion, the devise was void. (a)]

|| (a) But see 1 Taunt. 600. 604. || Abr. Eq. 175, 176. Drew and Merry, decreed.

J. S., who was to have had a considerable advantage by a will, was drawn in by fraud and false suggestions to make a composition for his interest, and to give a release; afterwards *J. S.*, being sensible of the fraud, makes his will, and thereby (after other legacies) he devises all the rest of his goods and chattels whatsoever to his wife, upon condition that she paid all his debts, and made her sole executrix: and it was held that his right to set aside the lease was devisable, and the words proper for that purpose.

(C) What Words pass a Fee in a Will: And herein,

|| I. Expressions which are equivalent to the word “Heirs.”

II. Word “give” or “devise” not requisite.

III. Devises which carry the Fee by Implication.

1. *To Trustees for Purposes which require the Fee.*
2. *Where the Devisee is described as an Heir.*
3. *Where the Devisee is in respect of the Premises devised charged with the Payment of a Sum of Money.*
4. *Expressions which are considered as sufficient to pass a Fee, as “Estate,” “Property,” &c. ||*

I. Express-

I. Expressions which are equivalent to the word "Heirs."

ALTHOUGH a set form of words, and the word *heirs* particularly, are necessary in deeds to convey an inheritance, yet may they be dispensed with in last wills, at which time it is presumed that the testator is *inops consilii*. Hence great regard is paid to the intention of the testator, and such intention is to govern in all cases where it can square with the rules of law: therefore, if a man devises lands to another *in perpetuum*, or in *feodo simplici*, or *to him and his assigns for ever*, or *to him and his*, or *that such a one shall be universal heir*; in all these cases, a fee passes by the will; for it is evidently the deviser's intention that the gift should continue beyond the life of the devisee.

|| So the following expressions will carry a fee, if their meaning be not abridged or restrained by other words in the will: *e. g.* to a person "and his heirs for their lives;" to a man "and his executors;" to a man "and his heir" (in the singular number); to a man "or his heirs." ||

So, if *A.* devises land to *B.* *to give, sell, or do what he pleases with it*; these words by the intent of the devisor convey a fee to *B.*

|| So any expressions which shew that the testator intended that the devisee might dispose of the fee, and where no express estate is given to him; *e. g.* "to sell and dispose for payment of debts;" "to be at his discretion;" and "to such uses as he shall appoint." So, if the words were "to *B.* or *sanguini suo*," they would pass a fee, because the blood runs through the collateral as well as lineal line.

|| As to the expressions stock, family, or house, which would, it appears, carry a fee, see Hob. 33. 17 Ves. 257. 1 Turn. & Russ. 156.; but a devise to one *et semini suo*, or, it seems, to his posterity, would create an estate-tail. Co. Litt. 9. b. 2 Freem. 268. 1 H. Bl. 461. ||

A devise to a man and his successors carries a fee; for by the word *successors* is intended *heirs, quia hæres succedit patri*.

|| II. Word "give" or "devise" not requisite. ||

If a devise be in these words, *viz. I release all my lands to A. and his heirs*, *A.* has a fee-simple; for where the (a) intention of conveying appears, the law dispenses with a form in a will.

heritance, if the law allows it, or that *J. S. shall be heir of my lands*, these words are sufficient to convey a fee. Hob. 2.

|| III. Devises which carry the Fee by Implication;—1. To Trustees, for purposes which require the Fee. ||

If lands are devised to trustees, without any words of limitation to support the trust of estates of inheritance, they, by implication, must have an estate of inheritance sufficient to support the trust; for

Co. Lit. 9. b.
Bulst. 222.
Bendl. 11.
Moor. 57.
|| 11 East,
524. || *Vide tit.*
Estates in
Fee-simple.
|| Com. Dig.
Devise,
(N. 4.) ||

Doe v. Sten-
lake, 12 East,
515.
Rose v. Hill,
3 Burr. 1881.
Co. Litt. 8. b.
Harg. note 4.
2 Atk. 645.
Roll. Abr. 854.
|| 2 Wils. § 6. ||

13 Ves. 445.
10 East, 438.
8 Vin. Abr.
236.
8 Vin. Abr.
235, and see
11 East, 220.
3 Ves. 470.
16 Ves. 135.

Cro. Jac. 416.
Roll. Abr. 835.
|| 8 Vin. Abr.
209. ||

Bendl. 30.
(a) *I appoint*
that J. S. shall
have my in-

Abr. Eq. 176.
adjudged in
the case of
Shaw and

Wright, Pasch. for there is no difference between a devise to a man for ever, and to a man upon trusts which may continue for ever.
1 Geo. 2.
[Str. 798. S.C. by the name of Shaw v. Weigh. Fitzg. 7. S.C.]

Preston's arguments in || But if an express estate be limited, though improper for the purposes of the trust, that estate cannot be made larger merely because the testator ought to have given a larger interest.
Warter, 1 Barn. & C. 747. Doe v. Fyldes, Cowp. 841. Wright v. Pearson, 1 Eden, 119.

Oates v. An estate of inheritance may be implied without any words of
Cooke, 3 Burr. limitation.
1684. 1 W. Bl.
545. S.C. Gibson v. Lord Montfort, 1 Ves. sen. 491. Jenkins v. Jenkins, Willes, 653. See
3 Bing. 3.

If the devise be to trustees and their heirs, or to them and the survivors and survivor of them, and the heirs of such survivor, upon trust, the extent of the legal estate vested in the trustees is determined by the nature of the trust.

Trodd v. If the trust be merely to receive the rents until *A.* attain 21, and to provide for his maintenance, and then to *A.* for life, &c., the trustees take a chattel interest only, during the minority or life of *A.*, which shall first determine.
Downes, 2 Atk. 304.
Goodtitle v. Whitby,
1 Burr. 228. Marrant v. Gough, 7 Barn. & C. 206.

Bagshaw v. If the trust authorize a sale, the trustees must have the whole
Spencer, legal estate.
2 Atk. 570.
577. Gibson v. Lord Montfort, 1 Ves. sen. 491. Wall v. Bright, 1 Jac. & W. 494. See
Hawker v. Hawker, 3 Barn. & A. 537.

Roberts v. So if trustees are directed to convey or yield up.
Dixwall,
1 Atk. 607. Stanley v. Stanley, 16 Ves. 491. 505. 15 Ves. 369. Smith v. Frederick, 1 Russell, 174.

Doe v. But to *transfer*, (which may be considered as applicable to the
Nicholls, land, and not to the estate) does not require the legal estate.
1 Barn. & C. 336.

Doe v. Simp- If there be any thing for trustees to do beyond merely receiving
son, 5 East, rents, and paying them over to persons entitled to premises
162. devised, they take a legal estate. Thus, if the trust be to pay
Shapland v. life-annuities out of annual rents, the trustees have a legal estate
Smith, 1 Br. during such lives; or to pay taxes, repairs, &c.
C. C. 75. S.C. 2 T. R. 446. *cited*.

Silvester v. So a trust to receive rents, and pay or apply them for the
Wilson, maintenance of *A.*, trustees have legal estate during *A.*'s life.
2 T. R. 444.
Tenny v. Moody, 3 Bing. 3.

Doe v. Willan, So to make leases, and receive and pay rents to a married
2 Barn. & A. woman and children.
84.

Kinch v. Ward, But it has long been settled beyond all question, that a devise
2 Sin. & Stu. to trustees to permit one to receive the profits of land, does not
417. give them a legal estate.

If a gross sum of money is to be raised, the words of the will must be looked to, to see *how* it is to be raised: if by sale, then the trustees take an estate in fee, unless an express estate be limited to them; if out of the *annual* rent and profits, the trustees will have a chattel interest only.

Barnardiston, 1 P. & W. 505. 1 Eden, 119. Doe v. Simpson, 5 East, 162.

Glover v. Monkton, 3 Bing. 13.
Warter v. Warter 1 Barn. & C. 721.
Carter v. 5 East, 162.

If there be trusts for the separate use of *femes covert*, though not immediately following each other, yet the trustees will take the whole fee.

Harton v. Harton, 7 T. R. 652. 2 Swanst. 391. n.

If there be a joint devise of freehold, copyhold, and leasehold to trustees, and they must take the absolute interest in the latter estates, they will therefore take the fee in the freehold.

Houston v. Hughes, 6 Barn. & C. 403. 421. See 5 East, 172.||

|| 2. *Where the Devisee is described as Heir.* ||

If a man devises land to his wife for life, and after her death to his three daughters, equally to be divided, and if one dies before the other, then one to be heir to the other, equally to be divided; this last clause gives a fee to the daughters, for the word *heir* is *nomen operativum*, and chiefly in a will shall be taken in its full extent, and then it reaches the most remote heir.

Roll. Abr. 833.
|| See Spark v. Parnell, Hob. 75.||

A. devises land to his son and heir, and if he dies before his age of 21 years, and without issue of his body then living, the remainder over; he survives the 21 years, and sells the land: the sale was adjudged good, for he had a fee-simple presently, the estate-tail being to commence upon a subsequent contingency.

Sid. 148. || If I appoint that J. S. shall be heir of my land, he shall have it in fee. Hob. 75.||

|| 3. *Where the Devisee is in respect of the Premises devised charged with the Payment of a Sum of Money.* ||

If *A.* devises land to *B.* for life, the remainder to *C.*, paying several sums in gross, *C.* hath a fee, though all the sums together do not amount to the annual rent of the land; for the devise shall be intended for his benefit; and if he had only an estate for life, he might die before he would receive the legacies out of the land, and consequently be a loser, which could never be the intention of the testator (*a*); and therefore, wherever there is a sum in gross to be paid, the devisee hath a fee, though the sum be not to the value of the land.

6 Co. 16.
Collier's case
Cro. Eliz. 378.
S. C. Spicer v. Spicer, Cro. Jac. 527.
Ansley v. Chapman, Cro. Car. 158.
Co. Lit. 9. b. [Wellock v.

Hammond, Cro. El. 204.] || Cowp. 841. 4 East, 496. 5 East, 87. || [(*a*) Yet even in this case *C.* shall not have the fee, if a contrary intention manifestly appear. Bacon v Hill, Cro. El. 497.]

So, if *A.* devises to *B.* in consideration that *B.* will release 100*l.* due to him to the executors of *A.*, *B.* has a fee-simple upon his release of the debt; for the devise shall be intended for his benefit, and an estate for life might be determined before he could receive 100*l.* out of the land.

Bendl. 15.

If a man devises 100*l.* in legacies, to be paid within a year to several persons out of land to the value of 10*l.* yearly, and then devises

2 Lev. 249.
2 Salk. 685.

devises the land to another, the devisee has a fee in the land; for though the devise be not to him, paying 100*l.*, yet since he must take the land subject to the charge of the legacies, he must have a fee to have any benefit by the devise.

|| Two principles have been relied upon in the determination of these cases:—*First*, That where an indefinite estate is given to a person in lands, and that *person* is charged with the payment of debts or legacies, he must take a fee; for otherwise, if he take only for life and pay the charges, and die soon after, he may be a loser, which the devisor could not have intended. *Second*, That where the devisee is to pay the charge *out* of the land, he must first take a sufficient interest therein, *i. e.* a fee. For to direct an act to be done which cannot be accomplished, unless the devisee have more than estate for life, is in wills, in the absence of words of express limitation, equal to a declaration, that the person to perform the act should have the fee. “I give my freehold house and all the furniture to *E. G.*, whom I make executrix of this my will, she paying all my debts and the legacies before mentioned, twelve months after my death.” Held, that *E. G.* took a fee.

“All the rest, residue, and remainder of my messuages, lands, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expences being thereout paid, I give and devise unto *J. D.*, and do constitute her executrix and residuary legatee.” *J. D.* took a fee.

“All the rest I have in the world, both lands, goods, and chattels, I give to my wife, my executrix, so that she shall sell my stock in trade and household goods, and if these will not pay my debts, she shall sell next the house of fee in *Penzance*, and not *Prospednick*, so that my executrix shall pay in good time all lawful debts.” The wife took a fee.

“I give to *G. S.* and *Sarah* his wife, all that my messuage and lands in *B.*; also all my goods and chattels and personal estate, of what nature and kind soever, as I shall did seized and possessed of, or entitled unto, after having thereout first paid and discharged all my debts; also subject to the payment thereout of all the aforesaid legacies. I nominate *G. S.* executor, whom I charge with the payment of all my just debts and legacies.” *G. S.* and wife took a fee.||

But if *A.* devises lands to *B.*, paying so much or such sums out of the profits of the lands, the devisee takes but an estate for life; for although he takes the land charged, yet he is to pay no farther than he receives, and so can be no loser.

5 East, 96.

5 T. R. 537.

Cowp. 841.

Willes, 140.

3 Maul. & S. 325.

5 East, 93.

See Chief Justice Mansfield's observations on this rule, 2 N. R. 550.

2 Prest. on

Est. 207.

Doe v. Holmes,

8 T. R. 1.

Doe v.

Richards,

3 T. R. 356.

See 5 East, 93.

Goodtitle v.

Maddern,

4 East, 496.

Doe v. Snel-

ling, 5 East, 87.

6 Co. 16.

2 Mod. 25.

|| 3 Burr. 1625.

8 East, 141.||

Whether the word *paying*

out of lands in general, and not mentioning any certain time, so that the loss may appear, passes a fee-simple, *Q.* and *vide* Hawker v. Buckland, 2 Vern. 106. [from which case it appears that it would not pass a fee-simple.]

Moor v. Denn,

ex dem. Mellor,

in Error, Dom.

Proc. 2 Bos.

& P. 247. See

|| So where the words were, “all the rest of my lands and hereditaments, and also all my goods, chattels, and personal estate, after the payment of my just debts and funeral expences, I give, devise, and bequeath the same unto *S. C.*,” and

"and I appoint her executrix." *S. C.* took an estate for life only. 5 East, 95.
2 Atk. 341.
3 Maul. & S. 516.

So by a devise to *M.* and *E.*, except 20*l.* to be paid out of *E.*'s part of the lands to *M.*, *M.* and *E.* took for life only. *Roe v. Daw*, 3 Maul. & S. 518.

But where a testator devised certain estates to his wife and other persons for life, and directed other parts of his property to be sold to pay debts; and after his debts were paid, he gave his wife 20*l.* *per annum* to be issuing out of the whole estate that should remain unsold; and then devised the residue of his goods and chattels, lands and tenements not before given, *his debts being paid*, subject and charged as aforesaid, to *R. S.*, if living at testator's death, if not to his children, to be divided between them, but that *Catherine* should have 200*l.*, *Thomasine* 300*l.*, and *Elizabeth* 200*l.* more than any of the rest:—it was held that the children took in fee. || *Gully v. Bishop of Exeter*, 4 Bing. 290.

So, if the devise had been to *B.*, paying an annual sum to another, this had been an estate for life, for he may pay this out of the yearly profits without any loss to himself. (*a*) *Cro. Car.* 158.
Jon. 211.
Bulst. 194.
||(a) This proposition is not now law: it would be an estate in fee. 3 Burr. 1542. ||

|| A devise of two tenements to *Sarah B.*, she paying thereout 40*s.* a year to her sister *Elizabeth B.* *Sarah* took a fee. *Baddeley v. Lappingwell*, 3 Burr. 1533.
S. P. *Goodright v. Stocker*, 5 T. R. 15., and see *Randall v. Tuchin*, 6 Taunt. 410.

"I devise all my lands at *W.*, late the estate of *C.*, and all other my interest in the estates of *C.*, unto *L. A.* for life; and after her decease, I devise the same unto *E. S.*, charged and chargeable with the payment of one annuity of 20*l.* to *J. T.* for his life." *E. S.* took a fee. || *Andrew v. Southouse*, 5 T. R. 292.

If a man devises to his younger brother all his lands, tenements, and hereditaments, and all his personal estate, and whatever else he hath in the world, and makes him executor, desiring him to pay his debts and legacies; the devisee hath a fee-simple by these words. *Ackland v. Ackland*, 2 Vern. 687.
Salk. 239.
pl. 18. *S. C.* by the name of *Hopsewell and Ackland*.

|| 4. *Expressions considered sufficient to pass a Fee, as "Estate," "Property," &c.* ||

If a man devises 50*l.* to be paid in three months, and all the rest and residue of his real and personal estate whatsoever he gives to his dearly beloved wife, whom he makes sole executrix; by these words, the wife has a fee-simple in the lands. 2 Vern. 564.
Murray and Wyse. Pre. Ch. 264.

So, where the testator, being seised of copyhold and freehold lands, devised all the rest of his estate, whether freehold or copyhold, to his wife and children, equally to be divided between them; it was holden, that the word *estate* must signify the interest he had in the land, and so pass a fee. 4 Mod. 89.
Show. 348.
S. C. Eq. Abr. 177. pl. 16.
[The words "all my tenant-right estate"]

pass a fee. *Wilson v. Robinson*, 2 Lev. 91. 1 Mod. 100. 3 Keb. 180. 245. So, all the rest of his estate. *Cliffe v. Gibbons*, 2 Ld. Raym. 1324.] If a man devises lands to *A.* for life, and after his decease the whole remainder of these lands to *B.*, these words pass a fee in remainder to *B.*

to *B.* by the manifest intention of the testator. *Lutw.* 762.—A devise of all a man's real and personal estate passes a fee in the real estate, adjudged between the Countess of Bridgewater and Bolton, *Salk.* 236. pl. 15. 6 *Mod.* 106. *S. C.* adjudged, and largely debated.

Abr. Eq. 178.
Barry and
Edgworth.
Pach. 1729,
decreed at
the *Rolls*.
2 *P. Wms.*
524. *S. C.*

A., a young lady, who was in eight days' time to be married to the defendant, being taken ill, made her will, and, after several specifick and pecuniary legacies, devises in these words: "*Item, I give and bequeath all my land and estate in Upper Catesby in Northamptonshire, with all their appurtenances, to William Edgworth of St. Margaret's, Esq.*" and made him and Mrs. *Rudge* executors and residuary legatees, and died seised of a real estate of the value of 200*l.* per annum, and possessed of about 3000*l.* personal estate, leaving the plaintiff's wife, who was her sister and heir. The only question was, Whether the defendant had an estate in fee, or only for life? It was agreed, that a devise of all her estate would have passed a fee; but a difference was endeavoured between such a devise of all her estate generally, and a devise of all her estate at such a place, that this was only a description of the place where the estate lay, and no devise of the interest which she had in that estate, farther than for life; and it was agreed clearly, that a devise of all her lands would pass only an estate for life, and not the estate in fee which she had in those lands. But the Master of the *Rolls* was clearly of opinion that defendant had an estate in fee, because the lands passed by the first words, and the interest in those lands by the second; and if the word *estate* meant nothing more than the lands, it would be useless: but if the devise had been of all her lands or estate at such a place (*a*), he thought that would not have passed the fee, but would have been taken according to the common acceptance for her lands at such a place; but, as this was, it must be a fee, and decreed accordingly.

(*a*) Lord C. Talbot said, he remembered this case very well, and that no such distinction as this was made in it. *Ca. temp.* Talb. 160. See 1 *Ves.* 226.]

Cro. Car. 447.
Wilkinson
and Merry-
land. *Roll.*
Abr. 834.
Jones, 380.

But where a man seised of Black Acre in fee by mortgage, which was forfeited, and of White Acre, as his own inheritance, devised White Acre to his brother, and then devised all the residue of his goods, leases, mortgages, estates, debts, ready money, and other goods, whereof he was possessed, after debts and legacies paid, to his wife, and made her executrix, and died: it was holden, that this was no devise in fee to the wife of the mortgaged land; for the word *estate* is coupled here with chattels, which shews that he meant only estates for years, and the rather, because the words *whereof he was possessed* shew that he intended only to give her chattels, and the mortgage-money, and not the inheritance of the land.

Roe v. Harvey,
5 *Burr.* 263*s.*
1 *T. R.* 414.
Barnes v.
Patch, 8 *Ves.*
603. *Nicholls*
v. Butcher,
18 *Ves.* 193.

|| If the word "estate" or "estates" be used in a devise, and it does not appear that the testator used it only with reference to chattels, or merely to describe the property devised, an estate in fee will pass, unless a less estate is expressly limited, or must by clear inference be implied.

See 2 *Prest. on Estates*, 87. *et seq.* 8 *Vin.* 227.

In the following cases it was held that the testator contemplated personal estate only: —

" All

“ All the rest of my *estate* and effects I give to C., his ex-
 “ ecutors or administrators in trust, to add the interest thereof
 “ to the principal, so as to accumulate the same.”

Doe v. Buck-
 ner, 6 T. R.
 612. See

Woollam v.

Kenworthy, 9 Ves. 157. and Doe v. Chapman, *infra*, and other cases there cited.

So, a devise that “ all my real and personal estate be divided
 “ according to the statute of distribution in that case made and
 “ provided.”

Thomas v.
 Thomas,
 5 Barn. & C.
 125.

If a sale of the devised property be directed, and the expences
 of the funeral to be thereout paid, a remainder in fee, after an
 estate-tail, will not pass by “ my estate and effects.”

Roe v. Avis,
 4 T. R. 605.

So a devise of the residue of my estate and effects to trustees
 to manage a farm, and afterwards to sell such residue or such
 effects as shall be upon the farm, was held not to pass a fee.

Doe v. Hurrell,
 5 Barn. & A.
 18.

So, a devise of the residue of my estate, consisting in money,
 jewels, leases, &c., or in *any other thing*.

Timewell v.
 Perkins,
 2 Atk. 102.

See Doe v. Rout, 7 Taunt. 79.

But a devise of the residue of my money, goods, chattels, and
estate whatsoever, may pass a fee.

Tilley v.
 Simpson,
 2 T. R. 659.

note. See Jongsma v. Jongsma, 1 Cox, 362.

So also, “ all my goods, chattels, rights, credits, personal and
 “ *testamentary estate*.”

Smith v.
 Coffin,
 2 H. Bl. 444.

See Doe v. Gilbert, 6 B. Moo. 268. S. C. 3 Bro. & B. 85.

So, “ all the rest of my goods and chattels and estate.”

Audrey v.
 Middleton,
 cited Ca. temp. Talb. 286.

So, “ all the rest and residue of my estate, of what nature and
 “ kind soever, to be equally divided, and the shares to be *paid*
 “ to guardians, and their *receipts* to be sufficient.”

Doe v.
 Chapman,
 1 H. Bl. 225.

Pennington, 1 Ves. & B. 406. Dunnage v. White, 1 Jac. & W. 583.

So, “ personal estate and estates whatsoever.”

Dictum per
Lord Hard-

wicke and Lord *Kenyon*, 2 T. R. 659 & 660.

So, “ all the residue of my estate, goods, and chattels what-
 “ soever.”

Tanner v.
 Morse, Ca.
 temp. Talb.
 284.

So, “ I give to S. my land in W. *Item*, I give to the said
 “ S. my wearing apparel, linen, books, *with* all other my *estate*
 “ whatsoever and wheresoever, not hereinbefore given.”

Scott v.
 Alberey, Com.
 Rep. 337. See
 Ridout v.

Pain, 3 Atk. 486. In Doe v. Tofield, 11 East, 246., the expression “ personal estates” passed
 the fee, it being manifest from the will that the testator meant thereby such real property over
 which he had an absolute personal power of disposition.

In the following cases, the word “ estate,” though accom-
 panied by descriptive expressions, was held to carry the fee: —

“ My estate of *Ashton*.”

Chichester v.
 Oxendon, 4 Taunt. 176.

“ That estate *I bought* of *Mead*.”

Bailis v. Gale,
 2 Ves. sen. 48.

- Tuffnell v. Page, 2 Atk. 37. " My estate in *Kirby Hall*."
- Holdfast v. Martin, 1 T. R. 411. See *Ibbetson v. Beckwith*, Ca. temp. Talb. 512. " My estate at *Braywick*."
- Doe v. Wright, 8 T. R. 64. " All my estate, freehold and copyhold, in *B*."
- Doe v. Earl of Jersey, 3 Barn. & C. 870. " My *B. F.* estate, with the lands thereunto belonging."
- Gardner v. Harding, 3 B. Moo. 565. " My freehold estate, consisting of 30 acres of land, situate at *S.*, in the occupation of *B*."
- S. C. 1 Brod. & B. 72. See *Chorlton v. Taylor*, 3 Ves. & B. 160.
- Denn v. Ho o 7 Taunt. 35. " All my real and personal estates whatsoever, that is to say, my land, houses, and buildings situate at *S.* upon my estate."
- Roe v. Bacon, 4 Maul. & S. 566. " All my lands at *T. & H.*, or elsewhere, with household goods, to *S.* for life; and, after her decease, then all *the said estates, goods, &c.*"
- Gardner v. Harding, 3 B. Moo. 565. It seems now agreed, that the words "in the occupation of" will not restrict the word "estate."
- S. C. 1 Bro. & B. 72. S. P. 7 East, 268. But see 3 Ves. & B. 163.
- Doe v. Morgan, 6 Barn. & C. 512. and cases there cited. Nicholls v. Butcher, 18 Ves. 193. Patton v. Randall, 1 Jac. & W. 189. So, estates contracted for will pass by the word "property." *Holmes v. Barker*, 2 Madd. 462.
- Andrew v. Southouse, 5 T. R. 292. It is clear a devise of "all my *interest* in *B*." passes the fee.
- Bailis v. Gale, 2 Ves. sen. 48. A devise of a *remainder* or *reversion* carries the fee.
- Price v. Gibson, 2 Eden, 115.
- Bebb v. Penoyre, 11 East, 164. But "rest and residue," ordered to be divided by executors, does not give a fee.
- 11 East, 163. "My half part" may pass a fee.
- Paris v. Miller, 5 Maul. & S. 408. So, "my share of the *B.* estate."
- 11 East, 296. The word "effects," in its natural sense, more peculiarly imports moveable personal property, but a testator may use it so as to pass his interest in real estate.
- 3 East, 523. The word "effects," used *simpliciter*, will carry the whole personal estate, as a gift of "all my effects," without more. But it is frequently used in a restricted sense, meaning "goods and moveables," as in the common expression of "furniture and effects." *Per Sir John Leach*, V. C.
- 15 East, 594. See 3 East, 516.
- 13 Ves. 46.
- 15 Ves. 519.

A devise of "all and singular my effects, of what nature or kind soever," will not alone pass real estate. *Doe v. Dring*, 2 Maul. & S. 448. S. P.

Henderson v. Farbridge, 1 Russ. Rep. 478. See *Camfield v. Gilbert*, 5 East, 516.

But if the devise be of "the remainder and residue of all the effects, both real and personal, which I shall die possessed of," a fee will pass. Lord *Mansfield* argued, that "real effects" means real property. *Hogan v. Jackson*, Cowp. 299. See 15 Ves. 507.

1 East, 35. 15 East, 594. Cowp. 245., and *Ward v. Bevil*, 1 You. & Jer. 512.

"All I am worth," may pass real estate.

Huxtep v. Brooman, 1 Br. C. C. 437.

"All I am possessed of," may pass testator's interest in real estate, if it appear from other parts of his will that such was his intention. *Monk v. Mawdsley*, 1 Sim. 286. See 5 Ves. 815.

"My inheritance," passes a fee.

Widlake v. Harding, Hob. 2. See 7 East, 97.

But "hereditament" *per se* denotes what may be inherited, and not the interest of the testator in the subject devised. 1 Salk. 258. Mose. 242. 5 T. R. 558.

5 T. R. 558. 8 T. R. 503., and 2 Bos. & P. 247. 251.

So, in a devise of a *perpetual* advowson, it was held that the word "perpetual," was descriptive only of the thing devised. *Pocock v. Bishop of Lincoln*, 2 Bro. 6 B. Moo. 159.

& B. 27. S. C.

It seems now settled, that *introductory* words in a will, however comprehensive, though of some avail to determine the intention of a testator, will not operate to carry the words of the devising clause beyond their usual signification. Introductory words have been relied upon as shewing that the testator did not mean to die intestate as to any part of his property; but this inference seems also to arise from the mere fact of his making a will.||

[By this devise, *viz.* "I give and demise to *A.*, her heirs and assigns for ever, all my lands at *B.*, and I give and bequeath to *A.* aforesaid all my lands at *C.*," *A.* only takes an estate for life in the lands at *C.*, and the reversion descends, although the will begin with these introductory words, "For those worldly goods and estates wherewith it hath pleased God to bless me," and contain a legacy of 1s. to the heir at law. 2 Prest. on Estates, 180. *et seq.* 8 East, 147. 11 East, 220. 14 East, 572.]

So, though a will begin with like introductory words, and then the testator gives all his freehold tenement lying in *G.* to *A.*, *B.*, and *C.*, "to them my sister's sons," and then, among several pecuniary legacies, leaves 10s. to his heir at law, *A.*, *B.*, and *C.* take only for life, and the reversion descends. *Right v. Sidebotham*, Dougl. 739.

So if, after the like words in the preamble, the testator gives to *W. W.*, his nephew, two houses at *S.*, with a croft and appurtenances belonging to them, now in the occupation of *A.* and *B.*, and further directs that the said houses should not be entered upon by the devisee till after the decease of his executor, *W. W.* takes only an estate for life. *Denn v. Gasken*, Cowp. 657.

Frogmorton v. Wright, 5 Wils. 414.

Ibbetson v.
Beckwith,
Ca. temp.

And yet introductory words to this effect are material in the construction of subsequent devises.

Talb. 160. Maudy v. Maudy, Ca. temp. Hard. 143. Goodright v. Stocker, 5 Term Rep. 13. Gulliver v. Poyntz, 3 Wils. 141. Hogan v. Jackson, Cowp. 306. || 8 T. R. 503. ||

Loveacres
v. Blight,
Cowp. 352.
(a) || The Court
thought the
word "re-
quest" was
omitted after
"at her." ||

One devises thus, "*As touching my worldly estate, I devise the same as follows: I give to my wife E. M. 5*l.*, to be paid yearly out of my estate at G., and also one part of the dwelling-house, with as much wood-croft home at her (a) as she shall have need of, by her executors hereafter named. Item, to my son T. M. and daughter E. 5*l.* each, to be paid twelve months after my decease. Item, to my sons T. M. and R. M., whom I make my — and ordain my sole executors, all my lands and tenements, freely to be enjoyed and possessed alike.*" T. M. and R. M. are tenants in common, and take a fee.

Grayson v.
Atkinson,
1 Wils. 333.

So where, after introductory words to that effect, a testator gave several legacies to A., and directed him to sell all or any part of his real or personal estate for the payment of his debts and legacies, and desired three persons to assist him in the sale thereof, and to be supervisors of his will; and, after giving some pecuniary legacies to others, concluded with this residuary devise: "As to all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements, my share in the copperas works, &c. I give to the said A.;" it was holden that a fee passed to A.

Smith v.
Coffin, 2 H.
Bl. 444.

So, where a testator reciting, "As to such worldly estate as God has pleased to bless me with," made a provision for his heir at law, and devised "all the rest and residue of his goods and chattels, rights, credits, personal and testamentary estate whatsoever to B., for his own use, benefit, and disposal," it was holden, that B. took an estate in fee in the lands of the testator, for the residuary clause is commensurate with the introductory clause.

Cro. Car.
129. Cham-
berlain and
Turner,
Jon. 195.
Dyer, 357. in
margine. (b) A.
devises in
these words:
"I give, rati-

A. devised his house or tenement, wherein J. S. dwelt, called the *White Swan*, in *Old Street*, to J. N. for ever; this carries the (b) fee-simple, and though J. S. had but a separate apartment in the house, and the other rooms were inhabited by other persons, yet the whole passed, because the house in which he dwelt was devised, and that house was called the *White Swan*, which sign extending to the whole house, shews the intent of the devisor.

"fy and confirm all my estate, right, title, and interest, which I now have, and all the term or terms of years which I now have, or may have in my power to dispose of, after my death, in whatever I hold by lease from J. P., and also the house called the *Bell Tavern*, to B.;" it was holden by three judges against *Holt*, that the devisee took an estate in fee in the *Bell Tavern*. Salk. 234. 3 Wils. 419. || See *Press v. Parker*, 2 Bing. 458. ||

(D) What Words create an Estate-tail or for Life.

Bro. tit.
Devise, 1.

AND here the former rule will hold good, that the intent of the devisor will supply the want of those words which are necessary

necessary in a conveyance at common law; and therefore (a), if *A.* devises land to *B.* and his heirs male, the law will supply these words, *of his body*, and make it an estate-tail. *Co. Lit. 9. b. 25. a. 27. a. Hob. 33. Vent. 228.*

229. *Vide* head of *Estates tail.* (a) But a devise cannot direct an inheritance to descend against the rules of law; and therefore, in this case, if *B.* hath issue a daughter, who hath issue a son, he shall never inherit; for the rule is, that whoever claims as heir in tail-male, must convey his descent wholly by heirs male. *Roll. Abr. 835. Vent. 228. Vide tit. Descent.*

So, a devise to one and *semini suo* creates an estate-tail: so, if lands are devised to one, and if he die before issue, or if he depart, not leaving (b) issue, or if he die, not having a (c) son, all these limitations create an estate-tail. *2 Vern. 766. Abr. Eq. 179. (b) And if it shall please God to take*

my son *R.* before he shall have issue of his body, so that the lands descend to his brother, this is an estate-tail. *Owen, 29. adjudged. (c) For the word son is nomen collectivum. Vent. 231. || Mellish v. Mellish, 2 Barn. & C. 520.||*

|| For if, after devising to one in general terms, the testator shews an intention that the subject devised shall go to the descendants of the devisee, his estate will be enlarged to carry such intention into effect.

Thus, where a house was devised to three brothers among them; provided always that the house be not sold, but go to the next of the name and blood: it was held that the devisees took estates-tail. *Chapman's case, Dyer, 533.*

So, by a devise to *J. S.*, and his children lawfully begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them or any of them as he should think proper; and for default of such issue, over, *J. S.*, who had no child at the time of the devise, was held to take an estate tail. *Seale v. Barter, 2 Bos. and P. 485. See Doe v. Vaughan, 5 Barn. & A. 464. Mellish v. Mellish, 2 Barn. & C. 520.*

And so, by the following devise:—"It (real estate) to go to my daughter *C.* as follows: in case she marries, and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother." *C.* took an estate in tail-male.

So though there be an express devise to *A.* only in a certain event, yet by implication he may take the estate absolutely.

Thus a testator, after bequeathing an annuity to his son, devised, "in case his son should marry before he attained the age of 30 years, then he gave to him and the heirs of his body all his real and personal estates; and if his son should happen to die without leaving issue of his body, then over:" Held that the son took an estate-tail, though he did not marry before 30. || *Daintry v. Daintry, 6 T. R. 307.*

But if a man devises lands to another, without more words, this is but an estate for life; and if the devise had gone farther, *viz.* to him and his assigns, these words, of themselves, had not enlarged the estate; but if it had been to him and his assigns for ever, it had been a fee. *Co. Lit. 9. b. Bro. tit. Devises, 33. Roll. Abr. 834.*

If *A.* devises lands to his eldest son *J. S.*, and the heirs male of his body, for the term of 500 years; provided if he, or any of his issue male, alien the premises then to remain over, this is an estate-tail, and the limitation for 500 years void; for though *10 Co. 78. Moor, 772. S. C.*

generally a devise to a man, and the heirs of his body, for 1000 years is a term, and not an inheritance, yet here the testator's intent was that it should be an inheritance, because by the proviso he took care to advance the issue of *J. S.*; but if it should be a term, then, by the descent of the inheritance on *J. S.*, the term would be merged, and the issues would be unprovided, for *J. S.* might alien the estate.

Roll. Abr. 854. *A.*, seised in fee of a house and lands belonging to it, devises the moiety of the house to his wife for life; *item*, he devises the other moiety of the house to his second son; *item*, he devises the said house, and all the lands belonging to it, to his second son: yet the son took but an estate for life; for the second devise to the son had its effect by conveying that moiety of the house, and the land which he had not by the first devise, and there are no words in the will to create a larger estate.

Cro. Eliz. 498. *A.*, having issue two sons, devises *Black Acre* to the eldest, and *White Acre* to the youngest; and if either of them died, his acre should go to the survivor, and farther devised (having two daughters) to each of them 10s. it was adjudged the sons took but an estate for life; for though the consideration generally gives a fee, yet where there are express words to determine the intent of the devisor (which is always the rule in wills), there the devise shall be (a) construed accordingly; and here it is provided, that, after the death of either of them, the survivor should have both acres, which declares his intent that they should have it but for life, notwithstanding the sums appointed to be paid to the daughters. Roll. Abr. 854.

Hay v. Earl of Coventry, 3 T. R. 83. See Goodright v. Jones, 4 Maul. & S. 88. Doe v. Vaughan, 5 Barn. & A. 464. and Ward v. Bevil, 1 Youn. & Jer. 512. || *W.* devised to *C.* for life; remainder to her first and other sons in tail male; remainder to all her daughters as tenants in common; and in default of such issue to testator's right heirs: Held that the daughters took for life only.

Fell v. Fell, 3 Wils. 399. The following case should here be noticed:—A devise to *Solomon* for life, remainder to his son *Thomas*, and his heirs male for ever; “but if *Thomas* should die without issue, then to his “next heir male for ever, the elder to be preferred before the “younger; and if no issue male left behind *Solomon*, then the “estate to devolve to the females; and if no females, then *Solomon* “to give and dispose of the same as he should think fit.” *Solomon* had two children, *Thomas* and a daughter: *Thomas* died without issue, in the lifetime of *Solomon*. A bill was filed by the daughter to restrain *Solomon* from cutting timber: and in a case sent to the *C. B.* the judges certified that *Solomon* took an estate for life; and his son *Thomas* dying without issue, the daughter took an estate in tail general, and that a remainder in fee-simple was vested in *Solomon*.

Lushington v. Sewell, 1 Sim. 435. Again, testator devised real estate to trustees in fee to pay one moiety of rents to his sister *Fanny* for life for her separate use, and after her decease to convey a moiety to her children living at her decease;

decease; and made a similar devise to another sister. By a codicil he declared his estates should not be equally divided between his sisters, but in proportion to the number of their children at his decease. By another codicil he devised: "to prevent disputes, I leave to my sister *Fanny*, and her heirs, my estate in *Cornwall*, and to my youngest sister and her heirs I leave my estate of *Hordley*:" Held, that by the word heirs the testator did not mean to increase the quantity of estate given to the sisters by the will. ||

If *A.* devises land to his son *B.*, and if he hath issue male of his body lawfully begotten, then that issue to have it, and if he hath no issue male, then to others in remainder; by this devise *B.* hath an estate-tail; for where the devisor saith, if he have no issue of his body, then it shall remain over, that is as much as if he had said, if *B.* dies without issue male, which had been sufficient to create an estate-tail in him.

A. devised to the three sons of *C. D.* successively, in tail-male, remainder to every son and sons of the said *C. D.* which should be begotten on the body of Sarah his wife; and for want of such issue to *W. N. &c.* *C. D.* had a fourth son by Sarah, and it was held that he took an estate in tail male; as the words "for want of such issue," must be construed "for want of heirs male of the body."

So, by a devise to *J. S.* "but if the said *J. S.* shall die without male heir," then to *A.* in fee, *J. S.* took an estate-tail, though the estate was charged with an annuity and legacies.

Land was devised to *A.*, and after his death to his first and other sons, and, in default of male issue, then to his eldest and other daughters, &c. their heirs male for ever: Held, that *A.* took an estate in tail-male. For, observed Sir *W. Grant*, it was evidently the intention of the testatrix to prefer the male issue of the father or his sons to the daughter; but the estate given to the father and sons respectively amounts in law to an estate for life only: to effectuate, then, the intention of the testatrix, an estate-tail must be given to the father or his sons, and I think the male issue of the father is intended. ||

A. having two sons, *B.* and *C.*, devised *Black Acre* to *B.* and his heirs, and *White Acre* to *C.* and his heirs, and farther willed that the survivor of them should be heir to the other, if either of them died without issue: though the first words are sufficient to pass an estate in fee, yet the subsequent words correct them, and pass only an estate tail, and the remainder in fee is not contingent, but executed, each son being tenant in tail of the part to him devised, with the remainder to the survivor in fee.

A man devised all his free lands to his wife for life, and after her death to *A.*, *B.*, and *C.*, his three daughters, equally to be divided; and if any of them die before the other, then the others to be her heirs, equally to be divided; and if they die without issue, then to others named in the will: adjudged, that the daughters had an estate-tail.

9 Co. 128.
Owen, 29.
Vent. 227.
Pollex. 487.

Evans v. Ast-
ley, 3 Burr.
1570.

Denn v. Slater,
5 T. R. 335.

Wight v. Leigh,
15 Ves. 564.

Cro. Jac. 695.
Chadock
and Cowley.
Pollex. 487.
See Sid. 148.

Cro. Jac.
448. King
and Rum-
ball. Roll.
Abr. 836.
Pollex. 487.

Nov. 64.
Dyer, 330.
Roll. Abr. 835.
(a) Where a man devised land to *A.* his son for ever, and after his decease the remainder to

his heirs male for ever, with other remainders over, it was holden an estate-tail in *A.*; for though the first devise, being to him for ever, would give him a fee-simple, yet the subsequent words to *his heir male*, shew what sort of inheritance the deviser intended him. Bulst. 219—225. Whiting and Welkins. Roll. Abr. 836.

Willes 3. See
8 T. R. 10.
3 Wils. 246.
Wealthy v.
Bosville, Ca.
temp. Hard.
258.

|| It is a settled rule, that though a man devise land by words which give the fee, yet if subsequent words shew that "heirs of the body," and not "heirs" generally, were intended, the gift will be reduced to an estate-tail.

Fitzgerald v.
Leslie, 3 Br.
P. C. 154. See
also Chapman
v. Scholes,
2 Chitty's ca.
temp. Mans-
field, 643. S. C.
Jeremy's Ind. for 1824, page 53.

A. devised to his eldest son and his heirs for ever; and failing issue of his said son, then to his second son and his heirs for ever; and failing issue of that son, then to every other son that he might have and their heirs for ever; and failing his issue male, then to his issue female, and their heirs for ever: Held that the sons took an estate in tail-male successively.

Brice v. Smith,
Willes, 1. See
Roe v. Scott,
stated by Mr.
Butler in note.
Fearn, C. R.
473. Tenny v.
Agar, 12 East, 253.

A. devised a messuage to his son *P.* and his heirs for ever, on condition of his paying a sum of money to *C.*; and testator declared if *P.* should die without issue, the estate devised to him should go to his heirs for ever: Held that *P.* took an estate tail.

Doe v. Ellis,
9 East, 382. See
Doe v. Which-
elo, 8 T. R.
211.

A. devised a messuage unto his son *Joseph*, his heirs and assigns, for ever; "but in case my said son *Joseph* shall die without issue, then I devise the same messuage unto the child or children with which my wife is now *ensient*, his or her heirs and assigns for ever." *Joseph* took an estate-tail.

Vanfan v.
Legh, 7 Taunt.
85.

So, a devise to one, and his heirs lawfully begotten, for ever, gives an estate-tail only. The testator in the same will had made a previous devise to the same person and his heirs for ever.

Dansey v. Grif-
fiths, 4 Mau. &
S. 61. Romilly,
Knt. v. James, 6 Taunt. 263.

So, a devise to *D.* and his heirs, but if he should die and leave no issue, then over.

Nor is the construction different, though the testator in certain cases gives the devisee power to charge or dispose of the fee.

Thus

Thus *W. G.* devised lands to his eldest son and his heirs, upon condition that he should grant to his second son and his heirs annual rent of 4*l.* And testator directed if his eldest son should die without heirs of his body, the land should remain to the second son, and the heirs of his body. Eldest son took an estate tail.

Dutton v. Ingram, Cro. Jac. 427.

J. B. devised land to his four children, *A., B., C.,* and *D.*, and their heirs, share and share alike: and he directed that, if they agreed to sell the land, they should have the money in equal shares; but if to keep it unsold, the rents should be divided among them, and to the respective heirs of their bodies, share and share alike. The children took estates-tail, with a power of selling the estate.

Roe v. Avis, 4 T.R. 605. See *Doe v. Rivers*, 7 T.R. 276.

But on a devise to *S.*, her heirs and assigns for ever, "but if *S.* shall happen to die leaving no child or children, lawful issue of her body living at the time of her death," then over; it was held that *S.* took an estate in fee, and that the devise over was good as an executory devise.

Doe v. Wetton, 2 Bos. & P. 324.

So, on a devise to *M. H.*, her heirs and assigns, and in case she should die, and leave no child or children, then over, the Court decided upon a consideration of the whole will that the words "die, and leave no child or children," meant "die without issue living at her death," and that the estate of *M. H.* was not reduced to an estate-tail.

Doe v. Webber, 1 Barn. & A. 715. See *Denn v. Shenton*, Cowp. 410.

It appears to be settled, that if the estate is given over to a person in existence for his life, dying without heirs or issue will be referred to the time of the first devisee's death. But other circumstances may be sufficient to induce a Court to restrain the words "dying without issue" to issue living at the death of devisee. See the above-cited case of *Doe v. Webber*. ||

Porter v. Bradley, 3 T.R. 145. *Roe v. Jeffery*, 7 T.R. 589. *Glover v. Monkton*, 3 Bing. 15. *Ld. Hardwicke*

seems to have been influenced by the same principle as is contained in the above cases, when he decided in *Lethieullier v. Tracy*, 5 Atk. 774. that the contingency of a dying without issue should be confined to the duration of the succeeding devise.

If a man devises land to his wife for her life, and after to her son, and if he dies without issue, having no son, that then *J. S.* shall have it; the son by this devise takes an estate in tail-male, for though the devise to the son, and if he dies without issue, had been a good tail-general, yet when the deviser went further and said, having no son, he thereby explained what issue he intended should inherit the land, and limited it to the issue male.

Roll. Abr. 157.

A., having issue *B.* and *C.*, devised some of his lands to *B.* his eldest son, and the heirs of his body, after the death of his wife, and if *B.* died, living his wife, then to *C.* his son; and devised other lands to *C.* his son, and the heirs of his body, and if he died without issue, then to remain over. *B.* died in the life of the wife, yet adjudged that *C.* could not enter into the land, while any issue of *B.* remained; for the words, if *B. died, living the wife*, did not abridge the estate-tail which was given by the former words, because the testator could not be supposed to intend to prefer a

Cro. Car. 185. *Spalding's case*, Bulst. 250. *S. C.* Vent. 250. 3 Lev. 454. *S. P.* 1 P. Wms. 427. *S. P.* 2 P. Wms. 196.

younger

S. P. Ld.
Raym. 524.
S. P.

younger son before the issue of his eldest, especially when he had, in the former part of the will, settled it on the issue of the eldest, and made the same provision of other lands the same way for the youngest son.

5 Lev. 125.
Luxford and
Cheek.
Raym. 427.
S. C. by the
name of
Brown v
Cutter.
2 Show. 152.
pl. 134. S. C.
by the name
of Brown v.
Cutter. [Note, Raymond has reported merely his own argument.]

A. seized of lands devised them to his wife, if she did not marry, but if she should marry, then his eldest son presently after her marriage to enter, and hold the land to him and the heirs male of his body, the remainder to his other sons in tail-male; the wife did not marry; yet the court resolved that the lands were entailed by the will, taking the intent of the devisor to be, that the entail should be created in all events, but that the eldest son should not enter till after the decease of the wife, unless in case of her marriage, and then to enter presently.

5 Leon. 129.
194.
3 Leon. 180.
Cro. Eliz.
55. Hawk-
ins's case.
*Q. et vide
supra.*

A man had issue, *A.*, *B.*, and *C.*, and having three houses, devised them all to his wife, with remainder of one house to each child, and his heir; and if any of his said issue die without issue of his body, the survivors to have *totam illam partem* between them, equally to be divided: these last words carry only an estate for life in the house of him that first dies to the survivors, for they imply no more than that the whole part of him that dies first shall go to the survivors, and there being no estate limited it can be only for life.

Dyer, 124.
Roll. Abr.
339.

A. devised all his lands to his wife till his son should be of the age of 24 years, and then to his heir and to his heirs for ever, and when he comes to the age of 24 years, that he shall have the third part for her life, and if he dies before the age of 24 years, then she to have it all for life; and after her decease, if the heir has no issue, the remainder to *B.*, the remainder to the right heirs of the devisor. The heir came to the age of 24 years; but no entail was created by the will, for the fee-simple descended to him, and the limitations were to take place if he died before the age of 24 years, which he did not.

Roll. Abr.
336. Cro.
Eliz. 525.
Cro. Jac.
415, 416.
448. Bulst.
193. Cro.
Car. 41.
2 Lev. 162.
(a) Salk.
235. pl. 12.
Ld. Raym.
568.

A. devised lands to *B.* his son, and if *C.* his daughter survived *B.* and his heirs, then she should have the lands: it was adjudged, that *B.* had but an estate-tail, for the word *heirs* must be intended heirs of his body, for he could not die without (a) collateral heirs while his sister was alive. But if the will had said, that if *J. S.* a stranger survives *B.* and his heirs, then he should have the lands; there, *B.* would have had a fee-simple, and then the intended remainder over must be void, for it is to vest on a contingency of *B.*'s dying without heirs, which is too (b) distant to expect.

1 P. Wms. 23. pl. 5. Comyns, 82. pl. 51. [2 Eq. Ca. Abr. 305. pl. 2. Ca. temp. Talb. 1. Dougl. 254. Amb. 363. 5 Term. Rep. 488. n. 491. 1 Ves. 89. 5 Atk. 617.] S. P. adjudged. (b) *Vide* Vaugh. 270, 271.

3 Lev. 70.
Parker and
Thacker,
adjudged.
[Morgan v.

So, where *A.* devised to *B.* for his life and to his heirs, and for want of heirs of him to *C.* in the same manner, and for want of heirs of him to *D.* and his heirs for ever, and the jury found that *B.* and *C.* were brothers, and that *D.* was next cousin and heir to them,

them, though not mentioned in the will, the court held, that they had but an estate-tail, and the remainder in fee to *D.* was good; for *D.* being cousin and heir to them, proves that he intended heirs of the body (*a*): also, want of heirs of him, are to be taken for want of heirs of his body.

[So, where *A.* devised lands to his son for life, then to his son *A.* for life, remainder to his son *G.* and his heirs for ever, and if he should die *without heirs*, then to his two daughters, this was determined to be an estate-tail in *G.*; for it was impossible he should die without heirs whilst his sisters were living; consequently the testator by *heirs* could only mean *heirs of the body*.

S. C. 1 Eden, 142. *Ives v. Legge*, 3 T. R. 488. note. ||

The rule holds the same where the remainder is limited to the heirs of the testator himself, if such heirs must also be heirs to the first devisee. As, where *A.* devised to his second son and his heirs for ever; and for want of such heirs then to the testator's right heirs; here, though the devise to the testator's heirs was a mere nullity, as such heirs must be in by descent, yet it was held sufficient to manifest the intent, and aid the construction of an estate-tail.

But where there was a devise to one and his heirs, and if he die without heirs then to a *charity*, Lord Chancellour said, the devise being to one and his heirs, and if he die without heirs, then over, such devise over was void; and the word heirs should not be construed to signify heirs of the body, where the devisee over is not inheritable.

So, where the testator devised to his son *and his heirs*, and if he should die *without heirs*, remainder over to another who was half brother to the first devisee; upon a question made, whether the first limitation was in fee or in tail? Lord *Hardwicke* said, it was a plain case, and one of those points which the court would not suffer to be argued, as having been determined before. This was a devise over to a stranger, as the law considers him, and who could not in any event inherit as heir to his brother.]

If *A.* devises lands to *B.* for life, and if he die without issue, then to remain to *C.*, this is an estate-tail in *B.*, for it is not to (*a*) remain to *C.* till the issue of *B.* be spent.

2 Brownl. 271. Moor, 682. Lit. Rep. 259. 1 P. Wms. 57. 1 Vent. 230. S. C. cited. (*a*) And therefore, whenever the ancestor takes an estate for life, and there is a limitation to his heirs or issue, these words shall be words of limitation, and not of purchase, and vest the inheritance in the ancestor; laid down as a rule in *Shelley's case*, Co. 99. But on this rule, of creating by implication an estate of inheritance in the ancestor, there have been several nice distinctions, as appears by the cases on this head.

|| If a man devise an estate to *A.* for life, and, in case *A.* dies without issue generally, devises it to another, *A.* will take an estate-tail if such an estate be requisite to enable all his issue designated to take.

A devise to *D.* for his life, and after his decease to and amongst

Griffiths,
Cowp. 254.
S. P.]

(*a*) 7 Co. 4.
S. P.

Ca. temp.
Talb. 1. Tyte
v. Willis. || S. P.
Doe v. Bluck,
6 Taunt. 485.
Pickering v.
Towers,
Amb. 363.

R. 488. note. ||

Nottingham
v. Jennings,
1 P. Wms.
25.

Attorney Ge-
neral v. Gill,
2 P. Wms.
569.

1 Ves. 89.
Tilburgh v.
Barbut,
5 Atk. 617.

Robinson's
case, 1 Roll
Abr. 857.
pl. 12.

Sparrow v.
Shaw, 3 Br.
P. C. 120. See
Willes' Rep. 3.
3 Atk. 796.
Doe v. Halley,
8 T. R. 5.

Doe v. Applin,
4 T. R. 82. See

Goodtitle v. Otway, 2 Wils. 6. amongst his issue; and, in default of such issue, over. Here, indeed, "issue" was construed as "heirs of the body," to satisfy the presumed intention of the testator, so that *D.* was entitled to an estate-tail by the rule in Shelley's case after noticed.

Doe v. Cooper, 1 East, 229. Devise to *A.* for his life only, and after his decease to his issue as tenants in common; but in case *A.* shall die without leaving lawful issue, then over. Held, that *A.* took an estate-tail by implication from the words "without leaving lawful issue."

See Wollen v. Andrewes, 2 Bing. 126. A devise to *W.* for life; "and, in case he has issues, then it is my will they should jointly inherit the same after his decease." In a subsequent part of the will, "but in case *W.* dies without issue," then over. *W.* took an estate-tail by the latter words.

Ward v. Bevil, 1 You. & Jer. 512. *Alexander C. B.*, observed, that *W.* would only have had an estate for life had it not been for the words giving the estate over.

Murthwaite v. Jenkinson, 2 Barn. & C. 357. S. C. A devise to three nieces for their respective lives, share and share alike; upon the death of each her share to go to her issue for life in like manner: "and if either of my said nieces shall die in the lifetime of the others or other of them, without issue of her body," her share to go to the survivors; "and if all my said nieces shall die without issue," then over. The nieces took estates-tail.

191. Affirmed Dom. Proc. 2 Sim. & Stu. 414. note. A devise to *A.* for life and no longer; and after his decease to such son as he should have, and for default of such issue, over. *A.* took an estate-tail.

Robinson v. Robinson, 1 Burr. 38. But on a devise to *L.* for life, and after his death to his children equally, and to their heirs; and in case *L.* died without issue, then over, the counsel admitted, and the Court assented to the proposition, that *L.* did not take an estate-tail; and that *issue* there meant *children*.

Goodright v. Dunham, Doug. 251. *Semble*, An estate-tail was not implied in this case, because it was not required to effectuate the intention of the testator. The children of *L.* took in fee.

The King v. The Marquis of Stafford, 7 East, 521. So, on a devise to *R. H.* for her life, remainder to trustees for her life, remainder to the use of the issue of the body of *R. H.*, in such parts, shares and proportions, manner and form, as *R. H.* should by will appoint; and, in default of such appointment, to the use of all and every the *children* of *R. H.*, and their heirs, as tenants in common; and in default of such issue, over. *R. H.* did not appoint, and died leaving one child, who, it was held, took an absolute fee. "In default of such issue," was construed "in default of children."

Doe v. Perryn, 3 T. R. 484. So, on a devise to *G.* for life, remainder to all his children, their heirs and assigns for ever, as tenants in common; but in case *G.* should depart this life without leaving any child or children, or *issue* of any such child or children, then over. The Court of *C. B.* certified that *G.* took for life only.

Smith v. Horlock, 7 Taunt. 129. So, on a devise to *L.* for life, with remainder unto all and every his child and children, whether sons or daughters, they, if more than one, to take as tenants in common, in equal shares; "and for want of such issue," over. *L.* took for life only, "*such issue*" meaning children, and therefore not comprehending all the issue of *L.*

Doe v. Vaughan, 5 Barn. & A. 464. See Seale v. Barter, 2 Bos. & P. 485.

So,

So, on a devise to *A.* for 99 years, if he should so long live; and after that term to the use of the first, second, third, and fourth sons of the said *A.*, and the issue males of their bodies, for the like term of 99 years, as they should be in seniority of birth; and in default of such issue male in him or them, then over. It was certified by the judges of *K. B.* that *A.* took an estate for 99 years, determinable with his life; and that upon his death his first son would take a like estate, but that the subsequent limitations were void.

Somerville v. Lethbridge,
6 T. R. 215.
Observe, that the words "in default of such issue" did not comprehend all the issue of *A.*; and see *Mr. Fearne's* observations

on *White v. Collins*, *Fear. C. R.* 153.

And it is not only necessary that the words limiting the estate over should comprehend all the issue, male or female, of the devisee for life, but it must also appear that all the issue so comprehended would not take otherwise than by giving an estate-tail to the first devisee.

A testator devised all his estate to trustees in fee, upon trust for his son when he attained 23, with maintenance in the mean time; and if he married a gentlewoman, then upon trust to make a jointure and settle the estate upon the issue of the marriage in strict settlement, as counsel should advise. "But if he (the son) dies without issue of his body," then over. It was held, that subsequent to the settlement the son was entitled to an estate-tail.

Allanson v. Clitherow,
1 Ves. sen. 24.

The case of *Lethieullier and Tracy* was very special. *Sir W. D.* had one child, a daughter, who was an infant; and the next object of his care, *Sir H. N.*, was also an infant. *Sir W. D.* devised his estates to his daughter for life; remainder to trustees for her life; remainder to her first son in tail-male; remainder to her second, third, and every other son in tail-general; remainder to her daughters in tail-general. He gave his trustees power to accumulate the rents during the minority of his daughter, and to lay out the proceeds in land to be settled to the same uses. "And in case my said daughter shall depart this life without issue of her body living at her decease," then the testator gave his trustees power, during the minority of *Sir H. N.*, to accumulate the rents as before. Then followed a substantive, independent devise of all the estates to *Sir H. N.*, after his attaining 21, in strict settlement; with a remainder over to another person in strict settlement. It was admitted, that giving the first son of the daughter an estate in tail-male only was a mere slip; and it was urged, that to supply this omission an estate-tail must be given to the daughter by implication from the words, *in case she shall depart this life without issue*, &c.; but Lord *Hardwicke* decided that these words in this will were not words of limitation, but were only introduced to provide for the contingency of the daughter dying without issue, then living during the minority of *Sir H. N.*; and therefore that the daughter was only entitled to an estate for life, with remainders to her issue in strict settlement, as set forth in the will.

5 Atk. 774.

See *Chapman v. Brown*,
5 Burr. 1626.

Agreeably to the above qualification of the rule, in the following

Ginger v.
White, Willes,
548.

ing case, the estate for life of the devisee was not enlarged :— There was a devise to *J.* for life, with remainder to his male children successively, one after another as they were in priority of age, and to their heirs; and in default of male children of *J.*, then to his female children, and their heirs; “and in case the said *J.* shall die without issue,” then over. But *all* the issue of *J.* were provided for by the prior limitations, therefore it was unnecessary to give him an estate-tail. The word “heirs,” annexed to the devise to the children of *J.*, was construed “heirs of their bodies.” ||

Vent. 250. Bur-
ley's case cited
by Hale C. J.
to have been
adjudged
45 Eliz. but Q.
Whether
there be any such case on the roll?

So, of a devise to *B.* for life, the remainder to the next heir male, and for default of such heir male, the remainder over; this is a good estate-tail, for the words *heir* and *issue* are *nomina collectiva*, and carry the land, not only to the immediate heir or issue, but to all that descend from the devisee.

2 Co. 66.
Archer's case.
2 Anders. 37.

But if lands are devised to *A.* for life, the remainder to his first heir male, and the heirs male of the body of such heir male, the devisee hath but an estate for life, by the express words of the will; and the limitation of the remainder to the heir male, and to the heirs male of such heir male, is a good contingent remainder in the heir male, because it may vest *eo instanti* that the particular estate determines.

6 Co. 16. b.
Wyld's case,
Moor, 397.
S. C. Cro.
Eliz. 743.
S. C. Vent.
229. 10 Mod.
376. S. C. cited.
|| See Seale v.
Barter, 2 Bos.
& P. 495. ||

Lands were devised to *A.* and his wife, and after their decease to their children, they having then a son and a daughter; it was adjudged, that *A.* and his wife had but an estate for life, the remainder to the children for life; for no greater estate had passed at common law; and the intent of the deviser must plainly appear, or they will never admit of a construction different from what they would allow in conveyances executed in the life of the party; and for that reason, if the devise had been to *A.* and his children or issue, *A.* having children at the time, *A.* and the children would have been joint-tenants for life.

6 Co. 17.
Vent. 229.
2 Lev. 59, 60.

But if *A.* had devised land to *B.* and his children or issue, and *B.* had none at the time of the devise, then he takes an estate-tail; for it is plainly the intent of the deviser that the children shall have the land; and they cannot take as immediate devisees, for they were not *in esse*; nor by way of remainder, for the devise was immediately to *B.* and his children; and therefore the words shall be taken as words of limitation, *viz.* as children of his body.

King v.
Melling,
Vent. 214.
225. &c.
2 Lev. 58.
3 Keb. 42. 52.
Pollex. 101.
Fitzgib. 25.
S. C. cited.
8 Mod. 263.
384. S. C.

One having two sons, *A.* and *B.*, by his will in writing devises lands to his son *A.* for his natural life, and after his decease he gives the same to the issue of his body lawfully begotten on a second wife (he having a first then living), and for want of such to *B.* and his heirs for ever, with power to *A.* to make a jointure to such second wife for her life, and dies; *A.*, in the life of his first wife, suffers a recovery to the use of himself in fee, and dies without issue: and the question was, whether by this devise *A.* was tenant in tail, for then by the recovery the remainder was destroyed;

destroyed; or if he was only tenant for life, then this recovery was a forfeiture of his estate; and it was adjudged in *B. R.*, against the opinion of *Hale Ch. Just.*, that *A.* had but an estate for life; but this judgment was reversed in the *Exchequer Chamber*, where it was adjudged that *A.* had an estate-tail.

case relating to this doctrine, it may not be improper briefly to insert the reasons of the resolution, which are these: — 1. Because that *issue* is *nomen collectivum*, and is a stronger word than *children*, which takes in only the immediate descendants of the parent; but *issue* takes in all from generation to generation; and so long as there is any issue of *A.* the remainder is not to take place. 2. In acts of parliament, *issue* is as comprehensive as heirs of the body; as in *West. 2. de donis*, it is said, *quo minus ad exitum descendat*, which takes in all issues in *secula seculorum*. 3. He had no issue at this time, for then it would, as this case is, vest in them by way of remainder; but having none, leaves it to the construction of law, upon the import of the word *issue*. 4. It is issue of his body begotten, which is an eye of an estate-tail. 5. It is said, “and for want of such issue,” which is a phrase agreeable to an estate-tail. 6. It is in case of the creation of an estate-tail, where *voluntas donatoris* has some influence. 7. It is in case of a will, where the intention of the testator is to govern.

¶ The rule in *Shelley's* case has produced a long series of decisions, in which devisees have been held to take estates-tail, though not expressly given to them by the words of their testators. The rule has thus been stated: — “When a person takes an estate of freehold, and in the same instrument there is a limitation similar in quality, by way of remainder, of the inheritance to all his heirs, general or special, of one denomination, such person is entitled to the estate limited to his heirs, in possession or by way of remainder.” (a)

The several requisites of this rule must all be satisfied before the devisee can take an estate-tail by virtue of it. (b) He must take an estate of freehold; the estate of freehold and the estate to the heirs must be both legal or both equitable (c); the limitation to the heirs must be by way of remainder (d); and the inheritance must be limited to the heirs, which is shewn by the following cases: —

Curtis v. Price, 12 Ves. 89. (c) *Fearne, C. R. 52. et seq.* *Ireson v. Pearman*, 3 *Barn. & C.* 799. (d) *Fearne, C. R. 275.* *Lloyd v. Carew.*

A devise to *F.* for life, with remainder to the heir male of his body *during his life*, and for want of such heir male, over. *F.* took only an estate for life (e).

case cited, 1 Vent. 230. that this limitation would have given an estate-tail to *F.*, had, “during his life” been omitted. (e) The devise over, for want of such heir male, did not import that the ulterior devisee should not have it till *F.* died without heir male generally, but for want of such heir male, who was to have it for life. *Fearne, C. R. 153.*

And so a devise to *H. B.* for his life, with remainder to his eldest or any other son after him, during his life; and after them to as many of his descendants, issue male, as shall be heirs of his or their bodies, down to the tenth generation, during their natural lives. — *H. B.* took only for life.

Murthwaite v. Jenkinson, 2 *Barn. & C.* 557.

But whether this rule is applicable to a devise, generally depends upon the question, whether the limitation of the inheritance comprehends *all* the heirs of the given denomination.

Thus

cited. 2 P. Wms. 472. S. C. cited. As this seems to be the most ruling and established

Walters' Brief Analytical View of the rule in *Shelley's* case, 2. (a) *Brydges v. Brydges*, 5 Ves. 120. *Elton v. Eason*, 19 Ves. 75. (b) *Pybus v. Mitford*, 1 Vent. 372. *Wills v. Palmer*, 2 W. Bl. 687. *Hayes v. Foorde*, 2 W. Bl. 698. 3 *Barn. & C.* 799.

White v. Collins, Com. Rep. 289.

See *Burley's* had, “during his life” been omitted. (e) The devise over, for want of such heir male, did not import that the ulterior devisee should not have it till *F.* died without heir male generally, but for want of such heir male, who was to have it for life. *Fearne, C. R. 153.*

Seaward v. Willock, 5 East, 198.

Note, in this case there is no devise over; and

See *dictum*
per Lord
Eldon, 2 Bligh,
49.

Thus the words "heirs of the body," *primâ facie*, mean all descendants; and it is a rule of law that all descendants shall take under these words: but then they may be qualified, and restricted by testators to mean certain descendants only. No rule has, however, yet been given to determine at once what is or what is not sufficient to restrict a limitation to "heirs of the body." Some opinion may, however, be formed from an examination of the cases in which the question has been considered. In the following cases, "heirs of the body" have been held not to be restricted by the accompanying expressions, and the devisees, by the rule in *Shelley's* case, have taken estates-tail. It should be observed, that "heir of the body," or "heir male," may be taken as *nomen collectivum*, and be as expressive as "heirs of the body."

Sayer v. Mas-
terman, Amb.
344.

A devise to *S.* and the heirs of his body, the males to be preferred before the females, and to succeed according to their birth; and a devise to a trustee during the life of *S.* to preserve contingent remainders, and on failure of issue of *S.*, over.

Jones v.
Morgan, 1 Br.
C. C. 205.
See Legate
v. Sewell,
1 P. W. 86.
(a) Bale v.
Coleman,
1 P. W. 141.
Devise to *A.*
for life, with a
power of leasing;

A devise to *W.* for his life, without impeachment of waste, and after his decease to the heirs male of his body, severally, respectively, and in remainder, the one after the other, as they and every of them shall be in seniority of age and priority of birth; with remainder to *T.* in strict settlement, with the interposition of trustees to preserve contingent remainders. Powers were given to *W.* whilst in possession of leasing (a), making jointures for wives, and raising portions for younger children.

power of leasing; remainder to the heirs of his body, remainder over. An estate-tail in *A.*

Poole v.
Poole,
3 Bos. & P.
620.

A devise to trustees in fee, in trust for testator's first son for his life, and to preserve contingent remainders; and after his decease for the several heirs male of such first son, so as the elder of such sons, and the heirs male of his body, should take before the younger and the heirs male of his body; and for want of such issue, over.

Doe dem.
Candler v.
Smith, 7 T. R.
551.

A devise to *M.* and the heirs of her body for ever, as tenants in common; but in case *M.* should die before twenty-one, or without having issue of her body, then over.

Pierson v.
Vickers,
5 East, 548.

A devise to *V.* and to the heirs of her body, whether sons or daughters, as tenants in common; and in default of such issue, over.

Bennett v. Earl
of Tankerville,
19 Ves. 170.

A devise to *H. A.* for life, without impeachment of waste, and after his decease to the heirs of his body, to take as tenants in common; and in case of his decease without issue of his body, over.

Doe v. Har-
vey, 4 Barn.
& C. 610.

A devise to *T. C.* for his life; remainder to trustees during his life; remainder to and amongst all and every the heirs of the body of the said *T. C.*, as well female as male, such heirs, as well female as male, to take as tenants in common, and not as joint-tenants; and for default of such issue, over.

A devise to *W.* for life, he keeping the premises in repair, and after

after his decease to the heirs of his body, in such shares as he (*W.*) should appoint; and for want of appointment, then to the heirs of the body of *W.*, share and share alike, as tenants in common; and if but one *child*, the whole to such only child; and for want of such issue, to testator's right heirs—*W.* took an estate-tail.

Jesson v. Wright, 2 Bligh, 1, overruling Doe v. Goff, 11 East, 668.

So a devise to *F. G.* for his life, with remainder unto the heirs of his body, in such parts, shares, and proportions, manner and form, as he (*F. G.*) should appoint; and in default of such heirs of his body, then over.

Doe v. Goldsmith, 7 Taunt. 209.

So a devise to *B.* for life, remainder to his heir of his body begotten, for ever.

2 Roll. Abr. 794. pl. 6.

So a devise to *B.* and such heir of her body as shall be living at her death, with remainder over in default of such.

Richards v. Lady Bergavenny, 2 Vern. 324.

So a devise to *A.* for life, remainder to the next heir male; and for default of such heir male, then to remain.

Burley's case, cited 1 Vent. 230. See

Miller v. Seagrave, Rob. Gav. 96.

So a devise to *W. C.* for his life, and after his decease to heir male of his body; and so on in succession to the heir at law, male or female.

Britton v. Twining, 3 Mer. 177. 182.

So a devise to *T.* for life, and after to the first heir male of his body; remainder over.

Dubber v. Trollope, Amb. 453.

So a devise to *A. W.* and his sons in tail-male, and for want of such issue male, over.

Wharton v. Gresham, 2 W. Bl. 1083

If there be trustees interposed to preserve contingent remainders, this does not prevent the application of the rule, but the devisee takes an estate-tail in remainder, as was held in the following case:—

A devise to *C.* for life; remainder to trustees for the life of *C.*; remainder to the heirs of the body of *C.*; remainder over.

Colson v. Colson, 2 Atk. 246. S. P.

Capillon v. Voice, 2 P. W. 470. Roe v. Bedford, 4 Mau. & S. 362. S. P. Hodgson v. Ambrose, Doug. 337. Affirmed Dom. Proc. Feb. 14. 1781. S. P. Browncker v. Bagot, 19 Ves. 573.

The word "issue" in a will is either a word of purchase or of limitation, as will best answer the intention of the testator. The word, indeed, has not the same rigid and technical character as "heirs of the body;" for, as Lord *Kenyon* remarked, though the words "heirs of the body" have been restrained, they always give way with greater difficulty than the word "issue." But it is clear that this word, unless restrained, includes all descendants, and therefore has the same force as "heirs of the body," and equally requires the application of the rule in *Shelley's* case, as may be seen by the following case:—

4 T. R. 300.; and see Doe v. Applin, 4 T. R. 88. 3 T. R. 373. Davenport v. Hanbury, 3 Ves. 257. Leigh v.

Norbury, 15 Ves. 340.

A devise to *C.* and the issue of his body living at his death, and for want of such issue, over. Lord *Northington* held, that all the posterity of *C.* were intended to take, and that they must

University of Oxford v. Cliftons, Amb. 385.

S. C. 1 Eden, take by descent; it therefore followed that *C.* took an estate-tail.
473. See
Doe v. Applin,
4 T. R. 82.

The following are cases in which "heirs of the body," and "issue," have been held to be restricted by other words or parts of the testator's will, so that the first devisee took only for life: —

Lawe v. Davies, 2 Ld. Raym. 1561. A devise to *B.* and his heirs lawfully to be begotten; that is to say, to his first, second, and other sons successively, and the heirs of the body of such sons successively.

Doe v. Mulgrave, 5 T. R. 520. A devise to *H.* and his first and every other son in tail-male, with remainder over. *H.* took only a life-estate.

Denn v. Bagshaw, 6 T. R. 512. A devise to *M.* for life, remainder to the first son of her body, if living at the time of her death, and the heirs male of such first son; and for default of such issue to the second son of her body, if living at the time of her death, and the heirs male of such second son; and so on to the third, fourth, &c., and every other son and sons of the body of the said *M.* and their heirs male successively; and *for default of such issue male*, over. *M.* had only one son, who died in her lifetime, leaving a son, who survived *M.* Held, that *M.* took for life only, and that her grandson took nothing, but that the remainder over took effect on the death of *M.* In answer to an argument, that the words "*for default of such issue male*," which preceded the gift over, might in favour of the intention have given *M.* an estate-tail, Lord *Kenyon* quoted the words of Lord *Mansfield*: "these words mean the same thing as, '*and after such estate-tail*;' so that, the first estate never taking place, the remainder vests in possession immediately."

Doe v. Laming, 2 Burr. 1100. See *Roe v. Collis*, 4 T. R. 294.; but see *Doe v. Harvey*, 4 Barn. & C. 610., which differs only in having a devise over. A devise of gavelkind land to *A.* and the heirs of her body, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common; no devise over. Held, that the words "heirs of the body" were in this case words of *purchase*, and not of limitation.

Goodtitle v. Herring, 1 East, 264.; but see *Poole v. Poole*, 5 Bos. & P. 620. A devise to *D.* for life, remainder to trustees for her life, remainder to the heirs male of the body of *D.*, severally and successively one after another; the elder of such sons, and the heirs male of his body being always preferred, and to take before the younger of such sons, and the heirs male of their bodies; and for want of such issue, over. *D.*'s estate for life was not enlarged.

Doe v. Ironmonger, 3 East, 533. This case seems contrary to later authorities. See *Doe v. Harvey*, 4 Barn. & C. 610. So a devise to *S.* for life, remainder to the heirs of her body, their heirs and assigns for ever, without regard to seniority of age or priority of birth; and in default of such issue, over.

Gretton v. Haward, 6 Taunt. 94. So a devise of all estates to testator's wife, she paying all debts; and after her decease, to the heirs of her body, share and share alike, if more than one; and in default of issue to be begotten by

by him, the testator, to be at her own disposal. There were children, and the wife was held to take only for life.

This case excited much surprise in the

profession, and seems to be incompatible with *Jesson v. Wright*, 2 Bligh, 49.

A devise of all testator's "*estates*" to *O.* and the issue of her body as tenants in common, if more than one; but in default of such issue, or being such, if they should all die under the age of twenty-one years, and without leaving lawful issue of any of their bodies, then over. Held, that *O.* took for life, with a contingent remainder in fee to her issue.

Doe v. Burn-
sall, 6 T.R.
30. S.C.
1 Bos. & P.
215. See
Gulliver v.
Wickett,
1 Wils. 105.

A devise of gavelkind lands to *W. J.* and *R.* during their respective lives, as tenants in common; and after their respective decease, testator devised the share of him or them so dying unto the heirs of his and their body and bodies respectively; and if more than one, as tenants in common; and if but one, to such only one, and to his or their heirs and assigns for ever. And if *W. J.* or *R.* should die without such issue, or leaving any such, they all should die without attaining twenty-one, then he devised the share of him and them so dying unto the survivors and survivor, and the heirs of the body of such survivors or survivor, as tenants in common; and in default of such issue of *W. J.* and *R.*, to testator's right heirs. Held, that *W. J.* and *R.* took for life only.

Crump v.
Norwood,
7 Taunt. 362.

But the devisee takes an estate-tail, though there are words of limitation added to the gift to his heirs; if such words (1.) are of the same import, and are virtually included in the words of limitation of the gift; or (2.) limit *a fee* to the heirs of the body or issue of the devisee, and there is a remainder over for default of such heirs or issue.

(1.) A devise to *R. M.* and the first heir male of his body, and the heirs male of his body; and in default of such issue, over. *R. M.* took an estate-tail.

Minshull v.
Minshull,
1 Atk. 411.

So in a devise to *Ambrose* and the heirs male of his body, and the heirs male of their bodies, and for want of such issue, over.

Gulliver v.
Ashby,
1 W. Bl. 607.

So a devise to *G. G.* for life, remainder to the issue male of his body, and the heirs male of the body of such issue male; and for want of such issue male, over.

Roe ex dem.
Dodson v.
Grew, 2 Wils.
322.

So a devise to *P.* for his life only, without impeachment of waste, and after his decease, then to the issue of his body, and to the heirs of the body of such issue; remainder over.

Hodgson v.
Merest,
9 Price, 556.

(2.) So in a devise to *N.* for life, remainder to the heirs male of his body lawfully to be begotten, and his heirs for ever; but if the said *N.* should die without such heir male, then over.

Goodright v.
Pullyn, 2 Ld.
Raym. 1437.

A devise to *L.* for life, remainder to the heirs of the body of *L.* and their heirs; and if she died without such heir of her body, then over. *L.* took an estate-tail.

Morris v. Le
Gay, cited
2 Burr. 1102.
2 Atk. 249.

So in a devise to *J. H.* for life, remainder to the issue male of *J. H.* and to his and their heirs, share and share alike; and for want of such issue, to the issue female of *J. H.* and her and their heirs; and for want of such issue, over.

King v.
Burchell,
Amb. 379.
S.C. 1 Eden,
424.

Wright v. Pearson, Amb. 358.
So in a devise to *T. R.* for life, remainder to his heirs male and their heirs, with a remainder over.
See Fearn's C. R. 126.

Denn v. Shenton, Cowp. 410.
So a devise to *S.* and the heirs of his body and their heirs for ever; but in case the said *S.* shall die without leaving issue of his body, then over to *G.* in fee, chargeable with the payment of 100*l.* to *A. B.* within one year next after *G.* or his heirs should be possessed of the land devised.

Denn v. Puckey, 5 T. R. 299.
So a devise to *N. W.* for life, without impeachment of waste, and after his decease to the issue male of his body, and to the heirs and assigns of such issue male for ever, and for default of such issue male, over.

Frank v. Stovin, 3 East, 548.
So a devise to *A.* for life, without impeachment of waste, and with a power of jointuring, and after his decease to the issue male of his body and their heirs, and in default of such issue, over.

Franklin v. Lay, 6 Madd. 258.
So a devise to *J. F.* and to the issue of his body, and to the heirs of such issue for ever; but if *J. F.* should die without having [*qu.* a misprint for *leaving*? — see argument and judgment] any issue of his body, then over.

Measure v. Gee, 5 Barn. & A. 910.
So in a devise to *T.* for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of *T.*, his, her, and their heirs and assigns for ever, and on failure of issue of the body of *T.*, then over.

Kinch v. Ward, 2 Sim. & Stu. 409.
So in a devise of freeholds and leaseholds upon trust, to permit and suffer *T. E.* to receive the rents for his life, and after his decease, "I devise the same unto the heirs of the body of the said *T. E.*, their heirs, executors, administrators, and assigns, for ever; but in case *T. E.* shall die without issue, then over."

Doe v. Collis, 4 T. R. 294.
But where a testator devised his estate to be equally divided between his two daughters, and gave one moiety to *E.* in fee, and the other to *S.* for life, and after her decease to the issue of her body and their heirs for ever, *and no remainder over*, it was held, that *S.* took an estate for life only. It was observed, that had *S.* taken an estate-tail, the estate would not have been equally divided.

Doe v. Elvey, 4 East, 313.
See Doe v. Holmes, 3 Wils. 237.
241. 2 W. Bl. 777.
And the following case may here be noticed: — A devise to *H. G.* and to the issue of his body, his, her, or their heirs, equally to be divided, if more than one; and if *H. G.* shall have no issue of his body living at the time of his decease, then over to *H. E.* in fee. *H. G.* who had no issue, suffered a recovery. Lord Ellenborough said, "*Quáncunque viâ datâ*, the devise over was barred; for if *H. G.* was not tenant in tail, but took for life only, the next limitation to the issue unborn was contingent, and the remainder over being also contingent, according to *Lodington v. Kime*, those contingent estates were destroyed." His Lordship, however, and the other judges, seem to have favoured the construction that *H. G.* took for life only. (*a*)

(*a*) See Franklin v. Lay, 6 Madd. 258.
Ld. Glenorchy v. Bosville,

But if the devise be to trustees, upon trust to convey or settle the estate devised to or upon *A.* for life, with remainder to his issue

issue or the heirs of his body, a court of equity will direct the trustees to convey the estate in strict settlement.

Cas. temp.
Talb. 4.
Ashton v.

Ashton, 1 Ves. sen. 149. Meure v. Meure, 2 Atk. 265.

Thus, on a devise to trustees, upon trust that they should, as counsel should advise, convey, settle, and assure the said manors, &c. to the use of *J.* for life, and after her death then to the heirs of her body; but in case *J.* should die without leaving issue of her body, then over to *J. P.* in fee; Lord *Kenyon*, M. R. declared the estate should be settled on *J.* for life, remainder to her first and other sons in tail-general, remainder to her daughters in general as tenants in common, with cross remainders in tail-general, with remainder to *J. P.* in fee.

Bastard v.
Proby, 2 Cox,
6. Papillon
v. Voice,
2 P. W. 470.
White v.
Carter, Amb.
670. S. C.
2 Eden, 566.

So, when an estate was devised to trustees, to convey to the use of the testator's daughter for her life, and so as she alone, or such other person as she should appoint, should receive the rents, and so as her husband was not to intermeddle therewith; and after her decease [in trust for the heirs of her body for ever; Lord *Hardwicke*, on the ground that it was a trust *executory* and not *executed*, decreed that the wife was entitled to an estate for life only: for if she had had an estate-tail, the husband, whom it was plainly the intention of the testator to exclude from all benefit, either during the wife's lifetime or after, would have been entitled to be tenant by the curtesy.

Roberts v.
Dixwell,
1 Atk. 607.

But if the trusts are *executed*, — that is, if the testator sets them out fully, and executes his whole intention respecting them, taking upon himself to be his own conveyancer, and leaving nothing to the discretion of his trustees or their counsel, — the will must receive the same construction as if the limitations were of legal estates.

1 Jac. & W.
570.

Thus lands were devised to a trustee, in trust to pay the rents to *S. G.* to her separate use for life; and after her death to pay the same to *E. G.*, her son, for life; and afterwards to pay the same to the heirs of his body; and for want of such issue to pay the same to all and every other son or sons of the body of *S. G.*, and the heirs of the bodies successively, the eldest to be preferred in priority of birth; and for want of such issue in trust, to convey to *T. G.* in fee. Lord *Hardwicke* decreed that *E. G.*, who survived his mother, was entitled to a conveyance in tail.

Garth v.
Baldwin,
2 Ves. sen.
646.

So, where a testator devised lands in trust for *P.* for life, remainder to trustees for his life, remainder to the heirs of the body of *P.*, remainder over; and also bequeathed certain monies to the trustees, to be laid out in the purchase of lands of inheritance, to be settled upon the same trusts as the lands devised; it was decreed that *P.* was entitled to an estate-tail in the lands to be purchased.

Austen v.
Taylor, Amb.
376. See
1 Jac. & W.
572. and
3 Atk. 794.

But *A.*, being seised of a legal estate in fee in *L.*, and of an equitable estate in fee in *S.*, by his will directed *B.*, the trustee of *S.*, to convey the legal estate to the uses therein declared, and then devised *L.* and *S.* to *B.* for life, and afterwards to the first son or issue male of his body, and to the heirs male of the body of such first son, remainder to *B.*'s second son, and his issue

Attorney
General v.
Sutton,
1 P. W. 754.

male in tail (but did not carry over the limitations to his third or other son), subject to a proviso, "that the said *B.* or his assigns, "and the heirs male of his body should not commit waste, and "should not impeach or endeavour to defeat the bequests in his "said will; and after the death of *B.* without issue male of his "body, or after the death of such issue male, testator devised "all his estates to charities. *B.* suffered a recovery of *L.* and "*S.*, and died without issue." It was decreed that the recovery as to *L.* was good, but void as to *S.*; thus determining that the devise as to *S.* was *executory*, and that in equity *B.*, as to that estate, was only tenant for life.

The difference between trusts executed and executory, is stated in *Jervoise v. the Duke of Northumberland*, 1 Jac. & W. 559., and the cases there cited; and see Lord *Deerhurst v. Duke of St. Alban's*, 5 Madd. 232.

See Fearn's
C.R. 80.

If a devise be to the heirs of the body of a person, who either has no estate, or whose estate will not, by the rule in *Shelley's* case, unite with the limitation to his heirs, such limitation will create a *quasi entail*, and the heirs included in it will take estates-tail, in the same manner as if an estate-tail had vested in the ancestor.

Mandeville's
case, 1 Co.
Litt. 26. b.

Thus, on a devise to a widow, and the heirs of the body of her late husband, it was held that the widow took an estate for life, that her son took an estate-tail, with remainder to his sister (the only other child) in tail.

Heny v.
Purcel,
2 W. Bl. 1002.

So, on a devise to trustees, upon trust to pay the rents to *Rebecca* the wife of *P.* for her life, for her separate use, and after her decease to the use of the heirs of the body of the said *Rebecca*; the elder of such issue, and his, her, and their heirs, to take before the younger of such issue, his, her, and their heirs, with remainders over; it was held that the two daughters, the only children of *Rebecca*, should take *successive* estates-tail. *Rebecca's* life-estate being *equitable*, could not unite with the *legal* limitation to her heirs, so as to give her an estate-tail. ||

Fountain and
Gooch, Hil.
29 &
30 Car. 2.
Rot. 1247.
[S. C. cited by
Lord Mans-
field in Cowp.
380.]

Upon a special verdict, the case was: *Richard Gooch*, seised in fee of lands in *Suffolk*, by will in writing devises to *Richard*, son of his late brother, all his lands, commonly called *P.*, and also all other his lands during his natural life, and to the heirs male of his body begotten; and for want of such issue, he the said *Richard* to have the said estate but during his natural life, and no longer; and then his will was, that the aforesaid estate should descend to *Philip* his nephew: *Richard* suffers a common recovery to the use of himself and his heir, and devises this land to the defendant in fee, and dies without issue male. It was adjudged to be an estate-tail in *Richard*, and so the remainder barred by the recovery, and not an estate for life, and so forfeited by the recovery; for the words *and for want of such issue, he the said Richard to have but an estate during his natural life*, are no more than the law implies; for if tenant in tail has no issue, it resolves into an estate for life, and so it was adjudged. The objection was, that it should be construed thus: — I give the land to *Richard* during his life, and no longer, in case he has

no issue male of his body; and so an estate-tail upon a contingent; and he dying without issue male, it is now become but an estate for life *ab initio*; but the judgment was *ut supra*.

[A testator devised lands to his daughter *E.* to hold the same, after the death of the testator's wife, to his said daughter and *the heirs of her body* lawfully begotten; and to his daughter *M.* other lands, to hold from and after his wife's decease to the said *M.*, and to the heirs of her body lawfully begotten; and declared his further mind and will to be, that in case either of his said daughters should happen to die single, married, or widow, without leaving children or child *living at their decease*, lawfully begotten, then the estate given her by his will should be void as to the inheritance of heirs, and of none effect, and the lands so given her should go to his heir male, and his heirs male, he and they paying to the surviving daughter an annuity during her life. *E.*, after the decease of her mother, suffered a common recovery of the lands so devised to her, and afterwards devised them, and died unmarried. Upon a question, whether the recovery had barred the remainder over; it being contended on behalf of the claimant in remainder, that upon the whole of the will the intention of the testator was not to give his daughter an immediate estate-tail, but an estate for life only, with remainder to her children in tail, if she left any, and if not, then to the testator's heir male, &c.; but if not so, still, that in providing for the event that had happened, he expressly revoked the estate of inheritance; — the Court said, the validity of the recovery depended on the point, whether the daughter was tenant in tail, or tenant for life only; and that it was necessary for the plaintiff to support the proposition, that, at the death of the testator, *E.* was, during her own life, tenant for life only; that the estate was given to *her* and *the heirs of her body*, which was an estate-tail; that if she was tenant in tail to the hour of her death, nothing was so clear, as that all conditions limited upon such estate-tail were avoided by the common recovery which had been suffered. And the court were of opinion, that she was tenant in tail.]

A copyholder in fee surrenders to the use of his will, and by will devises his copyhold lands to his wife, and if she hath issue by the devisor, that issue shall have it at his age of twenty-one years; and if the issue die before that age, or before his wife, or *if she hath no issue*, then she shall choose two attorneys, and she to make a bill of sale of my lands to her best advantage. *Per Curiam*, — She hath only an estate for life; and having no issue, hath no interest to dispose, but an authority only to nominate two, who shall sell, and the vendee shall be in by the will.

One by will devises lands to *A.* for life, without impeachment of waste; and in case he shall have issue male, to such issue male and his heirs for ever; and after the death of *A.*, in case he shall leave no issue male, to *B.* and his heirs for ever, and dies: *A.* suffers a recovery, and declares the use to himself in fee, and by his will devises it to *C.* in fee, and dies without issue; And the first question was, Whether by this devise *A.* took an

Driver v.
Edgar, Cowp.
379.

Cro. Jac.
199. Beal
and Shephard,
adjudged.
4 Mod. 318,
319. S. C.
cited.

3 Lev. 431.
Ld. Raym.
203. S. C.
cited in
8 Mod. 256.
See Fitz-
gib. 21.
10 Mod. 403.
between Lod-

dington and Kime; and the Court being ready to give judgment on this point, J. Powel, Jun. started another, viz. Whether these remainders could take place as

estate in tail-male, or only for life? — and it was held to be but an estate for life in *A.* 1st. Because it was devised to him expressly for life, and that without impeachment of waste, which would have been needless if it were an estate-tail. 2dly. The words, “*and in case A. die without issue male, or leave no issue,*” are not to be taken substantively and absolutely, but relatively to what was said before, viz., “*if A. die without issue, who shall take the fee*” as before is appointed;” and these oblique words cannot be intended to destroy by implication the estate expressly devised before to the issue male of *A.*, and there is no uncertainty in these words, *to the issue male*, which of them shall take, if there be several, for the eldest shall take the fee by purchase, &c.

executory devises or contingent remainders? upon which it was twice argued: but before any judgment the parties agreed: but in *Salk. 224. pl. 1. S.C.* it is said to have been further held, that this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder, so that a posthumous son could never take; but there is no judgment; but *per Raym. C. J.* in the case of *Sparrow and Weigh* it was determined, and judgment entered, *Patch. 9 W. 3.* that it was only an estate for life; and it was likewise decided in the same manner in Chancery, and on an appeal to the House of Lords. *Abr. Eq. 183.*

(a) *Goodright v. Dunham*, Doug. 251.
Doe v. Perryn, 3 T. R. 484.
The King v. The Marquis of Stafford, 7 East 521.
 (b) *Doe v. Burnsall*, 6 T. R. 30. S. C. 1 Bos. & P. 215.
Loddington v. Kime, 1 Salk. 224. (c) *Crump v. Norwood*, 7 Taunt. 362. *Doe v. Holmes*, 3 Wils. 237. 241. 2 W. Bl. 777.

¶ If there be a devise to *A.* for life, with remainder to his children and their heirs; “*and in default of such issue,*” or “*in case A. die without issue,*” over (a); — or, with remainder to his issue in fee; “*and in default of such issue,*” or being such, if they should all die under twenty-one, and without leaving lawful issue, over (b); — or, with remainder to the heirs of his body and their heirs; and if *A.* die without such issue, or leaving any such they all should die without attaining twenty-one, over (c); — such limitation does not enlarge *A.*’s estate for life, but gives a contingent remainder in fee to his children or issue; and the remainder over is also contingent, subject to be determined by the vesting of the remainder in fee to the children.

C. R. 152.

Mr. Fearne has observed, that the limitation in fee grafted on the limitation to the issue carries these cases out of the rule in *Shelley’s* case; and further, that when in such cases as above cited the words preceding the limitation over refer to the issue of the parent, there is no circumstance to extend the construction beyond the words, which may therefore be confined to the children or issue themselves; and if the words refer to *such issue*, the issue, children, or heirs just mentioned may be understood, if there be no contrary intention apparent.

C. R. 375.

But if the words preceding the limitation over refer to the children or issue and *their issue*, the estate in fee given to the children or issue will be restricted to an estate-tail, and the remainder over will be a vested remainder.

Ives v. Legge, 3 T. R. 488. in note.
Fearne, C. R. 376. See *Doe v. Reason*, cited 3 Wils. 244.

Thus where there was a devise to *M.*, testator’s daughter, for life, and after her decease the same to go and be enjoyed by the children of her body begotten, and their heirs, if she should have any, and in default thereof to *W. L.* (a son of testator) in fee, the words “*in default thereof*” referred both to the children and *their heirs*, so that the estate to the children was held to be an estate-tail. ¶

A. devised

A. devised his estate to trustees and their heirs, in trust for *B.* for life, and to his first and other sons in tail; but in case *A.* died without an heir male of his body begotten, the trust to be void; and in such case he gave the estate to *J.S.* It was held, that these words, *if he die without heir male of his body begotten*, did not give him an estate-tail by implication, nor enlarge an express estate devised to him for life.

Hardwicke, in 1 Ves. 26. to be wrong reported by him. S.C. cited in 8 Mod. 260. *Fitzgib.* 26, 27. 1 P. Wms. 333.

2 Vern. 427.
449. Pop-
ham and
Bamfield,
1 P. Wms.
54. S.C.
1 Salk. 236.
S.C. but
said by Lord

If *A.* devises to *D.*, his daughter, for life, and after her decease to her first son, and the heir of his body; and if he dies without heirs of his body, then to her second and other sons, and the heirs of their bodies, and after them to *N.* in *eâdem formâ*, and for default of such issue, to *J.S.* in fee; and after the will was finished, but before publication, the testator adds this clause: *Memorandum, the intent and meaning of the testator is, that D. shall not alien the lands given to her, but they shall be to her heirs male; and for want of such issue, to N.;*—this restrictive clause explains the intent of the testator, and therefore *B.* shall have an estate for life, and not an estate-tail by implication.

Skin. 240.
pl. 5.
3 Mod. 62.
311. S.C.
cited.
Vent. 230.
4 Mod. 318.
Pollex. 657.
2 Show. 405.
pl. 377.
Eq. Abr.
184. pl. 25.
Friend and
Bouchier.

If *A.* devises lands to trustees to pay debts and legacies, and then to settle the remainder of one moiety of what should remain unsold to *H.*, and the heirs of his body by a second wife, and in default of such issue to her son *F.* and the heirs of his body; the other moiety to *F.* and the heirs of his body, with remainders over; taking special care in such settlement, that it never be in the power of either of my said sons *F.* or *H.* to dock the entail of either of the said moieties given them, as aforesaid, during this or either of their life or lives;—this estate being only executory, it must be construed as if like provision had been contained in marriage-articles; and therefore the sons shall have estates for life conveyed to them; but it must be without impeachment of waste.

2 Vern. 526.
between
Leonard
and Earl of
Sussex, de-
creed in
Chancery.

A. makes a settlement of his estate on *B.*, his son, for life, remainder to his first, &c. son in tail-male. Afterwards, the reversion in fee being in himself, he made his will as followeth: *As touching my lands and tenements, &c. my will is, that if my son's wife die, during the life of her husband, without issue male, that then he shall have power to make a jointure to any other wife; and for want of such issue male of my said son, then the lands shall be and remain to my son, &c. by any other wife, and my granddaughter shall have 4000*l.* And in case of failure of issue male by my son, then all my lands shall go to my grandchildren and their heirs, share and share alike.* Adjudged, that the settlement and will being distinct conveyances, the estate for life in the settlement cannot be tacked to the estate in the will, so as to create an estate-tail in the son, so that he continued only tenant for life.

4 Mod. 516.
Skin. 359.
pl. 1.
Ld. Raym.
57. S.C.
Moor and
Parker.
[Lady Lanes-
borough v.
Fox, Ca.
temp. Talb.
262. S. P.
Doe v.
Fonnereau,
Dougl. 487.
S. P.
Habergham
v. Vincent,

5 Term Rep. 92. 2 Ves. jun. 204. S. P. So, an equitable estate for life cannot unite with a legal estate-tail, nor *vice versâ*. *Shapland v. Smith*, 1 Br. Ch. Rep. 75. *Knight v. Ellis*, 2 Br. Ch. Rep. 570.]

A man, seised in fee, devised to *J. B.* for his life only, without impeachment

Abr. Eq.
184. pl. 27.

10 Mod. 181.
cited in Fitz-
gib. 12. 22.
8 Mod. 261.
383.
Fortesc. 133.
Ch. Cas. 175.
Backhouse
and Wells,
Gilb. Ca.
8vo. 20. 129.

Abr. Eq.
185. P.
Wms. 759.
S. C. cited
8 Mod. 258.
384.
Fitzgib. 14.
Langley and
Baldwin,
certified to
be an estate-
tail by the
Court of
Common
Pleas, and
decreed accordingly in Chancery. S. C. cited in 1 Ves. 26. and said to be wrong reported in Eq. Abr.

Legate and
Sewell,
2 Vern. 551.
S. C. but no
resolution.
Eq. Abr.
389. 394.
pl. 7.
Gilb. Eq.
Rep. 145.
1 P. Wms.
87. 90, 91.
pl. 17.
[(a) Though
P. Williams says the parties agreed, yet in 2 Ves. 657. Lord Hardwicke says, that Lord Cowper thought himself bound to agree with the three judges, and so decreed.]

Abr. Eq.
185-6. Pa-
pillon and
Voice, de-
creed at the
Rolls. 2 P.
Wms. 471.
pl. 150.
Fitzgib. 38.
S. C. cited in
Ca. temp.
Talb. 8.

impeachment of waste, and from and after his decease, then to the issue male of his body lawfully to be begotten, if God shall bless him with any, and to the heirs male of the bodies of such issue lawfully begotten; and for default of such issue, remainder to *J. C.* and the heirs male of his body; and for want of such issue, he limits two remainders over in the same words: it was adjudged, that *J. B.* took only an estate for life, for the estate was given to him for life, and there was a limitation afterwards to his issue, which was a description of the person who was to take the estate-tail.

A. devised certain lands to his eldest son for life, without impeachment of waste, remainder to *J. S.* his grandchild for life, without impeachment of waste, with power to him to limit a jointure of the same land to any woman he should marry, for her life; and after his death he devised the lands to the first son of *J. S.* the grandchild in tail, and so to the sixth son; and then devised, that if *J. S.* the grandchild should die without issue male, the land should remain to *J. B.* Held, that *J. S.* took an estate-tail; for if there had been a seventh son, he could not have taken; and there it was necessary to create an estate-tail by implication.

A. devised the surplus of his personal estate to be laid out in a purchase of lands to be settled on *B.*, his nephew, for life, and after his decease to the heirs male of the body of the said nephew, and to the heirs male of the body of every such heir male, severally and successively one after another, as they shall be in seniority of age and priority of birth, every elder, and the heirs male of his body, to be preferred before every younger; and for want of such issue, to his brother in the same manner. On a case stated for the opinion of the court of Common Pleas, three of the judges certified (*a*), that the nephew should have an estate-tail conveyed to him, but Judge *Tracey* held it only an estate for life.

The plaintiff's father, by his will, devised the estate in question to the plaintiff for life, without impeachment of waste; remainder to trustees during his life, to support contingent remainders; with remainder to the heirs of the body of his said son, reversion to himself in fee, with a power to the son to make a jointure of such a part; and devised likewise a considerable personal estate to be laid out in a purchase of lands, and settled to the same uses: and the only question was, Whether the plaintiff took an estate-tail, or only an estate for life?—and it was held, that he took only an estate for life, as the words were express, and had all the other marks attendant on an estate for life; and, consequently, that the heirs of the body should take by purchase: and though the estate would vest in the first son as tenant in tail by way of purchase, yet not

so as to exclude the other sons, or their issue, from taking the like estate, whenever his estate determined for want of issue.

A. devises lands to his wife for life, and for her better support he gives and bequeaths unto her the sum of 500*l.*, to be raised by his executors or administrators by sale of timber, or by sale of any part of the premises, or otherwise by digging, sinking, getting, and sale of coal on the premises, or any part thereof, at her, her executors and administrators, choice and election; and if my said wife shall happen to die before the said sum be raised, as aforesaid, then such person whom she had appointed in her lifetime to raise, &c., for which I give them and her full power and authority; provided nevertheless, that if either of my sisters hereafter named, or such person for whom my trustees hereafter named shall be trustees, shall pay unto my wife, her executors, &c. the said sum of 500*l.*, that the said power of selling shall cease; and after the decease of my said wife, I devise all my estate before mentioned to *A.*, *B.*, and *C.*, and the survivor and survivors of them, upon the trusts hereafter mentioned, that is to say, in trust for my sisters *A. L.* and *D. E.*, equally betwixt them, during their natural lives, without committing any manner of waste, from and after the decease of my said wife; provided always, that what sum or sums of money, in part or in full of the said 500*l.* hereby left my wife, shall be really paid my wife, her executors, &c. by either of my said sisters, that in that case my will is, that such money be likewise raised by the getting of coal on the premises only; and if either of my said sisters happen to die, leaving issue or issues of her or their bodies lawfully begotten, or to be begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it shall happen that both my said sisters die without issue, as aforesaid, and their issue or issues too die without issue or issues lawfully to be begotten; the said trustees to stand and be intrusted to and for my kinsman *J. S.* and the heirs male of his body, &c. and for want of such issue, then in trust for *R. G.* This was held an estate-tail in the sisters.

Abr. Eq.
184. pl. 28.
Gilb. Eq.
Rep. 28.
3 Danv.
Abr. 178.
pl. 26.
8 Mod. 255.
382.
Fortesc. 58.
2 Stra. 798.
Barnard.
K. B. 54.
Fitzgib. 7.
Shaw and
Weigh, ad-
judged an
estate-tail in
the sister, in
the Great
Sessions of
Wales, but
that judgment
reversed by
B. R. where
it was held
only an
estate for life;
but the judg-
ment of B. R.
reversed in the
House of
Peers, by the
opinion of
Eyre C. J.
Pengelly and
Fortescue.
3 Br. P. C.
469.

(E) *Of Terms for Years, and uncertain Interests by Devise.*

IF a man devises lands to his executors for payment of his debts, and after debts paid the remainder over, the remainder is good; but it shall not vest at the death of executors, but the estate shall be considered as an uncertain interest, which shall go from executor to executor for the payment of the debts; for if it were to determine by the death of the executors, the debts might never be paid.

If a man devises his land *to be sold by his executors, or to his executors to be sold*, the executors shall have the profits to their own use, and not as assets, therefore they are obliged to sell to the first purchaser (*a*): but if the devise had been, *that his executor should*

8 Co. 96. a.
Cro. Eliz. 315.
Roll. Abr.
829. S. C.

Co. Lit. 112.
b.; 236. a.
Vide head of
Heir and
Ancestor.

||(a) It has been contended, that a devise of land to be sold by his executors does not invest the executors with the fee-simple, but merely confers a power. See Sugden on Powers, ch. II. sect. 1. A devise of land to executors to be sold gives them the fee; North v. Crompton, 1 Cha. Ca. 196.; but they are only entitled to the intermediate rents and profits upon the same trusts as the money to arise from the sale. (b) If testator directs that his executors shall sell his lands for payment of debts, then in the mean time such lands descend to the heir at law, but subject and liable to the debts. Lancaster v. Thornton, 2 Burr. 1027. But if the direction to sell amount to an absolute conversion into personal estate, then, though the legal estate descend to the heir, he takes no beneficial interest whatever as heir. Yates v. Compton, 2 P. W. 308. ||

Roll. Abr. 831. If a man, possessed of a term for years, devises the land to another generally, the devisee shall have all the term, without any limitation to determine upon his death.

3 Co. 20. A. devises his lands to his executors till his son comes of age, Boraston's case. the profits to be employed in the performance of his will; though Chan. Ca. 115. the son dies before he be of age, yet the interest of the executors S. P. continues till he might be of age, if he had lived; for since the intent of the devisor governs in wills, it might destroy that, if the || 3 P. W. executor's interest ceased at the death of the son; for it is reasonable to believe that the testator found on a computation, that the profits of the land in that time would answer his debts, so that this is a good devise of the term till the son would be twenty-one, though he die before. 177. ||

Doe v. Simpson, 5 East, 162. || On a devise to trustees and the survivor of them, and the executors and administrators of such survivor, in trust out of the rents and profits, and the arrears due, to pay certain annuities and a gross sum of 800*l.*; and after payment of the said annuities and the said sum of 800*l.* the estate was devised to W. for life; the See Carter v. Barnardiston, 1 P. W. 509. the Court of K. B. held that the trustees took an estate for life by 517. implication for the lives of the annuitants, with a term of years in remainder for the purpose of raising the sum of 800*l.* Mr. Sanders has observed (1 Uses & T. 247.), that by the expression "*term of years*" should be understood *chattel interest*. ||

Cro. Eliz. 252. If a man devises land to his wife *till his son comes of age*, to 2 Leon. 211. provide his children with necessaries; though the wife dies before Dyer, 210. the son comes of age, yet her interest does not determine by her death, because it was not a matter of mere confidence, but shall go to her executors; but (c) if the devise had been, *that his land should descend to his son*, but *that his wife should have the full profits thereof until the full age of his son*, for his education; here is nothing devised to the wife, but a mere confidence that she shall take profits for the education of the son; and by the will she is but in nature of a guardian or bailiff, for the benefit of the infant, which determines by her death.

Abr. Eq. 195. A man devised certain lands to his wife till his son and heir Gilbert, Eq. apparent should attain to his age of twenty-one years, and when Rep. 36. his son should attain to his age, then to his son and his heirs, and died; the son lived to the age of thirteen years, and then died; and

and the wife, supposing that she had a title to hold the lands till such time as the son would have attained his age of twenty-one years, in case he had lived to that time, continues in the perception of the rents and profits of the said lands for several years; and the bill was brought against her by the heir at law of the son, to have an account of the rents and profits from the death of the son; and though the wife was executrix likewise of her husband, yet it not being devised during that time, *for payment of debts, nor any creditors, nor want of assets appearing* *, it was held by my Lord Chancellor, that the wife's estate determined by the death of the son, and that the remainder vested presently in the son upon the testator's death, and was not to expect till the contingency of his attaining his age of twenty-one years should happen, for then in that case it never would have vested, he dying before that age; and therefore decreed the wife to account for the profits from the time of the son's death; and upon a re-hearing his Lordship continued of the same opinion, and grounded himself on the distinctions taken in 3 *Co.* 19. and 6 *Co.* 35.

|| So on a devise to trustees and their assigns until *Rogers* and *Bonny* should attain their several ages of twenty-one years, in trust to receive the rents for the maintenance of *Rogers* and *Bonny*, and when they attained their respective ages of twenty-one years, then to them for their lives, Lord *Hardwicke* was of opinion, that the trustees took only a chattel interest till *Rogers* and *Bonny*, or the survivor, attained twenty-one.

So a devise to trustees and the survivor, and the heirs of such survivor, in trust to lay out the rents for the maintenance of *T.* and *H.* during their minorities, and when they should severally attain the age of twenty-one years, then to *T.* and *H.* and their heirs equally, was held to be an *immediate* gift to *T.* and *H.*; and consequently the trustees took a chattel interest.

So, on a devise to trustees to receive and apply rents for the maintenance of *C. Sandy* until he should attain twenty-one years, it was held that the estate of the trustees was only during the minority of *C. Sandy*, and ceased upon his death under twenty-one years.

So, after a devise to *Jones* of a freehold house and copyhold lands, and also of the residue of personal estate, after payment of debts and legacies and the expences of being admitted to the copyhold lands in trust, to pay two life-annuities, with powers of distress, the will proceeded, "*Item*, after all expences are paid " and the annuities properly settled, I would have the remainder " of my cash to be laid out in some of the public funds, and the " dividends thereof, with the rents of my estate as above, I give " to *Jones* or his assigns in trust for the use of *W. B.* till he " attains the age of twenty-one years; and when he does attain " that age, then my will is that he be *put into possession* of the " above estates and money, to be at his own disposal, subject to " the said annuities." Held that the trustee took only during the minority of *W. B.*

Mansfield and
Dugard,
decreed Hil.
1713.

* This distin-
guishes it from
the case above;
|| and see
Lomax v. Hol-
meden, 3 P.W.
176. ||

Trodd v.
Downs, 2 Atk.
304.

Goodtitle v.
Whitby,
1 Burr. 228.
See Doe v.
Lea, 3 T. R.
41.

Morrant v.
Gough, 7 Barn.
& C. 206.

Doe v. Timins,
1 Barn. & A.
530.

So,

Doe v.
Nicholls,
1 Barn. & C.
336.

So, on a devise of copyhold land to trustees in trust for *T. G. P.*, to be transferred to him as soon as he attained twenty-one years, it was held that the trustees had a chattel interest during the minority of *T. G. P.* To distinguish this case from those in which a direction to convey has been held sufficient to give the legal estate in fee to trustees, *Holroyd J.* said, that "to be transferred" meant that the copyhold lands were to be delivered up, and not that the copyhold estate was to be surrendered by the trustees. ||

Sid. 151.
Roll. Abr.
851.
(a) So, if a
term for 1000
years be de-
vised to *A.*, the
remainder to
B., and the
heirs of his
body, the
whole term is
vested in *A.*,
and *B.* has
only a possi-
bility, and no
interest vests
in him till the
death of *A.*

A term was devised to *B.*, and if he died within the term, the residue to go to *C.* after he attained his age of twenty-one years; *B.* died, and then *C.*, before he came to that age: by this devise *B.* had the (a) whole term in him (for if a termor devises his house, or his term, without more words, the devisee has the whole term), and the residue of it was to go to *C.* on a precedent contingency, viz. when he came of age, which never happened, and, consequently, his executors can never have it: and the executors of the devisor have neither an interest, nor a possibility of one, because he made a total disposition of the term; as if a copyholder for life surrenders to the use of *B.* for life, who is admitted, and dies in the life of the surrenderor, yet he shall have no benefit by surviving him, because the whole interest was surrendered; therefore it was adjudged in the principal case, that the executors of *B.* should have the remainder of the term.

because, by the strict rules of law, an estate of freehold is greater than any term for years.
3 Lev. 264. Douse and Earl. || See (K) *post.* ||

2 Lev. 191.
Vent. 326.
2 Mod. 223.
2 Jon. 73.
Paget and
Voscusius.

A. devised to *B.* during his exile, and if it please God to restore him to his country, or if he die, then to *J. S.* *B.* was a *Dutchman*, and had a pension from the States, but upon some displeasure the States deprived him of his employment, and of his pension, and gave them to another, whereupon he voluntarily left the country, and lived here with *A.*, who had been his acquaintance beyond sea; and after his coming hither a war happened between the *Dutch* and *English*, and afterwards a peace was concluded between the two nations, yet *B.* continued here; and whether his estate was determined, was the question; and the court held it was not, for that the exile intended by *A.* was the leaving his country, because of the States' displeasure to him, and the withdrawing of his pension upon that displeasure.

Cro. Jac. 259.
Yelv. 185.
vide Bulst. 48.
cont.

If a copyholder devises his land to *A.* and *B.*, his two sons, and to the heirs of their two bodies begotten, and wills, that each of them shall enter at the age of twenty-one years; the executors shall not take the profits till they are both of full age, but he who comes of age first shall enter, and then the other when he comes of age, and they shall hold the land jointly.

4 Co. 82. Cor-
bet's case.
Cro. Eliz. 890.
Salk. 153. pl. 1.
1 P. Wms.
518. || 2 Ball &
B. 49. ||

A. devised his lands to *B.* and *C.* and the survivor of them, till 800*l.* should be raised out of them: it was adjudged, that *B.* and *C.* should have the land no longer than they might have received it out of the profits; and that if a stranger enters after the death of the devisor, they may have an account of the mesne profits, but cannot hold the land longer than the sum might have been levied;

levied; for if that were allowed, they may make it an eternal charge on the heir's estate: but if the heir himself enters and disturbs them, they may hold over, for the heir shall have no benefit of his own wrong; or they may have their action against him, at their election.

(F) Of Devises for the Payment of Debts.

CREDITORS are so far favoured, especially in equity, that wherever it appears to be the testator's intent that his lands should be liable to his debts, they shall be subjected thereto, although there are not express words to charge them; and it seems remarkable, that in all the cases on this head, the lands have been held liable, and that chiefly on the intention of the testator; and therefore it seems difficult to lay down any rules in this matter, which depend purely on construction. Thus much, however, may be inferred from the very cases on which the lands have been held liable, that *a bare declaration by the testator that his debts should be paid*, is not sufficient; for this being no more than the law says, shall be intended of personal, and not out of the real estate.

A. devised all his lands to *B.* and the heirs of his body, and in another part of his will, reciting that he owed *B.* money upon account, he therefore devised to him all his personal estate, and made him executor, willing him to pay his debts; and upon the reading of the will, though the clause, as to the payment of debts, seemed to relate to the personal estate only, and though the lands were devised to *B.* in tail, with a remainder over to another; and it was objected, that a tenant in tail could not be a trustee; yet the court decreed both real and personal estate to be sold for payment of the testator's debts.

If *J. S.* devises his lands to his brother, who is his heir at law, in fee, and likewise devises several legacies, and makes his brother executor, desiring him to see his will performed according to the trust and confidence he had reposed in him; this makes the real estate liable, for the testator needed not have devised the estate to his brother, being heir at law, unless he intended that he should take them chargeable with the debts and legacies.

A. devised in the following words:—*I do by this my will dispose of such worldly estate as it hath pleased God to bestow upon me: first, I will that all my debts be paid and discharged, and out of the remainder of my estate I give and bequeath unto my wife 300l.; my mind and will is, that my wife have one moiety of what is left, after my debts paid: Item, I give to my dear brother, R. B. a close lying in the parish of —, and for the remaining part of my estate, as well real as personal, I give and bequeath unto my brother J. B. whom I make executor: it was held clearly, that these words subjected his real estate to the payment of his debts.*

So where *A.*, being seised of a real estate, and also possessed of some personal estate, made his will in writing, and thereby devised in these words: *Imprimis, I will and devise that all my debts,*
legacies,

Eq. Abr. 197.

1 Vern. 457.
|| But see Clif-
ford v. Lewis,
6 Madd. 35.||

1 Vern. 411.
Clowdsley and
Pelham,
2 Vern. 229.S.
C. cited, and
the decree said
to be affirmed
in the House
of Lords.

2 Vern. 228.
Alcock and
Sparhawk,
decreed in
Chancery, and
affirmed in the
House of
Lords.

2 Vern. 690.

Abr. Eq.
198-9. Trot
and Vernon,
2 Vern. 708.

S. C. where it is said, that some stress was laid on the word devise.

legacies, and funeral charges shall be paid and satisfied in the first place. Item, *I give and devise*; and then proceeds to dispose of his real and personal estate: the personal estate not being sufficient, the question was, whether that clause in his will should amount to a charge on his real estate for the payment of his debts, legacies, and funerals?—and my Lord Chancellour *Cowper* was clearly of opinion that it should; for as to his debts, it was but natural justice they should be paid, and his personal estate would have been liable to the payment thereof, whether he had given any directions in his will about them, or not; when therefore he wills and devises, that his debts, legacies, and funerals shall be paid and satisfied in the *first place*, these words must be intended to give a preference, for those purposes, to any other whatsoever; and since he does not devise his real or personal estate to any person in particular, for those purposes, the persons who come within this description must be supposed to be within his view; and it must be taken as a devise for their benefit, preferable to any other disposition whatsoever, either of his real or personal estate; and, consequently, both of them are thereby made liable thereto.

Newman v. Johnson,
1 Vern. 45.

[A man seised of copyhold lands surrenders them to the use of his will, and then by his will says, *viz. My debts and legacies being first deducted, I devise all my estate, both real and personal, to J. S.* It was holden by the Lord Chancellour, that this should amount to a devise to sell for payment of his debts.

Bowdler v. Smith, Pr. Ch.
264.

One devised in these words:—*As to my temporal estate, where-with God hath blessed me, I give and dispose thereof as follows: First, I will that all my debts be justly paid, which I shall at my death owe or stand indebted in to any person or persons whatsoever; also I devise all my estate in G. to R. B.*—This estate in G. was all the real estate the testator had. *Per* Lord Keeper, this will creates a charge on the real estate for payment of his debts.

Lumley v. May, *id.* 36.

R. M., seised of freehold and copyhold land, surrenders to the use of his will, and then devises to his wife all his goods, chattels, and estate whatsoever, upon condition that she paid his debts and legacies; and by the will bequeathed 600*l.* to the defendant his eldest son and heir, and 400*l.* to the plaintiff his daughter, and other legacies to other people, and the surplus of his estate, after his wife's death, to be equally divided between his four children, and made his wife executrix, and died, leaving the defendant, his son, an infant; and the wife died before probate. This bill was brought by the creditors and legatees to have the estate sold to pay them; and the Court was of opinion, that the words *goods, chattels, and estate whatsoever*, with all the other circumstances of the case, and the personal estate falling short, would pass the testator's lands well enough, and decreed a sale, and the heir to join when he came of age: but he being an infant, they gave him a day to shew cause, when he came of age.

Harris, v. Inglewode, 3 P. Wms. 91.

So, where a will began, “As to all my worldly estate, *my debts being first satisfied*, I devise the same as follows:” the real estate was holden to be charged, nothing being devised till the debts are paid.

So,

So, where a will began, "As to my worldly estate, which it hath pleased God to bestow upon me, I give and dispose thereof in manner following; that is to say, *Imprimis*, I will that all my debts which I shall owe at the time of my decease be discharged and paid." Lord *King* decreed, that these words created a charge upon the real estate for such debts as the personal estate was not sufficient to pay; and this decree was affirmed in the House of Lords.

Legh v. Earl of Warrington, 4 Br. P. C. 90. *Hatton v. Nicholls*, Ca. temp. Talb. 110. *Lypet v. Carter*, 1 Ves. 499. *Earl of Godolphin v. Pen-*

neck, 2 Ves. 271. similar decisions on almost the same words.

J. J. by his will, first, orders all his debts and funeral expences to be honourably paid after his decease. In a subsequent clause he devises particular premises (enumerating them), excepting *H.* and *R.*; all which enumerated premises, except *H.* and *R.*, he devises to trustees, by and out of the money arising by sale, and out of the rents and profits thereof in the mean time, in the first place to pay and discharge his debts, funeral expences, and all legacies given by this will, or by other writing under his hand. He afterwards goes on and says, that *H.* and *R.* shall be in the first place for payment of the legacies mentioned in his will. On a bill by creditors to have the real estate by the will subjected to the payment of their debts, in aid of the personal, so far as that proved deficient, insisting, that the whole real estate was by the will established as a fund for that purpose, Sir *J. Strange*, M. R. said, that though on the first part of the will the court might take the whole real estate to be charged with debts, yet as there is no express lien on the real estate by these general words, and afterwards the testator distributes such part of his real estate for debts, and such for legacies, it is too much to lay hold on the general words to say, the whole should be charged with payment of debts. It can be done only by implication on the general words, which may be explained afterwards, and that implication destroyed. Consequently, the plaintiffs can only have a decree for an account of the personal estate in course of administration, and then the other parts of the real estate, except *H.* and *R.*, for payment of their debts.

Thomas v. Britnell, 2 Ves. 315.

But where there is a clear, full charge of the whole real estate in aid of the personal for the payment of debts and legacies, this shall not be restrained by a subsequent devise of a particular part of the real estate for that purpose, unless negative words are added.

Ellison v. Airey, 2 Ves. 568.

A will began thus: *As to my worldly estate, I dispose of the same as follows, after my debts and legacies paid*; and then gives several legacies and portions to the testator's daughters; and then says, that "*after all my legacies paid*," the surplus of the personal estate shall go to the son. After which follows a devise of land to the son; but if he dies without issue in the life of any of the daughters, then to the daughters. There was a sufficiency out of the personal estate to pay great part, though not all of the legacies.

Davis v. Gardiner, 2 P. Wms. 187.

gacies. It was holden, that the land was not chargeable to supply the deficiency.]

Williams v. Chitty, 5 Ves. 545. 550. See Coombes v. Gibson, 1 Br. C. C. 272. || Testator desired his debts and funeral expences to be paid in the first place, and nothing further appeared on the face of the will to charge the real estate with the debts. Lord Chancellor *Loughborough* held it to be charged, relying on Lord *Godolphin* v. *Penneck*, 2 Ves. sen. 271, which, he observed, was an authority that, if the testator talked about debts in the beginning of his will, the real estate must be charged.

Shallcross v. Finden, 3 Ves. 737. So, on a devise "after payment of all my just debts and "funeral expences," the real estate specifically devised was charged with debts.

Clifford v. Lewis, 6 Madd. 33. See Ronalds v. Feltham, Turner & Russ. 418. So, by the words "I will and direct that my debts and funeral "expences be paid," the debts were charged on the real estate.

Keeling v. Brown, 5 Ves. 559. Powell v. Robins, 7 Ves. 209. Sanderson, v. Wharton, 8 Price, 680. But it seems that an introductory direction, that the debts are to be paid *by the executors*, is not sufficient to charge the real estate.

Coombes v. Gibson, 1 Br. C. C. 272. Kentish v. Kentish, 3 Br. C. C. 257. Ronalds v. Feltham, Turn. & Russ. 418. Where the introductory words make the real estate liable, the charge affects copyhold as well as freehold lands. The freehold is as unnatural a fund for the payment of debts as the copyhold.

Noel v. Weston, 2 Ves. & B. 269. After a general direction that debts and funeral expences should be paid, and a bequest of the personal estate subject to the payment of those charges, the testator, in case his personal estate should not be sufficient to discharge "the same," charged his freehold estates with payment "thereof," and "subject thereto" devised all his freehold and copyhold estates. Held, that the copyhold estates were charged.

Mr. *Cox* observes in a note to *Davis v. Gardiner*, 2 P. W. 190. "Although the court may have expressed itself more "strongly in the case of creditors than of legatees, it seems, "that no *rule* of construction has been adopted in the one case "which does not apply to the other, and that the real estate "has been charged with legacies by words not stronger than "those made use of in the present case." Lord *Alvanley*, M. R., however, maintained that there is a distinction between debts and legacies in this respect; 2 Ves. 328. 3 Ves. 739. and 5 Ves. 362.; though Lord Chancellor *Loughborough* declared he knew not how to state the difference. 3 Ves. 551. It is certainly clear that under a charge of debts and legacies, creditors are to be paid in preference to legatees.

12 Ves. 154.

Kightley v. Kightley, 2 Ves. jun. 328. The words "first I will and direct that all my debts, legacies, "and funeral expences be paid," are it seems not sufficient to charge the *legacies* on the real estate specifically devised.

Bench v. Biles, 4 Madd. 187. "John Hampton devised all his real and personal estate to his "wife for life, and after her decease he gave several legacies; "and

“ and all the rest and residue of his real and personal estate he devised to his nephews absolutely.” Held, that the legacies were a charge on the real estate. See *Hassel v. Hassel, Dick.* 527.

Where money is directed to be raised by rents and profits, ^{2 Ves. & B.} unless there are other words to restrain the meaning and to con- ^{75.} fine them to the receipt of the rents and profits as they accrue, the court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell; and as a devise of the rents and profits will at law pass the lands, the raising by rents and profits is the same as raising by sale. *Per Lord Hardwicke*, 1 Atk. 506.||

If lands are devised to trustees for the payment of debts and legacies out of the rents and profits, the trustees may sell the land itself. *Foley*, 2 Chan. Ca. 205. S. P. decreed. See *Vin. Abr. Devise* (m. e.) Anonymous, Vern. 104. *Ligon v.*

But if the devise be to pay debts and legacies out of the *annual* Vern. 104.
rents and profits, by these words the land shall not be sold. Trafford v.
Ashton, 1 P.
Wms. 415. ||See Ch. Prec. 184. pl. 152. Cook v. Parsons.||

If there be a devise of a sum certain to be raised out of the profits of lands, and the profits will not amount to raise the sum in a convenient time, *per* Lord Chancellour, it is the law of this court to decree a sale.

A. devises, that his executors shall receive the rents, issues, and profits of his personal estate, in the first place to pay 60*l.* *per ann.* to one for life; and after that person's death, out of the remainder of his estate, his debts being paid, to raise portions for several children, payable at twenty-one, and maintenance in the mean time; and devises all his lands in several parcels to several persons, at future times: the Master of the Rolls held, that the lands were liable to be sold, and that the sales should be out of all the devisee's lands, unless the personal estate were sufficient, or the rents and profits in a reasonable time; and ordered an account to be taken thereof in the first place.

¶ A term of 200 years was created; and it was declared that the trustees should, by perception of rents and profits, or by leasing or mortgaging the same, raise and levy, &c., Lord *Hardwicke* said, "Where a man creates a trust for payment of debts, and declares the trust of that term to be by perception of rents and profits, or by leasing, or by mortgaging to raise sufficient money for the payment of his debts, it restrains it merely to a payment out of rents and profits; if it had been a trust *of the rents and profits*, the term might have been sold for the satisfaction of creditors. Where there are other limiting words following 'rents and profits' in a trust for payment of debts, I do not remember any case which will authorize me to direct a sale."

Ridout v. Earl of Plymouth,
 2 Atk. 104.

See 1 Ves.
 sen. 93.

A devise to trustees in fee, in trust to pay debts and legacies, and to provide maintenance for children till eldest son attained

Lingard v.
Derby, 1 Br.
C. C. 511.

21, then all the surplus as should arise from the rents and profits to and among the younger children, and that the trustees should convey his *said* manor, &c. to eldest son at 23. Testator then gave some legacies to be paid "after the debts, with all convenience, as the profits of the estate should advance the money." A sale for payment of debts was decreed. Lord *Hardwicke* observed, the word "*said*," in the direction to convey, must be taken according to the subject-matter, and could not hinder a sale. The word "advance" shewed that the legacies should be paid out of the annual profits; but with interest from a year after the testator's death.

Conyngham v.
Conyngham,
1 Ves. sen. 522.

A devise to trustees in fee of the rents and profits of a plantation then in lease. Decreed, that creditors should be paid *pari passu* by annual perception of the rents. The will did not warrant a sale.

Barker v. the
Duke of Devonshire,
3 Mer. 310.

A devise to *A.* and *B.*, who were appointed executors, upon trust to sell for such purposes as testator should appoint; with a direction that his debts were to be paid by his executors. Held, that *A.* and *B.* might sell for payment of debts.

PAYMENT OF PORTIONS.

Warburton v.
Warburton,
2 Vern. 420.

A term was created for raising portions for younger children, by rents, issues, and profits, and subject thereto to eldest son for life, and over, in strict settlement; in the mean time eldest son to have 40*l.* *per annum* for maintenance. Decreed, that the portions might be raised by sale.

Trafford v.
Ashton, 1 P.
Wms. 415.

So, a term was created out of the rents and profits to raise 8000*l.* for daughters, if no sons, to be paid *as soon as conveniently could be*. Decreed, that the sum might be raised by sale or mortgage.

Ivy v. Gilbert,
2 P. W. 15.
Prec. Ch. 583.
Affirmed Dom.
Proc. 2 Bro.
P. C. 468. See
Ridout v. Earl
of Plymouth,
2 Atk. 104.

But a trust that trustees should raise and pay out of the rents and profits of the premises, as well by leases for one, two, or three lives, or for any number of years determinable thereon, or for 21 years absolutely at the old rent, portions for daughters, precludes a power to mortgage or sell. No time was appointed for payment of the portions, and so they carried no interest.

Mills v. Banks,
3 P. W. 1.

So, a trust to raise portions by rents, issues, and profits, or by making leases for three lives at the ancient rent, or by granting copyholds on fines, to be paid at the age of 18 or marriage, or as soon as the same could be raised out of the premises as aforesaid, does not, it seems, authorize a sale or mortgage.

Green v.
Belcher,
1 Atk. 505.

But when a marriage settlement declared, that in case husband and wife should die and leave any issue unprovided for, it should be lawful for trustees to enter and receive the rents until they received 200*l.*, with which sum the premises were to stand and be charged for the benefit of such children unprovided for, in such manner, and in such proportions, as the survivor of husband and wife should appoint, the wife surviving appointed the 200*l.* to be paid to her daughter, the only child unprovided for. Decreed,

creed, that the sum of 200*l.* should be raised, with interest from the death of the wife.

A devise upon trust to raise portions during the minority of tenant for life, out of the rents and profits, or by sale or mortgage; held, that rents accumulated during the minority were first applicable to the payment of the portions, and that the deficiency should be raised by sale or mortgage.

When a trust was created for raising portions by means of a *reversionary* term, and no maintenance or time of payment mentioned, the court, though the portions were vested, would not decree a sale or mortgage.

Whether a *reversionary* term may be sold or mortgaged for raising portions, depends upon the intention manifested in the instrument. The general rule seems, that if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of 21 years or marriage; if there is nothing more, and the interests are vested, and the contingencies have happened at which the portions are to be paid, the interest is payable, and the portions must be raised in the only manner in which they can be raised; that is, by mortgage or sale of the *reversionary* term.

Testator devised freeholds and renewable leaseholds to uses in strict settlement; and directed that the *finer of renewal* should be paid out of the rents and profits of the same leasehold premises, or of any part of the freehold lands. Held, that a sale or mortgage was authorized; since the purpose for which the money was to be raised might require it immediately.

If a devise for payment of debts does not provide for their payment in a practicable manner, the case is not taken out of the statute of fraudulent devises.

A devise for the payment of debts has not the effect of reviving debts barred by the statute of limitations before the death of the devisor.

But when a debt is not barred at the death of testator by the statute, time does not run in equity after his death.||

[In what cases a devise for payment of debts will make the estate either legal or equitable assets, see tit. "EXECUTORS AND ADMINISTRATORS," Vol. III.]

(G) Of Devises by Implication.

THE law in conveying estates did not regularly suffer any to pass by implication, because it is a manner of transferring no way agreeable to the plainness and solemnity of the law; as if *A.* surrenders to the use of *B.*, and, for want of issue of *B.*,

Warter v. Hutchinson, 1 Sim. & Stu. 276.

Evelyn v. Evelyn, 2 P. W. 659.

Codrington v. Lord Foley, 6 Ves. 364., and the cases there cited; see also note, 2 Ves. jun. 481.; and Mr. Cox's note, 1 P. W. 452. Lyddon v. Lyddon, 14 Ves. 558.

Allan v. Backhouse, 2 Ves. & B. 65 See Sir Thomas Plumer's judgment, in which he reviews the authorities as to decreeing a sale or mortgage where the will directs a gross sum to be raised out of rents and profits; and see Lord Eldon's remarks, 1 Mer. 233., and the cases collected, 1 Powell on Dev. 234. (5th edit.) in note.

Hughes v. Doublen, 2 Br. C. C. 614.

Burke v. Jones, 2 Ves. & B. 275.

Hughes v. Wynne, Turn. & Russ. 307. Morse v. Langham, 2 Ves. & B. 286.

Vaugh. 261. 3 Lev. 260. Roll. Abr. 843. 15 H. 7. 17. b. Cro. Jac. 75.

Horton's case. the remainder over to *C.*; this, in a conveyance at law, had been
 Bro.tit.Devise, but an estate for life to *B.*, and no estate-tail by implication.
 52. 2 Sib. 53. But there has been greater favour and latitude allowed in the
 2 Lev. 207. disposition of estates by will; and in the construction of them,
 the judges, to support the intent of them, where it is very appa-
 rent, have admitted estates by implication, though to the dishe-
 rison of the heir at law. However, in those cases, such estates
 have been allowed only to arise by a necessary, and not a possible
 implication or intention in the deviser; for the heir's title being
 plain and obvious, no words which will bear a contrary signifi-
 cation shall, by construction, impeach it.

Vide the au-
 thorities in
 the preced-
 ing section,
 and Vern. 22.
 2 Vern. 572.
 2 Vent. 223.

As, if *A.* devises lands to his (*a*) heir after the death of his
 wife, this is a good devise to the wife for life by implication; for
 by the express words of the will, the heir is not to have it during
 her life; and if the wife has it not, none else can, for the execu-
 tors cannot intermeddle.

S. P. (*a*) So, if one having a wife and two daughters, heirs at law, devises lands to one of
 the daughters after the wife's death; this gives the wife an estate for life, though the daugh-
 ter is but one of the coheirs. 2 Vern. 723.

Doe v. Bow-
 ling, 5 Barn.
 & A. 722.

|| So, where a testator made specific devises of real property
 to his three daughters severally in fee; and bequeathed his per-
 sonal estate to be equally divided amongst them, and the shares
 to be paid at the age of 22 years, with interest for maintenance in
 the meantime. The will proceeded, "in case either of my three
 " daughters shall die before 22, or unmarried, the said de-
 " ceased's portion shall be equally divided between the two sur-
 " vivors, or their heirs; also, in case two of my daughters die
 " without heirs, then the whole devolves to the surviving one and
 " her heirs, in case no husband is living; if so, they enjoy the
 " property during life only, and afterwards, her or their fortune
 " goes to the heir or heirs of their sister, as heirs at law. I also
 " make this reserve, in case all my three daughters shall die
 " without heirs, and leave no husband living, or at the decease
 " of the said husband or husbands, should it happen such then
 " exist at their decease, I give," &c. [A devise over to testator's
 three brothers, one of whom would have been heir at law of
 testator in case of the death of the three daughters without
 issue]. *Elizabeth*, one of the daughters, died unmarried; then
Anne died, leaving a husband. Held, that the husband was
 entitled, under the above devise, to a life estate in the moiety of
 the real estate devised to *Elizabeth*.||

Bro. Dev. 52.
 Cro. Jac. 75.
 Vern. 22.
 2 Vern. 572.
 2 Vent. 223.
 The dicta in

But if a man devises to a stranger, after the death of his wife,
 this gives the wife no estate for life by implication; for it is but
 a demonstration when the estate of the stranger shall com-
 mence.

Tenny v. Agar, 12 East, 253, and Romilly v. James, 6 Taunt. 263., do not militate against this
 position; for in the one case the devise over was on the death of him who was, and in the
 other of him who would have been, the heir of testator.||

Aspinall v.
 Petvin, 1 Sim.
 & Stu. 544.

|| So, where a testator devised that his wife should have one
 moiety of the rents during her life, and his son the other moiety,
 and

and that upon the death of his wife his son should have the whole in fee; "but if my said son shall depart this life without issue in the lifetime of my said wife, then after the death of my said wife" for his nephew *John* in fee. The son, the only child of the testator, died without issue in the lifetime of the widow, leaving *John*, the nephew, his heir at law, and consequently heir at law of the testator. The question was, Whether the widow by implication was entitled to the son's moiety of the rents during the remainder of her life? It was contended in argument, that there was no devise to the nephew, except in the event in which he must be the heir of the testator, namely, the death of the son without issue, and that therefore the principle of the rule applied. But *Leach* V. C. decided, that the widow was not entitled to the moiety of the rents by implication; treating it as a devise to a stranger after the widow's death.

So, if a testator devise a particular estate to *A.* for life, and after the death of *A.* devises all the rest of his estates (he having other estates than the estate devised to *A.* for life) to *B.* in fee; although *B.* be heir at law of testator, yet *A.* takes nothing by implication, because the words "after the death of *A.*" may be intended only of that estate which was expressly devised to him. ||

Dyer v. *Dyer*,
1 Mer. 414.

So, if a man devises his term to his son, after the death of his wife, this raises no estate for life in the wife by implication; for here is no necessary implication that the wife shall have it, as in the former case, because the son is not by law to have the term, as the heir at law is to have the inheritance, without a particular devise, but the executor: and therefore the term in this case may go to the executor during the life of the wife.

Roll. Abr. 844.

[So, on the other hand, if an estate is devised to *A.* and his heirs, it shall not be controlled and cut down to an estate-tail in respect of the words, "and if he die without heirs, remainder to *B.*," if *B.* is a stranger and cannot be heir to *A.*]

Tyte v. *Willis*,
Ca. temp.
Tal. 1.

If a man devises land to *J. S.* and his heirs, after the death of *J. D.*, or after twenty years, and the devisor dies during the life of *J. D.*, or before the twenty years expired, the land in the interim shall descend to the heir at law; for during this time the devisor has made no disposition of it, but left it to descend according to the rules of law, which carry it to the heir.

Roll. Abr. 844.

Where a man devised all his pasture lands in *D.* to his youngest son, and also willed that all bargains, grants, &c. which he had from *C.* should be to his youngest son, and the heirs of his body; it was resolved, that the youngest son should not have an estate-tail in the pastures of *D.* by implication, for the words of a will to disinherit the heir at law must have a clear and apparent intent; and this at most could have been but a possible implication, that the devisor might have intended the son an estate-tail in the pastures, which is not sufficient to destroy the plain title of descent to the heir at law.

Vaugh. 262.
Cro. Car. 368.

|| So, on a devise, "I give to *A.* my farm and lands at *R.*, to him and his heirs and assigns for ever; and I also give to *A.* my farm and manor of *E.*" Lord *Eldon* C. held, that *A.* took in the latter an estate for life only; and observed, that all

Paice v. the
Archbishop of
Canterbury,
14 Ves. 364.

the old rules against disinheriting an heir, except by plain words or necessary implication, were gone, if a contrary construction were to prevail.||

Cro. Jac. 75.
Vaugh. 266.
Roll. Abr. 844.

(a) If a term be devised to executors after the death of the wife: *Qu.* Whether she shall have an estate for life, or

shall the executors have it during her life, to perform his will, and after her death as legatees? *Vide* Cro. Jac. 75. Vaugh. 261. ||The next of kin as to the personal estate stand in parity of reason with the heir at law as to the real. *Pickering v. Stamford*, 3 Ves. 493.||

James v. Dean,
15 Ves. 241.

||Testator bequeathed leasehold premises to his wife for her life, but did not use words sufficient to pass a renewed lease; after her decease he gave the premises to three nieces absolutely, in words sufficient to carry a renewed lease. Lord *Eldon* observed, "In the disposition to his wife for her life, he has not used any words that would pass the renewed lease; but it is clear that his three nieces would have taken the interest in those premises after her decease absolutely, though the lease had been renewed after the date of the will. The question upon that would have been, Whether, as to those premises which the testator had bequeathed, not until after the decease of his wife, but for all the interest which he should have to come therein at her decease, he did not intend that she should have an interest for life? and, notwithstanding the general rule, I think the construction that such must have been his meaning is not too strong."||

Moor, pl. 24.
Vaugh. 265.

A. seised of a manor, part in demesne and part in services, devised all the demesne to his wife expressly, for her life, and all the services for fifteen years, and then devised the whole manor to a stranger after her death: it was resolved, that the last devise should not take effect till after her death, and yet she should not have the services for her life by implication, but that the heir should enjoy the services after the fifteen years, while she lived; for there appears no necessary implication that she should have the whole for her life, with an exclusion of the heir; and a possible implication is not sufficient to exclude him, for nothing but the apparent intent of the deviser can do that; but if the deviser had said, that after the death of his wife and the stranger the heir should have the manor, there the wife, by a necessary implication, shall have the whole manor while the stranger and wife live, and the stranger cannot take any thing whilst she lives.

Cro. Eliz. 16.
Vaugh. 263.

From this it appears that the rule, *viz.* where a devisee takes any thing by an express devise, he shall not have any other thing devised by the same will by implication, is destroyed by the distinction of a necessary and a possible implication; for the former case proves, that a necessary implication will give an estate, though

though the devisee took by an express devise before; and a possible implication is sufficient in no case to convey an estate to the disherison of the heir; for that is the principal point between *Gardner and Sheldon*, in *Vaugh.* 263. where the words of the will are, that if my son *G.* and my daughters *M.* and *K.* die without issue of their bodies, then my lands to remain to my nephew *W.*—it was adjudged, that the devise to *G.*, being son and heir, was void, and that the daughters took no estate by that possible implication; but their dying without issue is only a designation of the time when the nephew is to take.

|| But under a devise of lands to the testator's son and his heirs; as to part upon condition that he should pay 300*l.* to testator's daughter at twenty-one, interest in the mean time; and in default of payment that she should enter and enjoy the said part to her and her heirs, and in case his son and daughter both died without leaving any child or issue, he devised the reversion of all the lands to *R. A.* in fee: held, that the son and daughter, by implication, took successive estates-tail.

A testator, having one son and six grandchildren, devised all his lands to his son, expressly for his life, and repeating the words, "after his death," in every one of the subsequent devises, divided those lands among his grandchildren, without using any words of limitation, or in any way describing the period during which it was his intention that they should enjoy them: held, that the grandchildren did not take a fee by implication, though an express estate for life was given to the heir at law.||

A. devised to his wife 600*l.* to be paid to *J. S.* for the payment of lands he purchased from him, and are already settled on her for her jointure; the lands were not settled on her; and adjudged they did not pass by the will by implication, for there appears no intent that she should have them by the will, and, consequently, they cannot pass from the heir at law by implication, since the devisor was only mistaken as to the settlement of them in his lifetime.

A. devised all his estate, real and personal, for the payment of debts and legacies, and devised 100*l.* to his heir at law: this was decreed a good devise in fee, but no implied trust arose to the heir at law for the surplus; for by that construction the devisee would have no benefit by the devise: besides, the legacy of 100*l.* to the heir at law is in this case an exclusion of the heir from any further benefit.

A. has two sons, *B.* and *C.*, and devises part of his land to *B.* in tail, and the other part to *C.* in tail; and if any of his sons died without issue, then the whole land should remain to a stranger in fee: *C.* died; yet the stranger could not enter into his part, for the other brother took it by implication, the words of the will being, that the whole land shall remain to a stranger, which he cannot have while either of the sons or any issue of their body be living.

|| By a devise to *J. H.*, and if he should die under twenty-one,

Tenny v. Agar, 12 East, 255.

Right v. Compton, 9 East, 267.

5 Lev. 259.
2 Vent. 57.
Moor, 51.
Wright and Vivell.
|| *Skerrat v. Oakley*,
7 T. R. 492.
Dashwood v. Peyton,
18 Ves. 27.||

Chan. Ca.
196. *North and Compton*,
vide head of Uses and Trusts,—Trusts by Implication.

4 Leon. 14.
|| As to the implication of cross remainders, see (I) *post, sub fine.*||

Doce v. Cundall, 9 East,

400. See judgment of *Bayley J.*
1 Barn. & C. 646.

Doe v. Frost,
1 Barn. & C. 638.

then over, the fee passes. By limiting the land over only upon the contingency of his dying in his minority, the testator shews he intended to give an absolute estate in fee.

Testator devised land to his two daughters, *Elizabeth* and *Anne*, to be equally divided between them; and at the death of *Elizabeth* her share to be equally divided between her children, and so with respect to *Anne's* share. *Elizabeth* had, at the time of testator making his will, three children; and he declared that the shares of such children should be placed in the hands of *J. F.*, and the rents only paid to them during their lives, and at their decease to be equally divided among their children, if any; if not, to become the property of their heirs and assigns for ever. Held, that the children of *Elizabeth* took estates in fee.||

Vide supra, letter (D).
Dyer, 171. a.
Bendl. pl. 114.
Moor, 115.
2 *Leon*. 226.
Vent. 230.
[(a) Although the rule here laid down, that an estate expressly defined by the testator shall not be enlarged by implication, be generally true, yet if the manifest general intent

Another rule relating to devises by implication is this, that where the devisee takes a particular estate of inheritance by express words in the will, such estate shall not be enlarged by implication (a); for since devises by implication are allowed in favour to wills, that where the intention of the testator may be presumed, the judges will pursue it, though it be not expressed in plain words, yet there is no room for such construction where the devisee has an estate given him by express words in the will; for that would be to over-rule the plain meaning of the testator against his own words: therefore, if *A.* devises to *B.* for life, the remainder to *C.*, and the heirs male of his body, and if it happens that *C.* shall die without heirs of his body, then the remainder to *D.*, this is but an estate in tail-male to *C.*, because that estate being given to him by express words, ought not to be over-ruled by a bare implication that the testator intended him a greater estate by the words, *if he chance to die without heirs of his body.*

of the testator require it, courts of justice will, in order to effectuate such general intent, disregard the particular intent, however expressly declared, if inconsistent with the general intent. See *Doe v. Applin*, 4 Term Rep. 82. *Robinson v. Robinson*, 1 Burr. 44. and other cases *supra*, (D); and see 2 Eq. Tr. 58. note (b) by Mr. *Fonblanque*.]

Bulst. 63.
Dyer, 171. a.
in marg.
(b) So, if a man devise to *A.* and the heirs of his body, and if he die without heirs, these last words will not, against the express declaration of the testator, give the devisee a fee-simple by implication. 2 Vern. 451.

If a devise be to *A.* and his heirs male, and if he die without heirs of his body, then to remain to *B.* in fee, this is but an estate in tail-made to *A.*, for the law supplies the words *of his body*; and since the devisor only gave it by (b) express words to him and his heirs male, it would be against his plain words to let in his issue female by implication on the other words, *if he die without heirs of his body.*

Bendl. 212.
Clatches' case. *Dyer*, 330. *Vaugh.* 267. || As to the implication of cross remainders, see (1) *post*, *sub fine*.

not, against the express declaration of the testator, give the devisee a fee-simple by implication. 2 Vern. 451.

B. having issue a son and two daughters by several venters, the son died leaving two daughters, and then *A.* devises one of his messuages to *B.* his own daughter, and her heirs for ever, and his other messuage to *C.* his daughter, and her heirs for ever; and if *B.* die without issue, living *C.*, then *C.* should have *B.'s* part to her and her heirs; and if *C.* die before her age of sixteen years, then *B.* should have her part in fee: and if both his said daughters should die without issue of their bodies, then his

his granddaughters should have the messuages. C. died without issue, having passed her age of sixteen years; the granddaughters had judgment for her part: and the words of the will, *if his two daughters died without issue of their bodies*, did not create cross remainders for each other's part by implication, but only denoted the time when the heirs at law should have the messuages; for, says the book, no such implication will serve when there is an express gift and limitation made to the devisees by the testator himself.

[Where an express estate-tail is given by the will, it will not be enlarged to a devise in fee by implication, from the land's being charged with the payment of annuities, or of a gross sum, not even if it be a charge in fee; for the charge in such case shall issue out of the whole estate, and not out of the particular estate only; and being governed by the directions of the will, it shall take effect according to the limitations thereof, and affect the whole inheritance.]

Doe v. Fyldes,
Cowp. 833.
Denn v.
Slater, 5 Term
Rep. 335.
Dutton v.
Engram, Cro.
Jac. 427.

(H) Of the Disposition of Goods and Chattels by Will, by what Description, and to whom good.

[See under the division "LEGACIES," B. 2, 3.]

(I) Of Executory Devises of Lands of Inheritance: And herein of Contingent Remainders and Cross Remainders, as far as they relate to this Place.

AN (*a*) executory devise is defined to be a devise of a future interest, which cannot vest at the death of the testator, but depends upon some contingency which must happen before it can vest.

Abr. Eq. 186.

(*a*) Of which there are three kinds.

1. Where the devisor de-

parts with his whole fee-simple, but upon some contingency qualifies that disposition, and limits a fee upon that contingency, which is new in law, as appears by *Brook*, 234. *Dyer*, 33. *Vaugh.* 271., and was first advanced in the case of *Hind and Lyon*, 19 *Eliz.* 3 *Leon*, 64. *per Nottingham*. 3 *Chan. Cases*, 1., &c. in the case of the Duke of Norfolk. 2d, When the devisor gives a future estate, to arise upon a contingency, but does not part with the fee at present, but suffers it to descend to his heir, as a devise to the heirs of *J. S.* till he shall have one, &c.; and these have been frequent. Of the 3d sort are leasehold interests, or terms for years, for which *vide infra*, letter (K), and *Salk.* 226.

[This is the definition commonly given of an executory devise; but it has been objected to as defective in point of accuracy and precision, inasmuch as it is not confined to executory devises only, but embraces every kind of contingent interest in lands given by devise, and some contingent interests by devise are contingent remainders. An executory devise is, strictly, such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal, it is more properly an executory bequest) as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only

Fearne's
Exec. Dev.
4th ed.
1, 2, &c.

only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; for whenever a future interest is so limited by devise, as to fall within the rules which the law has prescribed for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder.]

Dyer, 41. Co.
85. Plow. 29.
2 Leon. 69.
Co. Lit. 19.
Poph. 54.
2 Roll.
Rep. 220.
Godolp. 355.

To understand this doctrine, it must be observed as an established rule, that a fee cannot be limited on a fee; as if lands are limited to one and his heirs, and if he dies without heirs, they shall remain over to another, this last limitation is void: so, if lands are given by deed to one and his heirs, so long as *J. S.* hath issue, and after the death of *J. S.* without issue, to remain over to another, this remainder is likewise void, because the first devisee had a fee, though it was a base and determinable fee.

Cro. Eliz. 205.
Roll. Abr. 626.
Dyer, 124.
(a) All the
candles must
be lighted, and
burning out at
the same time,

Yet, in a will, such limitations may be good upon a contingency that may happen within the compass of a life or lives in (a) *esse*, or nine months after the expiration of a life, or (b) a reasonable number of years; for these tend not to a (c) perpetuity, which is so odious in law: but this not by way of direct (d) remainder, but by way of executory devise.

per Twisden. (b) That twenty, nay thirty years have been thought a reasonable time. Salk. 229. pl. 8. || An executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life or lives in being, is good. See Fearn's C. R. 437., 7th edit. Whether the twenty-one years may be taken as a term in gross and without reference to minority, see *Beard v. Westcott*, Turn. & Russ. 25. *Bengough v. Edridge*, 1 Sim. 175. || (c) As the case of *Gardiner and Sheldon* does, which therefore has been denied to be law, which *vide* in *Vaugh.* 271. (d) Where a contingent estate is limited, and depends upon a freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder. 2 Sand. 580. *Purefoy and Rogers*, 3 Lev. 454. S. P. *Carth.* 310. [*Doe v. Holmes*, 3 Wils. 237. 241. 2 Bl. Rep. 777. S. P. *Goodtitle v. Billington*, Dougl. 753. *Doe v. Morgan*, 3 Term Rep. 763. S. P. *Walter v. Drew*, Com. Rep. 372. S. P. *Wealthy v. Bosville*, Ca. temp. Hardw. 258. S. P. *Carwardine v. Carwardine*, Fearn's Executory Devises, 4th edit. 5.

3 Chan. Ca. 9.

As, if tenant in fee-simple devises his land to *A.* and his heirs, and if he dies without issue in the life of *B.*, then to *B.* and his heirs; though this be a limitation of a fee-simple upon a fee, yet, because the remainder to *B.* must vest upon a contingency, which will fall in a life, it has been held good as an executory devise.

(a) Reported
Cro. J. 590.
Roll. Abr. 611.
Palm. 151.
2 Roll. Rep.
216. 2 Leon.
111. *Vaugh.*
272.

So, in the celebrated case of (a) *Pells and Brown*, where one having three sons, *A.*, *B.*, and *C.*, by his will in writing devises lands to *B.*, his second son, and his heirs for ever, paying 20*l.*, and if *B.* dies without issue, living *A.*, then *A.* to have those lands to him and his heirs for ever; *B.* enters and suffers a common recovery to the use of himself and his heirs, and then devises those lands to *J. S.* and his heirs, and dies without heirs, living *A.*: it was adjudged, first, that *B.* had a fee-simple, and yet the limitation to *A.* good, as an executory devise in fee; for it was to happen within the compass of a life; and therefore if *B.* died with issue, living *A.*, or without issue, after the death of *A.*, then this future interest was never to arise: secondly, it was adjudged, that this being a mere collateral possibility was not bound by the recovery

very, for it had not existence at all when the recovery was suffered, and therefore the recompence in value could not extend to it; besides, to allow the particular tenant to destroy any such future interest, would be the means of frustrating the most commendable intentions of the devisor, providing for his younger children, or for the payment of his debts, &c.

One by will devises his lands to his mother for life, and after her death to his brother in fee, provided that if his wife (being then *ensient*) be delivered of a son, that then the land shall remain to him in fee, and dies, and the son is born: it was held, that the fee of the brother should cease, and vest in the son by way of executory devise upon the happening of the contingency.

One having issue *A.*, his only daughter and heir apparent, by will devises lands in *D.* to her and her husband, and her heir, upon condition that they should assure lands in fee to his executors and their heirs, to perform his will; and if they failed, then he devised the said lands in *D.* to his executors and their heirs, and died: it was adjudged to be no condition (*a*); for then by the descent to the daughter, being heir, it would be destroyed; but it was held a limitation, or an executory devise to his executors, in case the assurance was not made, and that they might, for breach thereof, enter and sell; for though a fee cannot be limited upon a fee absolute, yet upon a fee determinable it may, and enures as a new original devise to take effect when the first devisee fails to make the assurance.

should go to them and their heirs; though the word *paying* in a will amounts to a condition, yet because that must descend to the devisee as heir, and no one else can take advantage of his default, it must be an executory devise, to vest in default of payment by the eldest. 3 Co. 21. a. Cro. Eliz. 833. Hainsworth and Pretty.

||So, in the following cases, a limitation of an estate to take effect after a preceding estate in fee, and in defeasance of it, was held good as an executory devise.

A devise to *E. H.* for ever, "that is, if he have a son or " sons who shall attain twenty-one; but if he should chance to " die without son or sons to inherit, my will is that *W.* shall in- " herit." This was held to give a fee to *E. H.*, subject to an executory devise, if he should die without issue, or the issue should not attain twenty-one.

A devise to a child *en ventre sa mère*, and the heirs of such child for ever; provided that if such child should die before the age of twenty-one years, leaving no issue of his body, then over. The devise over was held good as an executory devise.

6 T. R. 30., but see S. C. 1 Bos. & P. 215.

So, on a devise of all my estates to my son, but in case my son shall die under twenty-one years, or shall leave no issue, then over to my daughter and her heirs, or was construed to mean *and*, so that the limitation to the daughter was good as an executory devise. (*b*)

strued *and* in devises, and where not. 1 Powell on Dev. 379. note. (3d edit.)

So, a devise to testator's son in fee, and if he should have no children,

Dyer, 127. *in margine.*

Palm. 135.
Dyer, 33. *in margine.* Cro. Eliz. 359.
Cro. Jac. 592.
(*a*) So, if a devise of borough-english lands had been to the eldest son, paying such a sum to the younger sons, and in default of payment, that the land

Heath v. Heath, 1 Br. C. C. 147.

Gulliver v. Wickett, 1 Wils. 105.
See Davy v. Burnsall,

Right v. Day, 16 East, 67.
(*b*) See the cases collected where or has been con-

Doe v. Frost, 3 Barn. & A. 546.

children, child, or issue, then on his decease to go to the heir at law of testator; the son took in fee, with an executory estate over to the person who should be heir at law at the son's death without children.

Doe v. Wetton, 2 Bos. & P. 324.

So, "a devise to testator's daughter, her heirs and assigns for ever; but if she should happen to die, leaving no child or children, lawful issue of her body, living at the time of her death, then over. Held, that the daughter took an estate in fee, with an executory devise over."

Roe v. Jeffery, 7 T. R. 589.
See Glover v. Monkton, 5 Bing. 13.

So, on a devise to *J. F.* in fee; but in case *J. F.* should depart this life, and leave no issue, then the testator devised over estates *for life only*; it was held that the limitation over was good as an executory devise, the failure of issue of the first devisee being confined to the time of his death.

Doe v. Webber, 1 Barn. & A. 713.

So, on a devise to *M. H.* in fee, and in case she died and left no child or children, then to *I. B.* in fee, she paying 1000*l.* to the executors or appointee of *M. H.*: held, that the limitation to *I. B.* was a good executory devise. "Children" was construed to mean "issue," and the failure of issue was from the context confined to the death of *M. H.*||

Cro. Eliz. 878.
Pay's case.

(a) It is inaccurate to call it a remainder, for the reason assigned for the judgment proves the limitation was allowed to operate as an executory devise. Fearne's E. D. 4th ed. 25.]

If *A.* devises lands to *B.* for five years from *Michaelmas* following, the remainder to *C.* and his heirs, this is a good remainder (a), although it cannot vest before the particular estate begins, and the freehold cannot be in expectancy, for in the mean time the fee shall descend to the heir.

3 Roll. Rep. 197. Palm. 132. [Thrustout v. Denny, 1 Wils. 270. S. P.]

One devises lands to his wife till his son came to the age of twenty-one years, and then that his said son should have the lands to him and his heirs, and if he dies without issue before his said age, then to his daughter and her heirs: this is a good contingent or executory devise to the daughter, if the contingency happens, and in the mean time the fee descends to the son as heir; and if he lives to twenty-one, though he after die without issue, or leave issue though he die before twenty-one, yet the daughter is not to have the lands, because he is to die without issue, and before twenty-one, else the daughter cannot take.

Cro. Car. 185.
Spalding and Spalding, S.C. cited 3 Lev. 434. Lord Raym. 524.
|| See Doe v. Micklem, 6 East, 486. ||

But where one having issue three sons, *A.*, *B.*, and *C.*, devises to his son *A.* after the death of his wife, to him and the heirs of his body lawfully begotten, in fee-simple; and if he die in the life-time of my wife, that then my son *C.* shall be his heir, and dies; *A.* hath issue, and dies in the lifetime of the wife; it was adjudged, that the issue should have the land after the death of the wife, and not *C.*; for it was in effect a devise to the wife for life, remainder to *A.* in tail, remainder to *C.* in fee, upon the contingency of *A.*'s dying in the life of the wife, and does not abridge the estate-tail, expressly given *A.* by his dying in the life of the wife.

1 Lev. 135.
Snow v. Cutler, Eq. Ca. Abr. 188.

Baron and *feme* being seised of a copyhold, to them and the heirs of the *baron*, *baron* surrenders it to the use of his will, and then devises it to the heirs of the body of the *feme*, if they attain the

the age of fourteen, and dies without issue, and then she marries a second husband, and has issue that attains the age of fourteen, and then she dies; and whether this was a good devise, by reason of the double contingency,—*scilicet*, the having heirs of her body, and that such heir should live till fourteen,—was doubted; but it was admitted that if the devise was good, it must be by way of executory devise, which is allowable when to take effect within the compass of a life, but not after a dying without issue; for that tends to a perpetuity: and it cannot take effect by way of remainder; for it is a new devise to take effect after her death, and is not as a remainder joined to her estate: but the court being divided upon the point of contingency, it was agreed to be adjourned into the Exchequer Chamber, and the reporter supposes the parties agreed afterwards, for he heard no more of it.

[Where one devised all his lands after the death of his executor to *A.*, his executor's son, and his heirs for ever, but if *A.* died leaving no son, then to that son of his executor to whom he should think fit to give them by his will; and for want of a son of his executor, then to *B.*: it was held a good executory devise to *B.* as confined to the period of a life in being.

Prec. Chan.
67. Fairfax
v. Heron.

Where lands were limited by marriage-settlement to the use of *A.* and his wife, for their lives, remainder to trustees and their heirs during the lives of *A.* and his wife, to preserve contingent remainders; remainder to the first and other sons of the marriage successively in tail-male, remainder to the right heirs of *A.*; with a proviso, that if the heirs of the wife should, within twelve months after the death of the survivor of the husband and wife, pay 4000*l.* to the heirs or assigns of the husband, that then the fee should remain to the use of the heirs of the wife: the House of Lords held this executory limitation of the use to the heirs of the wife to be good.

Lloyd v.
Carew,
Chanc. Prec.
72. Show.
Parl. Cas. 137.

So, where a testator devised to his wife for life, remainder to *C.* his second son in fee, provided if *D.* his third son should, within three months after his wife's death, pay 500*l.* to *C.*, his executors, &c., then he devised the same lands to *D.* and his heirs; it was adjudged a good executory devise to *D.*]

10 Mod. 419.
Marks v.
Marks,
Strange, 129.

If a man having only one sister and heir, who had issue *A.*, and after married *B.*, by whom she had issue *C.* and *D.*, devises lands to his sister until *C.* attains twenty-one, and after *C.* attains that age, to *C.* and his heirs; and if *C.* dies before twenty-one, then to the heirs of the body of *B.* and their heirs, as they shall attain their respective ages of twenty-one, and dies: *C.* dies before twenty-one, living *B.*; and after *B.* dies, *D.* either as heir of *C.*, in whom the fee was vested, or as heir of the body of *B.* (though he could not be so during the life of *B.*), being of age after the death of *B.*, shall have the estate by way of executory devise, and not the right heir of the devisor.

2 Mod. 289.
Taylor and
Biddulph,
Abr. Eq. 188.
[S. C. cited
and relied
upon by the
judges in Ca.
temp. Talb.
232.]

[So, where the testator devised lands to his grandson *W.* and his heirs, and if *W.* should die under age, then to his grandson *T.*, and if *T.* should die under age, then to such other son of the body of

Cas. temp.
Talb. 229.
Stephens v.
Stephens.

of his daughter *M. S.* by his son-in-law *T. S.* as should happen to attain his age of twenty-one years, remainder over; and the testator died, leaving two grandsons, *W.* and *T.*, who both died under age; afterwards another son, *A.*, of the body of *M. S.* by *T. S.* was born: it was decreed a good executory devise to this after-born son *A.*, if he should attain his age of twenty-one years.]

Proctor v.
Bishop of Bath
and Wells,
2 H. Bl. 358.

|| *Mary Proctor*, seised of an advowson, devised it unto the first or other son of her grandson *Thomas Proctor* that should be bred a clergyman and be in holy orders in fee, but in case *T. P.* should have no such son, then to *C.* in fee. *Thomas Proctor* survived testatrix, and died without ever having a son. Held, that both limitations were void, as too remote, and the heir at law took: no son could have been entitled until the age of twenty-four.

Gore v. Gore,
2 P. W. 28.

But the devise of a contingent estate, unsupported by a preceding freehold, may be good by way of executory devise. *A.* having two sons, *B.* and *C.*, devises to trustees for five hundred years to pay debts and 50*l.* per annum to *B.* for his life, and after the determination of that term, to the first and every other son of *B.* in tail, remainder over. *B.* had no son at the death of testator, but it was held a good executory devise; and a son afterwards born took an estate-tail.

Doe v. Carle-
ton, 1 Wils.
225. S. P.
Harris v.
Barnes, 4 Burr. 2157.

So, on a devise to testator's son for 99 years, if he should so long live, remainder to the heirs of his son's body and the heirs of their bodies, such heirs took by way of executory devise.

Wright v.
Hammond,
1 Str. 427.
2 Eq. Abr.
338. pl. 11.

In consequence of the rule that an executory devise must vest within a life or lives in being and twenty-one years after, a devise after failure of the heirs or the issue of *A.*, where such heirs or issue have not a prior particular estate, is void.

Vin. Abr. vol. 8. p. 110. pl. 32. Lanesborough v. Fox, 3 Bro. P. C. 130. Goodman v. Goodright, 1 Bl. 188. 2 Burr. 873. Doug. 507 n. Habergam v. Vincent, 5 T. R. 92.

Banks v.
Holme, Dom.
Proc. cited
and stated in
note, 1 Russell,
394. See
Bristow v.
Boothby,
2 Sim. & Stu.
465.

Thus, by a marriage settlement, lands were settled after estates to the husband and wife to the use of the first and other sons successively in tail-male, remainder to the daughters in tail-general, remainder to the husband in fee. The husband in his will recited, that by his marriage settlement he was seised of or entitled to the reversion in fee-simple expectant upon and to take effect in possession immediately after the decease of his wife, in case and upon the contingency that there should be no child or children of his wife, by him begotten, or there being such, all of them should depart this life without issue. Having thus described his reversion, he proceeded to devise it. "Now, "in case I should die without leaving any children or child, or "there being such, all of them should happen to depart this life "without issue lawfully begotten." These words describe an event that could not take place, unless his sons all died without female issue as well as without male issue, and unless his daughters died without issue either male or female; and it is only upon that contingency that he devises his reversion. This reversion, however,

was

was a reversion expectant, not upon a general failure of his issue, but upon estates limited to the sons of the marriage in tail-male and to the daughters in tail-general. Mistaking what his reversion was, he introduces a description of it, which serves to shew what it was he meant to dispose of, and what it was he meant to do with that of which he could dispose. He states, that what he meant to devise was that which he was not entitled to devise, unless there was a failure of all issue; and he does devise it, in case of there being a failure of all issue. The House of Lords held, that the devise was accordingly void as being too remote;—thinking that, inasmuch as he had stated in his will what the reversion was of which he thought himself entitled to dispose, and which was a reversion different from the interest which was actually in him, a court could not hold that he meant to dispose of that which was the real nature of his reversion.

But where testatrix devised to *A.* for life, remainder to *A.*'s first and other sons in tail-male, remainder to his daughters in tail-general, remainder to trustees for a term of years to raise legacies, and in a subsequent part of her will bequeathed legacies from and immediately after the decease and failure of issue of *A.*;—Held that “failure of issue,” in the gift of the legacies, meant failure of such issue as were included in the limitation of the estate, and therefore that the bequests were not too remote.

Morse v.
Lord
Ormonde,
1 Russell, 582.

So, lands were settled on marriage on the sons successively in tail-male, remainder to the settlor in fee, and, there being two sons of the marriage, the settlor devises the lands so settled in case his said sons, “or any other son or sons of mine hereafter to be born, shall happen to die respectively without any issue male of their bodies, or of the body of some or one of them.” The Court of K. B. certified, and Lord Chancellor *Bathurst* decreed, that the event of a future marriage was not in the settlor's contemplation, and that the words “or any other son or sons” were to be restrained to sons of the first marriage; and consequently that the devise was good.

Jones v. Morgan, 3 Br. P.C. 322.
Fearne's C. R. Appendix. See *Lytton v. Lytton,* 4 Br. C. C. 441.

If a testator devises “in default of issue of my own body,” without having given any estate to such issue, these words may, on the ground of intention, be restrained to issue living at his death.||

French v. Caddell, 6 Br. P. C. 58.
Wellington v. Wellington,

4 Burr. 2165. S. C. 1 W. Bl. 645. *Sandford v. Irby,* 3 Barn. & A. 654.

[An estate by way of executory devise may be so limited, as that its taking effect or not may depend upon the act of the owner of the fee which precedes it. Thus, *W.* by will devised his estates in *B.* except, &c. to his son *F.* and his heirs, &c. and the rest of his estates to his son *C.* and his heirs, &c.; and if either *F.* or *C.* should die without having settled or otherwise disposed of the estates so devised, or without leaving issue of his or their respective body or bodies lawfully begotten, or, having such issue, such issue should die before his or their age or ages of twenty-one, and without leaving lawful issue, he willed that the premises, so given to such of his sons *F.* and *C.* so dying, should go and

Beachcroft v. Broome,
4 Term. Rep. 440.

he gave the same unto the survivor of them, his heirs, &c. for ever; and if the survivor should die without having settled or otherwise disposed thereof, or of the estates thereby originally devised to him, or, &c. and his son *W.* should then be dead without issue, then he gave such of the said devised premises as should not have been settled or disposed of as aforesaid unto the right heirs of *G.*, then deceased, in fee. *F.* died without issue; *C.* by lease, release, and recovery, conveyed part of the estate so limited as above mentioned to *I. S.* in fee, and then died; after which *W.* died without issue. And the question was, whether under the devise to *C.*, and the conveyance by him, *I. S.* took an absolute and indefeasible estate of inheritance in fee-simple? And it was held, first, that on failure of the first limitation, the second might have taken effect, as an executory devise. Secondly, that the testator had in express terms given one estate to one son and his heirs, and another to another son and his heirs, and if either of them died, without having settled or disposed of his estates, or without issue, then that it should go over; that this was a lawful intention; and that *C.*, having settled and disposed of the estate given to him, had thereby defeated the limitation over.]

If *A.* hath issue two sons, *viz.* *B.* and *C.*, and devises lands to *B.* for life; and if he dies without issue living at his death, then to *C.* in fee; but if *B.* shall have issue living at his death, that then the fee shall remain to the heirs of *B.* for ever, by which devise *B.* has only an estate for life, the remainder to his heir not executed; and though the reversion descend on *B.* as heir of *A.*, yet it drowns not the estate for life against the express devise and intention of the will, but leaves an opening, as it is termed, for the interposition of the remainder, when it shall happen to interpose between the estate for life and the fee; and this being a contingent remainder, and not an executory devise, will be barred by a recovery suffered by *B.*

If one devises lands to his wife for life, and if she hath a son, and causes him to be called by the christian and surname of *Sampson Shelton*, then after her death devises the same to her son, and if he dies before twenty-one, to the right heirs of the deviser, and dies; and after the wife marries *Broughton*, by whom she hath a son, which she caused to be christened *Sampson Shelton*, &c. the devise is good by way of contingent remainder, but not by way of executory devise; for when a contingent estate is limited, and depends upon a freehold, which is capable of supporting a remainder, it shall never be construed an executory devise, but a contingent remainder: adjudged, and that the reversion descending to the heir of the deviser till the contingency happened, by the bargain and sale, and fine thereof, by the heir of deviser to *B.* and his wife, and their heirs, before the birth of their son, the contingent remainder was destroyed.

A. having two sons, *B.* and *C.*, devised lands to *B.* for 50 years, if he should so long live, and for my inheritance after the said term I devise the same to the heirs male of the body of *B.*, and for default

Lev. 11.
Holmes and
Plunkett,
Lord Raym.
28. 47. Keb.
29. 119.
[Ferne's
C.R. S.C.]

2 Sand. 380.
Purefoy and
Rogers.
4 Mod. 284.
2 Lev. 39.
3 Keb. 11.
3 Salk. 299.
[Doe v.
Morgan,
3 T.R. 765.]

Salk. 226.
pl. 4.
Goodright
and Cornish,

default of such issue, then to *C.* And the court resolved, 1st, that *B.* had not an estate-tail by implication upon the words *without issue*, because the deviser had given him an estate for years by express words, and the court cannot make such a construction against express words, when thereby they would drown the estate for years, and make an estate of inheritance. 2^{dly}, The court held this devise to the heirs male of the body of *B.* to be void in its creation for want of an estate of freehold to support it; and they seemed not to think it an executory devise, because it was limited as a remainder, and because it was limited *per verba in presenti*; for if one devises his estate to the heir of *J. S.* and *J. S.* is living, the devise shall not be construed an executory devise, and such devise is therefore void; but if it were to the heir of *J. S.* after the death of *J. S.*, that is good as an executory devise. 3^{dly}, The court held the limitation to the heirs of *B.* was become void by the event, whatever it was in its creation, because *B.* died without issue. 4^{thly}, The court held, that if the remainder to the heirs male of *B.* was void in point of limitation, then the next remainder limited to *C.* took effect presently.

C. seised in fee devised to trustees for eleven years, and then to the first son of *A.* and the heirs male of his body, and so on to the second, third, &c. sons in tail-male, provided they, the said sons, shall take on them my surname; and in case they, or their heirs, refuse to take my surname, or die without issue, then I devise my land to the first son of *B.* in tail-male, provided he take my surname; and if he refuse, or die without issue, then to the right heirs of the deviser. *A.* had no son at the time of the devise, and died without issue, and *B.* had a son who was living at the time of the devise, who took the surname of the deviser. The whole court agreed, that the devise to *B.* was not a contingent remainder, because of the precedent estate for years, which could not support it; it appears likewise by the case to be the opinion of *Treby C. J.* and *J. Powel*, that it could not be good as an executory devise, if it were considered as a devise to the heirs of *A.*, being limited *per verba de presenti (a)*; but *Blencow J.* held, that the devise to the son of *A.* was future; for he supposed the testator knew that *A.* had no son, and the rather because he does not name him; but it was adjudged in *C. B.*, and affirmed in *B. R.*, that the remainder to the first son of *B.* was good, and vested in him.

A man devised lands to his executors till his son should come of age, and when his son should come of age, then he should enjoy them for him and his heirs: this is a remainder executed in the son, and not in contingency, for the words *when* and *then* in this case only denote the time when the remainder is to execute, and will no more make the remainder contingent than in the common case, when a lease is made for life or years; and after the decease of the tenant for life, or the expiration of the term for years, then to remain to another; for though the words be *after the term it shall remain*, yet it is a present and not a con-

Lord Raym. 5.
Skin. 408.
pl. 5. 4 Mod.
255. S. C.
12 Mod. 53.
S. C. cited in
2 P. Will. 56.

Salk. 229. pl. 8.
Scatterwood
and Edge,
12 Mod. 278.
S. C.

[(a) In the case of a future limitation to the unborn children of the testator's grandson, Lord Talbot thought its being limited *per verba de presenti* no objection to its taking effect as an executory devise. Chapman v. Blissett, Ca. temp. Talb. 150.]

3 Co. 19.
Boraston's
case; vide tit.
Remainder
and Reversion.

tingent remainder, for where words refer to that which *must needs happen* there shall be no contingency.

Doe v. Moore, 14 East, 601. See Duffield v. Elwes, 2 Sim. & Stu. 544. 3 Barn. & C. 705. S. C. || So on a devise to *J. M.* in fee when he attained twenty-one; but in case he should die before he attained twenty-one, then over; it was held that *J. M.* took an immediate vested interest, liable to be divested upon his dying under twenty-one.

Stanley v. Stanley, 16 Ves. 491. 506. So on a devise to trustees to receive the rents for a particular purpose until *T. M.* should attain the age of twenty-one years, and at that age to convey to him for life with remainders over, Sir *W. Grant*, *M. R.* was of opinion, on the authority of a great number of decisions, from *Boraston's* case downwards, that *T. M.* took a vested remainder for life, after an estate in the trustees for so many years as his minority might last.||

Dyer, 303. Hob. 33. *A.* having issue five sons (his wife being *ensient* with a sixth), devised two thirds of his lands to his four younger sons, and the child *in ventre sa mère*, if it were a son, and their heirs; and if they all die without issue male of their bodies, or any of them, that the lands shall revert to the right heirs of the deviser: by this devise, the younger sons are tenants in tail in possession, with cross remainders over to each, and no part shall revert to the heirs of the deviser, till all the younger sons be dead without issue male of their bodies.

Cro. Jac. 695. A man having two sons, devised part of the lands to one of them and his heirs, and the rest to the other and his heirs, and further willed that the survivor shall be heir to the other, if either die without issue; by this the devisees are tenants in tail, with remainder in fee executed of each other's part.

Cro. Jac. 448. 655. Gilbert and Witty, S. C. cited in Saund. 104. (a) No cross remainders can be created by implication in a deed, nor by will between three or more, unless the words of the will do plainly express the intent of the deviser to be so; as where *Black Acre* is devised to *A.*, *White Acre* to *B.*, *Green Acre* to *C.*, and if they die without issues of their bodies, *vel alterius eorum*, then to remain; there, by reason of the words *alterius eorum*, cross remainders shall be. Vent. 224. per *Hale C. J.* Vide *supra*, (F).

Walters on Cross Remainders, 61. See the cases Doe v. Burville, Loft, 101. S. C. 2 East, 47. in note. Wright v. Holford, Cowp. 31. Phipard v. Mansfield, *ibid.* 797. Bradford v. Foley, Doug. 63. Ather-

ton || Estates-tail are sometimes implied in a will by way of cross remainders. The following rule has been stated as the result of the cases in the margin:—"When there is a devise in tail, "either express or implied, to a class of persons, whether ascertained or unascertained, and in default of issue of such persons "the subject of the devise is given over, cross remainders between "such persons and their issue will be implied."

ton v. Pye, 4 T. R. 710. Watson v. Foxon, 2 East, 36. [Roe v. Clayton, 6 East, 634. Doe v. Webb, 1 Taunt. 234. Green v. Stephens, 12 Ves. 419. and S. C. 17 Ves. 64. Mogg v. Mogg, 1 Mer. 655. Horne v. Barton, 19 Ves. 598. Staunton v. Peck, 2 Cox, 8. And see Powell on Dev. Ch. xxxi. xxxii. (3d edit.)]

In all the cases last referred to there is a limitation over in default of issue of the persons to whom the devise is made. In nearly all these cases, this limitation over is referred to by the court as furnishing satisfactory evidence of the testator's intention, that till failure of such issue no part of the estate should go over; and consequently, to effectuate such intention, cross remainders were implied. But in none of these cases did the court state it was necessary that there should be a limitation over in order that cross remainders might be implied, or in other words, that the intention of the testator could not be implied from other circumstances. Indeed, Hobart, p. 34. cites a case from the Year-book 7 Ed. 6. in which there was a devise to three brethren in tail, with a declaration that "one should be heir to the other," and this, he says, makes cross remainders. But where a testator, having three sons, devised the *Withy* farm to his two youngest sons, *John* and *George*, equally between them, share and share alike; and after bequeathing to them all his personal estate in the same proportions, he then adds, "I entail the *Withy* farm on "the male heirs of *John* and *George* born in wedlock." *George*, having survived the testator, died without issue; the question was, whether the words "I entail the *Withy* farm on the male "heirs of *John* and *George*," were sufficient to raise cross remainders between them, and to exclude the claim of the heir at law, an elder brother. The court decided against cross remainders on the ground that there was nothing in the will to shew that the testator intended no part of the farm to go to the heir at law till the failure of issue of *both* the devisees. Mr. Justice *Bayley* said, "It seems to me that in case we were to decide for the plaintiff now, it would next be contended, that if "there was a devise to two persons of an entire estate in tail, as "tenants in common, cross remainders ought to be implied between them. The words 'I entail, &c.' are here not words of "purchase, but of limitation." ||

Cooper v.
Jones, 3 Barn.
& A. 425.

(K) Of Executory Devises of Leases for Years:
And herein of the Limitation of the Trust of a
Term as far as it relates to and agrees with a
Devise thereof.

Cro. Car. 198. **I**F a farmer devises his term to *A.* for life, the remainder to another, though *A.* has the whole estate (for that is in him during his life), and so no remainder can be limited over at common law, yet it is good by way of (a) executory devise.

(a) The great question in these cases was, Whether the disposition of the term to a man for his life was not such a total disposition of it, that no remainder could be limited over, it being in the eye of the law a greater estate than for any number of years?—and this was resolved in the affirmative in the reign of E. 6. Dyer, 74. by all the judges of *England*; but this resolution seeming very severe, and against natural justice, that a man should be hindered from making provision for his family, and the contingencies of it, occasioned a contrary resolution. 19 Eliz. Co. Lit. 46. Dyer, 35. For the judges, observing the good effect such limitations by way of trust had, which were allowed in Chancery, permitted farmers to dispose of their leases in the same manner by last will; and then the Chancery, the better to fix them in it, allowed of bills by the remainder-man, to compel the devisee of the particular estate to put in security, that he in remainder should enjoy it according to the limitation; but when they perceived that this multiplied Chancery suits, they resolved that there was no need of that way, 10 Co. 47. a. 52. b. Sid. 451. but that the particular devisee should not have power to bar the remainder-man; so that the law has been long settled, that executory devises of terms for years are good, provided the contingency is to happen within a life, or twenty lives all *in esse*; for then there can be no tendency to a perpetuity, which was the great mischief apprehended from these kinds of limitations. Abr. Eq. 191. || The period now allowed is a life or lives in being, and twenty-one years and a few months. ||

Roll. Abr. 612. So if *A.*, possessed of a term for years, devise it to *B.* his wife for eighteen years, and after to *C.* his eldest son for life, and after to the eldest issue male of *C.* for life, though *C.* had not any issue male at the (b) time of the devise, and death of the deviser, yet, if he have issue male before his death, this issue male shall have it as an executory devise; for although it be a contingency upon a contingency, and the issue not *in esse* at the time of the devise, yet, inasmuch as it is limited to him but for life, it is good, and all one with (c) *Manning's* case.

(b) If *A.* possessed of a term, devises it to *B.* his wife for life, and after her death to his children unpreferred, and after *B.* dies, *C.* then being the only daughter of *A.* shall have it; for an executory devise, that hath a dependence on the first devise, may be made to a person uncertain. Andr. 60, 61. (c) Where a term of fifty years was devised to *B.* after the death of *C.*, and that *C.* should have it during his life, it was adjudged that this was a good devise of as much of the term as remained at the death of *C.* 8 Co. 95. *Matthew Manning's* case.

Cro. Car. 167. But if *A.* devise his term to his wife for her life, and after her decease to *B.* his son; and if *B.* die without issue, then to *C.*, this devise to *C.* after the death of *B.* without issue is void; for since it cannot vest while *B.* hath issue of his body, the devise is no more than to *B.* and the heirs of his body, which, without doubt, would be void; for though men presumed on the judges when they first allowed of remainders of terms after estates for lives, and endeavoured to bring remainders upon estates-tail within the reason of these resolutions and concessions, yet the courts would never endure those remainders, because it is too foreign and distant to expect them after the man's death without issue;

issue; and if they were allowed of would make a direct perpetuity, which is an undeniable reason against any settlement, for it is against the nature of human affairs so to settle an estate in a family, that upon no contingency or revolution of fortune the owner shall have power over it.

Therefore, the devise to *B.* in the above case is an absolute disposition of the term to him, and vests it totally in him, and at his disposal, and shall go to his executors during the continuance of it, and shall never for default of issue of his body revert to the executors of the devisor.

contra, but have been denied to be law. 3 Chan. Ca. 6. 10.

If one possessed of a term devise it to his wife for life, the remainder to his first son for life, and if he die without issue, to his second son, &c. the remainder to the second son is void, for the remainder of a term cannot depend upon a possibility so remote as the dying without issue; although it was objected that the devise was not to the first son and his issue, (in which case it was agreed it should go to his executor), but it was given to him for life only, with an executory devise to the second son, upon the contingency of the first's not having issue at the time of his death.

If a man possessed of a term for years devises it to *D.* his wife for life, and after to *W.* his eldest son, and his assigns, and if he dies without issue *then living*, to *T.*, this being a perpetual limitation, by intendment of law is void; and if men should be admitted to make such devises, there would not be any end of them, nor any certainty.

cited, and Sid. 37. cited. And in 3 Chan. Ca. 1. &c. in the Duke of Norfolk's case, where it is denied to be law; and in Salk. 225. pl. 5. Carth. 226. denied to be law; and that the established law in cases of this nature is the Duke of Norfolk's case. See the next case.

A. having issue several sons (the eldest *non compos*) created a term for years, and by another deed declared the trust thereof to his second son, and the heirs male of his body, remainder to his other sons; provided that if his eldest son died without issue, or not, leaving his wife *ensient* with a child, living the second son, so that the earldom of — descended on the second son, then the said term to remain to the third son and the heirs male of his body, with like limitations to the other sons; the eldest son died without issue, living the second, and this limitation to the third son was held good.

was reversed, and Lord Nottingham's established. Chan. Ca. 53. And has admitted to be law; and note, that executory devises and limitations of the trust of a term are governed alike. Vern. 234. Pollexfen, 15—50. || See note of Lord Nottingham's judgment in the above case, given from his Lordship's MSS. 2 Swanst. 454. ||

If a man possessed of a term devise it to his son; and if he die unmarried, and without issue, to his daughters; and if his son be married, and have no issue then living to enjoy it, then after the death of his son's wife he devise it to his said daughters; the devise to the daughters is void, being a limitation after the death

Sid. 451. Roll. Abr. 611. 831. But *vide* 10 Co. 87. Leonard Love's case, and Sid. 37. which seem

Lev. 290. Love and Wyndham. 2 Chan. Rep. 14. S. C. Sid. 450. Vent. 79. Mod. 50. 2 Keb. 637.

Cro. Jac. 459. Child and Bailly, Palm. 333. 336. S. C. Jon. 15. S. C. Roll. Abr. 612, 613. S. C. Mod. 52.

3 Chan. Ca. 2., &c. decreed by my Lord Nottingham, but reversed by North, Lord Keeper, Vern. 163. But upon an appeal to the House of Lords, Lord North's decree

has been ever since

3 Lev. 22, 23. Gibbons and Summons. But *Q.* of this case, for it does not seem

to be law; and *vide* the case of Sanders and Cornish, Roll. Abr. 612. Cro. Car. 230. and Cro. Jac. 461. a case cited where *A.* possessed of a term for years devised it to

of their brother without issue; for it is not to be taken (as objected) that the dying should be without issue living at his death, and so the contingency to happen within the compass of a life; and if it should be intended of such dying without issue, yet the court held it would be void, according to *Child* and *Bayly's* case; for though such a devise hath prevailed in case of an inheritance, as in *Pells* and *Brown's* case, yet it hath not yet prevailed in case of a term; and the court said they would not extend the devises of chattels to make perpetuities farther than they had been.

his wife for life, and then that *J.* his son should have the occupation thereof as long as he had issue; and if he died without issue unmarried, in the same manner to another son, the remainder over; this remainder upon the death of the son unmarried was adjudged good; for here the limitation is, if he dies without issue unmarried, then the remainder over, which is upon the matter, if he dies within the term unmarried, for he cannot have issue unless he marries; and this is a possibility which the law will expect, because it will happen in a life; and there is no difference between the occupation or use of a term or the profits of the land, and the land itself or the lease or farm; for a devise of any of them will carry the whole interest. And *vide* the following cases.

Salk. 225. pl. 3. Carth. 266. Comb. 208. Lamb and Archer.

2 Vern. 151. Martin and Long.

If a term be devised to *A.* and the heirs of his body; and if *A.* die without issue, living *B.*, then to *B.*; this is a good limitation, the contingency arising within the compass of a life.

A. devises to his son, his executors, administrators, and assigns for ever, a leasehold estate; but if he died before twenty-one without issue, in that case he devises it over to his brother; and the question was, whether the remainder over was good? It was objected, that it was a perpetuity, for that the remainder depends on the son's dying without issue; for if he die before twenty-one, though he leaves a child, and that child afterwards die without issue, the son may be said to be dead before twenty-one without issue; yet the court held the remainder good.

Abr. Eq. 195. Fletcher's case.

One *F.* being possessed of a term for years devises it to his wife for life, and after her death to *R. F.* for her life, and after her death to *T. F.* and his children, and then devises in this manner: and if it shall happen the said *T. F.* to die before the expiration of the said term, not having issue of his body then living, then to go over to the plaintiff for the residue of the term; the defendant's title was by an assignment of *R. F.* and *T. F.* of all their estate, right, title, and interest; *R. F.* was dead, and *T. F.* died without issue; and the plaintiff brought his bill to have an assignment of the term, pursuant to the will. All that was insisted upon for the defendant to difference this case from the Duke of *Norfolk's* of a term, and of *Pells* and *Brown's* case of a fee, was, that this contingency of his dying without issue was not confined to his own death; but that the words *then living* should relate to the words *before the expiration of the term*, and so this went farther than any of the cases had ever yet been carried; for he might have issue for several generations, and yet if such issue failed at any time before the expiration of the term, then it was to go over, and this in a long term tended plainly to a perpetuity, and therefore ought not to be allowed; but by the devise to *T. F.* and his children, and the subsequent words, and if he die without issue, the

the whole term and interest was vested in him, and he might dispose thereof as he thought fit, and it could not be restrained by the words *then living*, which related only to the words *before the expiration of the term*, and so the remainder over to the plaintiff void. But for the plaintiff it was argued and agreed, that the remainder to him was good by way of executory devise, and that the words *then living* must relate to the time of his death; for otherwise there would be no difference between this and the common limitations of a term to one, and the heirs or issue of his body, and if he dies without issue, the remainder to another, which is void; for there it must likewise be intended, if he die without issue before the expiration of the term, or during the term, since after the expiration of the term he can limit no remainders over, because nothing remains then to be limited; but here, it being limited over upon this contingency, if he die without issue then living, *viz.* at the time of his death, it is good, because this contingency must happen within one life, or not at all; for upon his death it will be certainly known whether he leaves issue or not: if he does, the contingency cannot take place; if he does not, then it may; and this being to happen within the compass of a life, is good as an executory devise, and differs in nothing from the Duke of *Norfolk's* case, save only that there it was by *proviso*, and also upon the death of another person without issue then living; and here it is upon his own death, which makes no manner of difference.

A man possessed of a term for thirty-one years devises it to his son *H.* during his minority, and if he attains to his age of twenty-one years, then to him during his life, if the term shall so long continue, and no longer, and after his death, to such of his issue to whom he shall devise it; but if he die without issue, then to his other son *G.* for the residue of the term. *H.* afterwards died without issue, or without making any disposition of the residue of the term; and the only question was, whether by the words of this will the whole term did not vest in *H.*? and it was decreed, that it did not; for the words *die without issue* have a twofold meaning, either without issue at the time of his death, or without issue, whenever the issue fails; and though in case of an inheritance, if lands are devised to one, and if he die without issue, the first devisee takes an estate-tail by implication, which shall go to his issue, and they shall take in a course of descent to all succeeding generations, yet, to make such a construction in the case of a term, which cannot come to the issue by descent, is unnecessary; and therefore, in such case, the other construction of the words, which is most natural and obvious, shall take place; and it shall be intended only, if he die without issue living at the time of his death (*a*); and, consequently, the dying without issue, being confined within the compass of a life, hinders not the remainder over, but it may well take place by way of executory devise, according to former resolutions.

estate. 3 Ves. 99. 6 Ves. 159. 17 Ves. 479. 3 Mer. 183.; and see cases *post*, (L) 1. *sub fine.* ||

|| The

Abr. Eq. 193,
194. Targett
and Gant.
Vide 2 Vern.
43. 195.
The case of
Peacock and
Spooner, and
2 Vern. 668.
Webb and
Webb, Abr.
Eq. 362.
Fitzgib. 317.
320. 1 P.
Wms. 432.
pl. 121.
10 Mod. 405.
|| (*a*) This dis-
tinction is now
exploded, for
it is settled, i
the words
would, in the
case of real
estate, have
given an estate-
tail by implica-
tion, they pass
the absolute
interest in the
personal

Burford v. Lee, 2 Freem. 210. Anon. *ibid.* 287. Green v. Rod, Fitz. 68. Beaucherk v. Dormer, 2 Atk. 313. Saltern v. Saltern, 2 Atk. 576. Earl of Stafford v. Buckley, 2 Ves. sen. 181. Att. Gen. v. Hird, 1 Br. C. C. 169. Bigge v. Bensley, 1 Br. C. C. 190. Glover v. Strothoff, 2 Br. C. C. 53. Gray v. Shawne, 1 Eden, 153. Jeffrey v. Sprigge, 1 Cox, 62. Everest v. Gell, 1 Ves. jun. 285. Boehm v. Clarke, 9 Ves. 580. Barlow v. Salter, 17 Ves. 480. Elton v. Eason, 19 Ves. 75. Donn v. Penny, 1 Mer. 20. Lyon v. Mitchell, 1 Mad. 467. Kinch v. Ward, 2 Sim. & Stu. 409.

WORDS "DYING WITHOUT ISSUE" RESTRAINED BY IMPLICATION.

Fearne's C.R. 471. But, with respect to executory devises of terms of years, or other personal estates, the court of Chancery has very much inclined to lay hold of any words in the will to tie up the generality of the expression of *dying without issue*, and confine it to dying without issue living at the time of the persons' decease.

Pleydell v. Pleydell, 1 P.W. 748. See Amb. 125. Thus, in a devise to *A.* for life, remainder to his children, and in default of such issue, over; issue means children.

Rackstraw v. Vile, 1 Sim. & Stu. 604. So, where there was a bequest to *S.* absolutely, but by a codicil testator declared it should only be for the natural life of himself and his wife, provided they had no issue; and that at their death it should become a part of the residue;—Sir *John Leach*, V. C. said, "The failure of issue is plainly confined to the "death of the survivor, by the direction that the bequest to *S.* "is to become a part of the residue at their death."

But the circumstance of there being a devise over for life, in default of issue of the first taker, will not alone restrain those words.

Boehm v. Clarke, 9 Ves. 581. See 17 Ves. 483. As where there was a devise to *E.* for life, with remainder in default of issue to *C.* for life, with remainder in default of issue to *F.* for life, with remainder in default of issue to *R.*; the remainders after the limitation to *E.* were held to be too remote. "Where the entire interest is given over, the mere circumstance "that one taker is confined to a life-interest, furnishes no "indication of an intention to make the whole bequest depend "upon the existence of that person at the time when the event "happens, on which the limitation over is to take effect."

17 Ves. 482. 7 T.R. 589. 3 Bing. 17. Where, however, nothing but an interest for a life or lives is given over, a failure of issue must necessarily be intended a failure within the compass of the life or lives.

Kirkpatrick v. Kirkpatrick, 13 Ves. 476. See Thackeray v. Hampson, 2 Sim. & Stu. 214. 217. and Ambl. 122. Testator bequeathed personal estate to his two natural children, equally between them; on the death of either before twenty-one, and without issue, his share to go to the survivor; "but in the "event of both dying without issue," their shares were given over. Both the children died under twenty-one and unmarried. Lord *Erskine* C. held, that the gift over was not too remote, as it was intended to take effect if both died under twenty-one and without issue.

Testator

Testator bequeathed all his personal estate to his daughter, who was an infant, she paying an annuity to his wife. But if the daughter died before twenty-one, the wife was to have 400*l.*; and from and after the daughter's decease, without issue of her body, testator gave his personal estate to his brother, he paying the 400*l.* Held, that this was a bequest to the brother if the daughter died without issue under twenty-one, and therefore good. It was observed, the wife was to have the 400*l.* if the daughter died under twenty-one, and the brother being to pay it, if she died without issue, the estate must come to him at the same time as a fund out of which it was to be paid.

Balguy v.
Hamilton,
Mose. 1.

Testator bequeathed unto his daughter all his worldly substance, provided she married with the consent of his executors therein mentioned. But in case she should marry without consent, or die without issue, he appointed that all his said substance should return back to his executors, to be by them distributed among several persons therein named. Held, that the bequest over was to take effect on the death of the daughter without issue then living.

Keily v.
Fowler, 6 Br.
P. C. 309.

Testator devised a term to his son *George* and his wife for their lives, and after the decease of the survivor, to the children of *George*, share and share alike, but if *George* should die without issue of his body, then over. Held, that the devise over was not too remote; on the ground that these words would only have given an estate-tail by implication, in the case of real estate, and therefore the intention of the testator might be considered.

Doe v. Lyde,
1 T. R. 593.
S. C. cited
1 Ves. sen. 286.
Wilkinson v.
South, 7 T. R.
555.
But see
Chandless v.

Price, 3 Ves. 99. in which Lord *Loughborough* said, that the distinction between words which give an express estate-tail and those which give such an estate by implication is exploded; and that in both cases the limitation over is too remote. See, too, 6 Ves. 159. *Ex parte Sterne*, 17 Ves. 479. *Barlow v. Salter*, 3 Mer. 183.

BY A BEQUEST TO THE SURVIVOR.

A bequest over to the survivor of two persons, after the death of one without issue, *prima facie* affords a presumption that an indefinite failure of issue was not contemplated by the testator; for it will be intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest, which might or might not be accompanied by actual possession.

Thus, where personal estate was bequeathed to *A.* and *B.*, and if either of them should die without children, then to the survivor; it was held, that dying without children must in this case be taken to be dying without children then living, because the immediate limitation over was to the surviving devisee.

Hughes v.
Sayer, 1 P. W.
554.

But if the survivorship be necessary only to vest the interest, and to render it transmissible, the objection of remoteness is not at all obviated, and the restrictive presumption does not arise. Thus, where there was a bequest of personal estate to *A.* and *B.*, with a gift over, in case either of them should die without issue, to the survivor, his executors, administrators, or assigns, this gift over was held to be too remote.

Massey v.
Hudson,
2 Mer. 130.
See Gray v.
Shawne,
1 Eden, 157.

A BEQUEST OVER "WITHOUT LEAVING ISSUE."

9 Ves. 204.

See Daintry v.

Daintry,

6 T.R. 307.

contra, *sed*
quære.

Atkinson v.

Hutchinson,

3 P.W. 258.

Forth v.

Chapman,

1 P.W. 663.

Lampley v. Blower, 3 Atk. 396. Sheppard v. Lessingham, Amb. 122.

In the case of a bequest of personal estate, it is now settled that the words "without *leaving* issue" mean, without leaving issue living at the death of the party, to the failure of whose issue the words relate. This is the result of the following cases.

Devise of a term to wife for life, remainder to such children as the testator should leave at his death; and if all his children should die without leaving issue, then to *A*.

Devise of a term to *A*. and *B*., and if either of them die, and leave no issue of their respective bodies, then to *C*.

Sheffield v.

Lord Orrery,

3 Atk. 282.

A devise over, "without leaving any issue behind them."

Goodtitle v.

Pegden, 2 T.R.

720.

A devise of a term to *P*., and the heirs lawful of him for ever; but in case he should happen to die, and leave no lawful heir, then over.

Forth v. Chap-

man, 1 P.W.

664. Crooke v.

De Vandes,

9 Ves. 197.

And a different signification is given to the word "*leaving*," with respect to real and personal estate, though in the same devise; as to the former, it does not prevent the devisee taking an estate-tail, but as to the latter, as we have seen, it restrains the word issue, so as to include only those who are living at the death of the first taker.

"WITHOUT HAVING CHILDREN."

But the words "without having children," do not receive the same construction as "without leaving children."

Weakley v.

Rugg, 7 T.R.

322. See Bell

v. Phyn, 7 Ves.

453.

Testator bequeathed a term to *A*., and if she happened to die without *having* children, then to *B*. *A*. had children, but they died in her lifetime; it was however held, that the absolute interest vested in *A*. on the birth of a child, did not go over on her death, although the children died before her.

ALTERNATE BEQUESTS.

Knight v. Ellis,

2 Br. C.C. 570.

But see Raw-

lins v. Gold-

frap, 5 Ves.

440.

Certain monies were bequeathed, that *A*. should receive the interest during his life, and after his decease, testator gave the said monies to the issue male of *A*., and in default of such issue, he gave the same to *B*., *C*., and *D*., share and share alike. *A*. having survived the testator, died intestate and unmarried. Lord *Thurlow* held, that *A*. was only entitled to a life-interest in the fund; that it was only on a contingency that it would have gone to his issue, who would have taken as purchasers; and that *B*., *C*., and *D*. took the fund in the alternative of that contingency.

Bell v. Phyn,

7 Ves. 459.

A limitation of the annual produce to a parent, and of the capital to his children, with a gift over, in case the parent dies
without

without children, must mean if there are none at the death of the parent, for then the provision is intended to be made.

So, where there was a devise of a term to *A.* for life, remainder to his first and other sons in tail, remainder to his daughters as tenants in common; and in default of daughters, or in case of their death before twenty-one or marriage, then to *Q.*, and *A.* died without ever having children;—the devise to *Q.* was held good.

But Sir *W. Grant* held, that if personal estate were devised to *A.* for life, with a remainder to the heirs of his body, that would give the absolute interest; and no limitation over would take effect.

A devise of leasehold estates to *R.*, and to his issue lawfully begotten, to be divided amongst them as he thinks fit; and if *R.* shall happen to die without issue lawfully begotten, the premises are to be sold. Lord *Thurlow* said, “I think the testator intended and has expressed his intention of giving a contingency with a double aspect; in one event, a gift to the children of *R.*, if he should have any; and if he should not have any child, that then the estate should be sold for the purposes in the will.”

A devise of leaseholds to *S. P.*, and to the heirs of his body lawfully begotten, and to their heirs and assigns for ever; but in default of such issue, then after his decease to *T. W.* absolutely. Held to be a limitation, with a double aspect, to *S. P.*, and to the issue of his body, if there were any such issue living at his death; if not, then over.

So, there was a similar decision on a bequest to *S.* and her children, and in default of such issue, and in case of her death, then over.

But on a devise of real and personal estate to *B.* for life, without impeachment of waste, remainder to the heirs of his body as tenants in common; and in case of his decease without issue of his body, then over;—Sir *W. Grant* held, that *B.* took an estate-tail in the real estate, and an absolute interest in the personal.

And the same judge made a like decree, on a similar devise to *A.* and his male issue, for want of male issue after him to *B.*

A GIFT EXCEEDING THE LIMITS OF A LIFE OR LIVES IN BEING,
AND TWENTY-ONE YEARS AFTER, TOO REMOTE.

A bequest upon trust, in case *W. R. R.* (testator's grandson) should die without issue living at his death, to pay and transfer personal estate unto and amongst all and every the brothers and sisters of *W. R. R.*, share and share alike, upon his, her, or their attaining twenty-five, “if a brother or brothers, and if a sister or sisters, at such age or marriage.” Held, that all the brothers and sisters of *W. R. R.* living at his death were included in this limitation, but that a vested interest was not given till twenty-five, and consequently that the gift was too remote.

A REMAINDER

Stanley v. Leigh, 2 P.W. 680. Maddox v. Staines, 2 P.W. 421.

Browncker v. Bagot, 19 Ves. 582. 1 Mer. 280. and see 7 Term R. 557.

Stockley v. Mawbey, 3 Br. C. C. 82.

Wilkinson v. South, 7 T.R. 555.

Gawler v. Cadby, Jacob, 346.

Bennett v. Earl of Tankerville, 19 Ves. 170.

Donn v. Penny, 19 Ves. 544.

Leake v. Robinson, 2 Mer. 563. S. P. Bull v. Pritchard, 1 Russell, 213.

A REMAINDER AFTER A BEQUEST TO AN UNBORN CHILD, VOID.

Beard v.
Westcott,
5 Barn. & A.
801. S. C.
Turn. & Russ.
25. and see
Gilb. Us. by
Sugden, p.
260. note (2).

A devise of leaseholds to *A.* for ninety-nine years, if he should so long live, remainder to his first son, then unborn, for ninety-nine years, if he should so long live, and so on in tail-male to such first son lawfully issuing for ever, and for want of such issue of such first son, remainder over. — Held, that *A.* took an estate for ninety-nine years in the leaseholds, determinable on his death; and that upon his death, leaving one or more sons, his first son would take what should then remain of the term, and that all the subsequent limitations were void, as too remote.

EFFECT OF THE FIRST TAKER BEING RESTRAINED FROM DISPOSING OF BEQUEST.

Bradley v.
Peixoto, 3 Ves.
323.

A bequest to *A.* for life, and at his decease to his executors, administrators, and assigns. A gift over, in case *A.* should attempt to dispose of the property bequeathed, is inconsistent and void.

Cuthbert v.
Purrier, Jacob,
415. and see
Ross v. Ross,
1 Jac. & W. 154.

So, if there be an absolute bequest to *A.*, with a gift over, in case he shall die intestate, *A.* has the absolute interest, and may dispose of it in his lifetime.

Britton v.
Twining,
3 Mer. 176.

So, a bequest to *W. C.* for life, with a restriction against alienation, and after his decease to the heir male of his body, and so on in succession to the heir at law, male or female, was held to give *W. C.* an absolute interest; for although the intention was to give *W. C.* only a life estate, there was nothing to show that "heir male" was not used in its technical sense.||

(L) Of void Devises: And herein,

1. *Of devising what the Law already gives, or what the Policy of the Law will not admit.*

ALTHOUGH the judges are favourable in their construction of wills, that, if possible, the intention of the testator may prevail, yet where the testator makes the same disposition of his estate as the law would have done, had he been silent; or where his disposition is made in such general terms that his intention is altogether doubtful and uncertain, and cannot be collected from the words of the will; or where the testator is establishing a settlement against the reason and policy of the law; in these cases the judges have thought fit to reject the will.

Roll. Abr. 626.
Hob. 30. Plow.
545. Godb.
461. || Vin. Abr.
Descent,
(1).||

Therefore if a devise be made to *J. S.* and his heirs, who is heir at law to the devisor, this is a void devise, and the heir shall take by descent as his better title; for the descent strengthens his title by taking away the entry of such as may possibly have right to the estate, whereas if he claims only by devise, he is in by purchase.

2 Leon. 101.
Baspole's case,
Hob. 30. Roll.
Abr. 626. (1).
pl. 2. Preston
& Holmes.

So, if a man devises lands to his wife for life, remainder to *J. S.*, who is heir at law in fee; this is a void devise to *J. S.*, because after the disposition of the particular estate, the reversion would have come to him by descent, as heir at law.

|| So,

|| So, where a man devised lands to his wife in fee; and after his death she married again, having previously settled the lands upon herself for life; remainder to *T. H.*, her only son by the first marriage, for life; remainder over to his issue in strict settlement; remainder to such persons as she, the wife, should by deed or will appoint. Afterwards she devised *all her estate* to *T. H.*, charged with several legacies. Subsequently, *T. H.* died without issue, and the question was, whether the lands should descend to his maternal or paternal heir; that is, whether the devise, operating as an appointment, vested the lands in him as a purchaser, or he took them by descent. The Court of C. P. certified that the lands descended to the maternal heir of *T. H.*, for he was in by descent. An appointment by will, it was observed, is subject to the same rules as a common devise.

The heir does not take by purchase, unless the devise gives him an estate different in quantity or quality from what he would have taken if the land had not been devised. Hence, if land be devised to the heir in fee charged with debts; or with legacies or annuities with power of entry, possession, and perception of the rents to secure payment, the heir takes the land exactly as he would have done had he not been mentioned in the will, and therefore he takes by descent. The right of possession given to the legatees can only be considered in the nature of a security, or means of enforcing the payment of the legacy.

Thus testator devised to his eldest son and heir at law in fee, upon condition that he would pay certain sums to testator's other children; and if he refused payment thereof, they, the other children, were to have the estate to them and their heirs. Held, that the heir took by descent.

Testator devised lands to his wife *durante viduitate*, with a power of granting building leases, and charged with an annuity to testator's daughter for her life; upon wife's marrying again, testator devised the lands to his only son and heir, charged with the daughter's annuity, and an annuity for the wife for life; after the wife's decease he devised the estates to his son, charged with an increased annuity to the daughter; and, after the decease of the survivor of the wife and daughter, he bequeathed 1500*l.* for the children of the daughter, to be paid within one year; and in default of payment thereof, or of daughter's annuity, he devised all the lands to a trustee, his executors, administrators, and assigns, to raise the said sums out of the rents, or by sale or mortgage; "and subject to the said several charges and trust he gave the said lands, after the decease of his wife, to his said son, his heirs, executors, administrators, and assigns." Held, that the son took by descent.||

A. seised of lands on the part of his mother, devises them to his executors for sixteen years, for payment of his debts, and after devises them to his heir at law *ex parte maternâ*; this is a void devise to the heir at law; for though it was urged, to support the devise, that if it obtained, the heir of the part of the father might in the end inherit, which he could never do if the devise

Hurst v. The Earl of Winchelsea, 1 Bl. 187. See the remarks on this case, Sugden on Pow. 323. The same rule applies to copyholds. Smith v. Trigg, 1 Str. 487.

Fearne's Post. 229. Watk. on Descents, 268 [174].

Hainsworth v. Pretty, Cro. Eliz. 833. 919.

Chaplin v. Le-roux, 5 Maul. & S. 14. See Emerson v. Inchbird, 1 Ld Raym. 728. Clarke v. Smith, Com. R. 72. Allen v. Heber, 1 Bl. 22. Serjeant Williams's note, 2 Saund. 8. d. Co. Litt. 12. b. note (2). Watk. on Descents, 268. 1 Barn. & A. 547. 3 Lev. 127. Hedger and Row.

devise be rejected; yet they adjudged the devise to be void, because there is no alteration made in the tenure of the estate; nor is the quality thereof anywise altered; but whether the devisee takes either by descent, or the will, it is a fee-simple, and it were but *actum agere* to make him take by will.

But where another estate is created by the will than would descend to the heir at law, or where the quality of the estate is altered by the devise, there the disposition by the will shall prevail, though it be made to the heir at law. Thus, where a man had issue a son and a daughter, and devised that his land should descend to his son, and if he died without issue of his body, then the land to go over, &c.; the son by this will took an estate-tail, though heir at law to the devisor, because here is an estate-tail created by the will; whereas a fee-simple would have descended, which if the devisee were allowed to take, it would make the remainder over void.

So where a man has issue only two daughters, and devises his lands to them and their heirs; this is a devise to the heir at law (for so are the daughters), and yet good, because the devise makes them joint-tenants, in which survivorship takes place; whereas had they taken by descent, they had been coparceners, and therefore the will altering the quality of the estate ought to prevail.

|| So, where *A.* having two daughters, one of whom died, leaving a son, devised his land to the son of his deceased daughter; the son took as a purchaser. For "by this devise there was an alteration of the estate; for if the land had descended, both the daughters would be but one heir, and would take as coparceners: but when a devise is made of all to one, or the son of one of the daughters, then the devisee takes by purchase in a different manner from what would be, in case the land had descended."

So, if one devise to his eldest son and a stranger, it is a good devise; and they take as *joint-tenants*.

But if the testator devise to his son and a stranger, or two or more of his sons, one only being his heir, *in common*, it should seem that the son being heir shall take his portion by descent.

Whenever a person devises an estate to his heir at law, and limits a remainder over, the heir shall take *by the devise*, and be in by purchase. But if the particular estate be devised to a stranger, and the remainder over to the heir in fee, the heir is in by descent.

In the case of an executory devise the heir at law shall take the estate by descent, until the contingency arise; for until that event the fee is not affected. Hence, then, a devise to the heir of the same estate which he thus takes is void.

Thus, a person devised to his wife till the heir should attain the age of twenty-four years; and that at that age the heir should have the lands to himself and his heirs for ever; with a limitation over if the heir died under twenty-four. It was adjudged

Hob. 29, 30.
Cownden and
Clerk, Moor.
860. Godolp.
461. Roll.
Abr. 610.
|| Watk. on
Descents,
271. ||

3 Lev. 127.
Cro. Eliz. 431.
2 Sid. 53. 780.
Packman and
Cole.

Watk. De-
scents, 274.
Com. Rep.
125. ca. 86.,
and 2 Ld.
Raym. Read-
ing v. Royston.

Godb. 94. ca.
105., and see
1 H. Bl. 1.
Dally v. King.
Watk. on
Descents,
275. Fearne
Post. 130, 132.
Watk. De-
scents, 272.

Hinde v. Lyon.
Dyer, 124. a. pl.
38. 2 Leon. 11.
3 *ibid.* 64. 70.
S. P. Doe v.

judged that the heir, having attained twenty-four, was in by Timins,¹ Barn. & A. 530.

descent. See Scott v. den, 458. S.C.

Scott, Amb. 385. cont. But see note *id.* (2d edit.); and 1

If the *quality* of an estate be altered, the devise is not void; as if lands be vested in trustees to pay debts and legacies, and then to convey to the heir at law, the descent is broken, and the heir takes by purchase.|| Swaine v. Burton, 15 Ves. 363.

A. devises his land to *B.* for life, the remainder to *C.* in tail, the remainder to the next heir male of the devisor, and the heirs male of his body; *B.* and *C.* died without issue; the next heir of the devisor was a daughter, and she was adjudged to have the land by way of reversion and descent; and though she have a son born afterwards, he shall not take the land from her. Hob. 33. Perk. 506.

|| DEVISES VOID AS TENDING TO A PERPETUITY. ||

Also, devises are rejected that are against the reason and policy of the law. Hence devises, as well as all other settlements which tend to introduce a perpetuity, are void; for wills, though favourably expounded, are yet to be construed according to the common rules of the courts of law and equity. Therefore a devise to *J. S.* and his heirs, the remainder to *J. D.* and his heirs, is void, because the law in no case will allow a limitation of a fee upon a fee; because by the devise to *J. S.*, and his heirs, the devisor has transferred the whole estate to him, and then the limitation over must be void: nor can this devise be good by way of future interest, or a remainder to vest upon a contingency, because no man can say when the heirs of *J. S.* will fail; and to allow the remainder to *J. D.* to be good upon such a distant contingency, is to perpetuate the estate in the family of *J. S.* to preserve a remainder in *J. D.*, which probably may never vest. Co. Litt. 18. Dyer, 33. 3 Chan. Ca. 35.; *vide supra*, letter (I).

|| To determine whether any given limitation be valid, it must first be considered whether it is a *remainder* or an *executory devise*. Now it is a general rule that a limitation which *may* take effect as a remainder shall not be construed an executory devise. And this rule is not affected, though the probability is that a contingent estate will not take effect during or by the time of the determination of the particular estate; for it is sufficient if it *may* do so. Fearne, C.R. 394. and see Gilb. Us. by Sugden, 260. note

If, then, a testator by his will limit a particular estate for life which vests in possession on his death, and devises an estate in remainder on some contingency which *may* happen during the continuance or immediately on the expiration of the estate for life, it matters not how remote such contingency may be; for, if the remainder vest at all, it must vest before or at the instant of the death of the tenant for life, so that there is no question as to a perpetuity. See Fearne, C.R. 561. note (h) II.

So, if the particular estate be an estate-tail, testator may limit remainders on contingencies however remote; for neither in this case does the reason of the law as to perpetuity apply: the inheritance is under the control of the tenant in tail, and may be aliened by him. Fearne, C.R. 522. note by Butler.

Fearne, C.R. 502. See opinions of Mr. Booth and Mr. Charles Yorke, 2 Cas. & Op. 432. Lord Chancellor Northington, 1 Eden, 415, 416. See Chapman v. Brown, 3 Burr. 1626.

But it seems there is one species of contingent remainder, an estate to a child of an unborn person, which the law will not under any modification endure. "An estate may be limited by way of contingent remainder to a person not *in esse* for life, or as an inheritance; yet a remainder to the issue of such contingent remainder-man as a purchaser is a limitation unheard of in law, nor ever attempted, as far as I have been able to discover."

Fearne, C.R. 251. 561. note (h) II. "This is called a possibility upon a possibility, which Lord Coke tells us is never admitted by intendment of law."

But though an estate cannot be limited to the issue of an unborn person to take as purchasers, yet it is certain that successive remainders to persons not *in esse*, who are not in the relation of father and son, may be valid.

Thus:—A devise to *Albemarle* (a person *in esse*) for life; remainder to trustees during his life to preserve contingent uses; remainder to the first and other sons of *Albemarle* (he having no issue) in tail-male; remainder to the next younger son or any other younger son of *F.B.* (the father of *Albemarle*, who had then no other younger son than *Albemarle*) who should attain the age of twenty-one years for life; remainder to trustees during his life as before; remainder to the first and other sons of the body of such next younger son who should live to attain the age of twenty-one years successively in tail-male; with remainders over.

2 Cas. & Op. 437.

Albemarle died without issue. *F.B.* had another younger son, *Thomas*, who was born after the death of the testator, and who attained twenty-one in the lifetime of *Albemarle*. Mr. Booth wrote, "*Thomas* is tenant for life, with remainder to trustees during his life to preserve the contingent remainders, as far as they are good in point of law." And in another part of the same opinion the learned gentleman clearly held, that such contingent remainders subsequent to the estate of *Thomas* were not valid. Of the same opinion was Mr. Charles Yorke, who thought that *Thomas* on coming *in esse* took a contingent remainder, and that the remainders over were void. In this case we observe that, notwithstanding the prior contingent estate to the issue of *Albemarle*, the contingent estate to his unborn brother for life was held good. But here a remark by Mr. Yorke. He said, "A contingent remainder must vest during the life, or immediately upon the death, of the devisee of the particular estate which precedes it, such devisee being *in esse* at the time when the will speaks; but it cannot be made to wait or expect the vesting of another estate, prior in limitation, and equally contingent with itself. The law does not allow a contingency to depend upon a contingency, or one possibility to be thus raised upon another." Hence, then it may be urged, if *Albemarle* had died after the testator, and before *Thomas* attained twenty-one, but leaving a son in whom an estate in tail-male would have vested, and then such

2 Cas. & Op. 440.

such son had died after *Thomas* had attained twenty-one and without issue, yet the remainder to *Thomas* would have been void, because it vested not during the life of *Albemarle* but was saved by a possibility, *Albemarle's* having issue. If this be correct, it is obvious it affords a rule which may oftentimes be of great importance in the construction of devises of limitations of contingent remainders.

John Duke of Marlborough devised real estates to several persons for life, with remainders over to their first and other sons respectively in tail-male, with a clause that, on the birth of each and every son to be born of the tenants for life, certain trustees should revoke the uses limited to their respective sons in tail-male, and in lieu thereof limit the premises to the use of such sons for their lives, with immediate remainders to the respective sons of such sons severally and respectively in tail-male. Lord *Northington C.* said, "This clause being directory and compulsory to the trustees (for every legal direction this court will compel a trustee to perform), the provision is in substance neither more nor less than this—a clause by which the testator makes his great grandson (who was at the time of the making of the will unborn) tenant for life, with a limitation to the sons of such grandson as purchasers in tail." His Lordship declared, that the clause of revocation and re-settlement, as tending to a perpetuity and as repugnant to the estate limited, was void and of none effect.

Duke of Marlborough v. Earl Godolphin, 1 Eden, 404. S.C. 5 Br. P.C. 592.

So *C. M.* conveyed to the use of himself for life; remainder to trustees for the term of 1000 years; remainder to Sir *H. M.* for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders to his first and other sons in tail-male, with remainders over. And the settler directed that the trustees of the 1000 years' term should, after any contract for alienation by any person on whom an estate was thereby settled, raise a sum of money for the person next in remainder. Sir *R. P. Arden, M.R.*, declared the trusts of the term void, as tending to a perpetuity, and being inconsistent with the rights of the several persons to whom estates-tail were limited by the deed.

Mainwaring v. Baxter, 5 Ves. 457.

So, a testator devised real estate in strict settlement, and bequeathed leaseholds to trustees in trust to pay the rents and profits to the persons for the time being entitled under the limitations of the real estate; with a power to the trustees at any time, with the consent of the persons so entitled, or if minors at their own discretion, to sell and invest the produce in real estate to the same uses. By virtue of the limitation of the real estate, the first tenant in tail upon coming *in esse* took the absolute interest in the leaseholds; and the question raised was, whether the power of sale should operate so as to prevent the vesting of such absolute interest till a tenant in tail attained twenty-one years. But Lord *Eldon C.* declared that the leaseholds vested absolutely in the first tenant in tail. "I think the power of sale is void; for it may travel through minorities for two cen-

Ware v. Polhill, 11 Ves. 257. S.C. cited 2 Ves. & B. 64. Phipps v. Kelynge, *ibid.* 57. 62.

"turies; and if it is bad to the extent in which it is given, you cannot model it to make it good."

See Sugden
on Pow. 148.
(4th edit.)

But the usual power of sale in a marriage settlement is not void through it may travel through minorities, because it does not suspend the vesting of the absolute estate in the lands. It was not contended in *Ware v. Polhill* that the first tenant in tail, on attaining twenty-one, might not have disposed of the leaseholds absolutely discharged of the power of sale, but still the power was void.

See 9 Ves. 154.
11 Ves. 285.

Butler's note,
Ferne, C.R.
516.

An executory devise or bequest is void, if by possibility it may postpone the vesting of the absolute estate or interest in the subject given for a longer space than a life or lives in being and twenty-one years after, allowing a few months more for gestation; or for a longer period than twenty-one years and a few months, without reference to a life or lives in being. This vesting of the absolute estate, the possible postponement of which beyond the allowed limits renders the devise or bequest void, "must be understood of an absolute vesting, or of an estate or interest so vested as to be subject to no ulterior limitation by which it is liable to be defeated."

Long v. Black-
all, 7 T.R. 100.

As to the period within which an executory devise must vest, see *Bengough v. Edridge*, 1 Simons, 173., and the cases there cited; also 1 *Sand. U. & T.* 197. One of the cases here referred to was peculiar. Testator bequeathed leaseholds to his son *Thomas*, and upon his death without issue male then living (which happened), then to the child with which his wife was *ensient*, in case it should be a son, during his life; and after his decease, then to such issue male or the descendants of such issue male as at the time of his death should be his heir at law; and in case at the time of the death of such child, there should be no such issue male, nor any descendant of such issue male, then living, or in case such child should not be a son, then he bequeathed the same to *Phillippa Long*, her executors, administrators, and assigns. Testator's wife was at the time of the making of his will, and of his decease, *ensient* with a son, who was afterwards born, but who died without issue. Held, that the gift to *Phillippa Long* was valid and took effect. Here it is evident that this executory bequest might by possibility have postponed the vesting of the absolute interest during the months which the testator's wife was *ensient*, the life of the son, a period for the gestation of such son's issue male if he died leaving issue *en ventre sa mere*, and, lastly, twenty-one years for the minority of such issue male.

Bristow v.
Boothby,
2 Sim. & Stu.
465. Morse v.
Lord Ormonde,
1 Russ. 382.
and the cases
there cited.

If a testator devise lands to *A.* for life, remainder to his first and other sons in tail-male, remainder to his daughters in tail-general, and in default of *all* the issue of *A.* he creates a charge, it is void for remoteness;—for it is evident the limitation of the charge not being on failure of the preceding estates, but of *all* the issue of *A.*, it could not take effect as a remainder; and, considered as an executory bequest, its vesting might have been postponed far beyond the allowed period.

It is to be noted in the above case that the power, which any of
the

the persons seised in possession of a prior estate-tail would have, to bar the charge did not sustain it. Mr. *Butler* writes, "Speaking generally, no period is too remote for the limitation of an executory estate or interest engrafted on an estate-tail previously limited. If land were limited to *A.* in tail, and, if *A.* should have no child who attains the age of twenty-seven years, to *B.*, the limitation to *B.* would be good." This position is undoubtedly correct; but the estate to *B.* is good, *not* because it might be barred by *A.*, but because it could not in any event prevent the lands being aliened, so as to create a perpetuity. If the limitation had been to *A.* in tail-male; and, if *A.* should have no child who attains twenty-seven, to *B.*, the limitation to *B.* might be barred by the recovery of *A.*, but nevertheless it would be void as too remote. *A.* might have died leaving an only child, a daughter *en ventre sa mère*, and she might afterwards have died under twenty-seven; thus, the vesting of the inheritance might have been suspended for upwards of twenty-six years, if the limitation to *B.* were to be held good. In order to be good, the executory estate must be limited to take effect on failure of the issue *inheritable* to the estate-tail.

Fearne, C.R.
522. note.

See Benson
v. Hodson,
1 Mod. 108.

If an estate were devised to *A.* in tail-male, remainder upon the death of *A.* without issue generally to *B.*, it is apprehended the limitation to *B.* would be valid, but not as an executory devise but as a contingent remainder. It is obvious, however, that the limitation to *B.* would not be good unless the estate-tail were created by the same instrument.

Jones v.
Morgan,
3 Br. P.C.
332. Fearne's

C.R. Appendix. *Bankes v. Holme*, Dom. Proc. cited and stated in note, 1 Russ. 394.

Lands were limited to several persons for life successively, with limitations to their issue respectively, in strict settlement, subject to a trust to accumulate the rents during the minorities of tenants for life and in tail in possession, and to pay the produce of such accumulations to such person or persons respectively as should immediately upon the expiration of such minority or respective minorities as aforesaid, or the death or deaths of such minor or minors as aforesaid, be tenant or tenants in possession, and be of the age of twenty-one years. It was held that this trust was void, because the accumulation *might* have continued for ages, and so long would the absolute interest in the accumulated fund have continued in suspense. Sir *W. Grant*, M.R. stated the effect of the trust to be the same as if an estate had been limited so as to vest only in the first *descendant* of a person in being who might attain twenty-one, which would of course have been too remote, and void.||

Lord South-
ampton v.
Marquis of
Hertford,
2 Ves. & B. 54.
Marshall v.
Holloway,
2 Swanst. 432.

A. devised his manors, messuages, &c. to the Drapers' company, and their successors, upon trust to convey to *B.* for life, and to his first son and all other his sons for life, and to their issue male for life; and for want of such issue to *J.S.* for life, and to his issue male for life, &c., and so to a great number of them for life, and so to convey *toties quoties*; and the court held this attempt to make a perpetual succession of estates for life to

2 Vern. 737.
Humberston
and Humber-
ston decreed.
[1 P. Wms.
332. S.C. Go-
dolphin v.
Godolphin,
1 Ves. 21. S.P.]

|| See the decree 1 Cox's P.W. 333. It is rather ambiguously worded, but it must be understood to mean that

all the persons named in the will who were in existence at the time of the testator's death were made tenants for life, and not persons born afterwards but before the decree. 1 Eden, 423. 4 Ves. 332, 333. 2 Cas. & Op. 441.||

Hucks v. Hucks, 2 Ves. sen. 568.

||So where in marriage articles the intended husband covenanted to settle lands for the son begotten on the wife's body, and to the first son of such first son, with remainders over, and there was one son of the marriage, it was decreed he should have an estate-tail.

Chapman v. Brown, 3 Burr. 1626. See as to the doctrine involved in this and the following case, Butler's note Fearne's C.R. 204.

So it was thought by Lord Mansfield and Wilmut Js., in case of a devise to an unborn person for life, remainder to his first and other sons in tail, that the unborn son of an unborn son could not take; and that, to effectuate the general intention of the testator, the word "son" should be construed a word of limitation, and an estate-tail given to the devisee.

Nichol v. Nichol, 2 Bl. 1152. And see the cases 1 Powell, Dev. 410. note, (3d edit.)

So, on a devise to the second son of *B.* (unborn) for life, and after his death, or in case he should inherit his paternal estate, then to *his second son* and his heirs male, with divers remainders over; it was held, that to effectuate the general intent of the deviser such second son would take an estate to him and the heirs male of his body, determinable on the accession of the paternal estate.

Routledge v. Dorril, 2 Ves. jun. 357.

This doctrine of *cy près* is not applicable to bequests of personal estate.||

Abr. Eq. 207. Williams and Williams. A pecuniary legacy cannot be limited after a dying without issue. 1 Bur. Rep. 272.

A. devised all the rest of his personal estate by leases in trust, or otherwise, to his three nephews, *A.*, *B.*, and *C.*, and makes them executors, and wills, that they shall give bond to each other, that in case either die without issue of his body, to leave at their death all the said chattels and personal estate to the survivors and survivor of them; and the bill was to have the said bonds given, but was dismissed, being an attempt to entail a personality.

Stratton v. Payne, 3 Br. P.C. 257.

[And that the limitation of a personal estate to one in tail vests the whole in him is proved by many cases.

Pelham v. Gregory, 5 Br. P.C. 435. Duke of Montague v. Lord Beaulieu, 6 Br. P.C. 255. || 17 Ves. 479. 3 Mer. 183.||

1 P. Wms. 290. Seale v. Seale, Pre. Chan. 421.

Where one devised that all his money in the government fund should be laid out in the purchase of lands, and settled on his eldest son *A.* and *the heirs male* of his body, remainder to the second son *C.* and the heirs male of his body; and bequeathed the rest of his personal estate to *A.* and *the heirs male of his body*, remainder over in the same manner; Lord Chancellour held, that the personal estate (*viz.* the residue after what was to be laid out in

in purchase of lands) could not be entailed, but the whole vested in the eldest son.

So, where long exchequer annuities for ninety-nine years were given by will to trustees for the residue of the term, *in trust* for *E.* for so many years of the said term as she should live; afterwards to the plaintiffs for so many years of the said term as they or the survivor of them should live; and after the decease of the survivor, *in trust* for the *heirs of their bodies* lawfully begotten, for all the residue of the said term; and for default of such issue, in trust for the defendant;—Lord Chancellor *King* held the remainder over to be void, and that the whole vested in the plaintiffs, to whom the limitation was for life, with remainder to the heirs of their bodies; and accordingly the annuities were decreed to be sold, and the money to be paid to the plaintiffs. In this case the devise was only *in trust*, and yet the rule was the same.

So, where a testator by his will devised that 400*l.* should be put out on good security for his son *T.*, that he might have the interest of it for *his life, and for the lawful heirs of his body*; and if it should so happen that he should die without heirs, it should go to his youngest son *J. B.*; Lord *Hardwicke* decreed that the whole vested in the first taker, and the limitation over was too remote.

Again, *R. T.* by will gave the *profits and half-yearly dividends* of 4000*l.* capital bank stock to Sir *W. P.* during his life; together with the income and payments of six annuities, payable at the exchequer, to *receive the payments* during his life. And gave his dwelling-house in *London* (being leasehold), and the use of all the furniture and household linen therein, to *M. C.* during her life: and gave to *L. A. P.* (daughter of Sir *W. P.*) his dwelling-house and estate at *O.* and the use of all the goods, furniture, and linen there, together with all the cattle and cart horses, and the utensils in husbandry, as well as some other estates and leasehold houses, *during the term of her natural life.* And after the death of *M. C.*, he gave to *L. A. P.* his dwelling-house in *London*, and the use of the goods therein during her life. And after the death of Sir *W. P.*, he gave to *L. A. P.* the *dividends* on the 4000*l.* bank stock, and all the *payments* growing due on the said exchequer annuities *during her life*; and after her decease, he gave, bequeathed, and devised all the afore-mentioned land, houses, bank stock, and exchequer annuities to the *heirs male of her body*, lawfully begotten, for ever; together with all the furniture in both his houses: and for *want of such issue*, he gave and bequeathed all the said respective estate, bank stock, and annuities unto *W. D.* for life, remainder to the heirs male of his body, remainder over.

Upon the death of *R. T.*, *L. A. P.* entered on the estates devised to her, suffered a recovery, and sold the real estates; afterwards she devised and bequeathed all her real and personal estate to the said Sir *W. P.* (her father); his heirs, executors, and administrators. Her father surviving her, by his will, after giving

Dod v. Dickinson,
Vin. vol. 8.
p. 451. pl. 25.

1 Ves. 153.
154. Butterfield v. Butterfield.

Daw v. Pitt
(since Earl of Chatham) and Western,
heard at the Rolls July 1766.

several legacies, gave and devised all his real estates, and all the residue of his personal estate (which residue included the leasehold estates, furniture, bank stock, and annuities devised as above to *L. A. P.*) unto the defendant *W. P.*, his heirs, executors, administrators, and assigns. After the death of Sir *W. P.* the plaintiff *W. D.* claimed the leasehold estate, bank stock, and exchequer annuities, by virtue of the remainder limited to him in the will of *R. T.*; but the Master of the Rolls held the limitation over to *W. D.* to be void, and that the whole vested in *L. A. P.*, and therefore dismissed the plaintiff's bill.

June 1770.
Vide Earl
Chatham v.
Tothill,
6 Bro. Parl.
Ca. 450. 1771.

But, upon a re-hearing before the Lords Commissioners of the Great Seal, they reversed the order of dismissal, and decreed that the plaintiff should have the benefit of the said leasehold estates, bank stock, and exchequer annuities during his life. Afterwards, however, upon an appeal to the House of Lords, the Lords reversed that decree, and thereby established the decision of the Rolls.

Glover v.
Strothoff,
2 Br. Ch.
Rep. 33.

Again, *A.* possessed of a considerable real and personal estate, (among other bequests) made one in the following words: "And further, I hereby appoint my said trustees to lay out at interest, upon real and personal security, as they shall think proper, the sum of 4000*l.* sterling, part of my said real and personal estate, and to make payment of the interest of the said sum of 4000*l.* only to *R. G.*, the younger son of the said *R. G.*, during all the days of his natural life, and to make payment of the principal sum itself to the heirs to be lawfully procreate of his body; but declaring that the above interest shall not be affectable by the debts or deeds of the said *R. G.* (the son), and in the event of his death, without lawful issue of his body, or of his selling, as-signing away, or otherwise disposing of the above interest, or any part of it, my will is, that the said sum of 4000*l.* together with 1500*l.* sterling further, making in all the sum of 5500*l.* sterling, shall pertain and belong to *J. H. W.*" One question was, Whether the remainder over of the 4000*l.*, and the legacy of 1500*l.* after the death of *R. G.* (the son) without issue of his body, were not too remote? It was argued, in support of the limitation, that it was good, from the manifest intention of the testatrix that it should take place upon the event of (the son) *R. G.* dying without leaving lawful issue. But on the other side it was contended, that the 4000*l.* was an estate-tail in money executed in *R. G.* the first taker, and the cases of *Butterfield v. Butterfield*, 1 Ves. 133. and *Daw v. Pitt*, *supra*, were cited; and it was said, that the case was too strong to admit of circumstances of the intent of the testatrix to contradict it. And *per* Lord *Thurlow*, With respect to the 4000*l.* personalty, the cases of *Butterfield v. Butterfield* and *Daw v. Pitt* have confirmed the doctrine upon that subject, that it is too late now to argue upon the distinction of principal and interest, or to insist upon circumstances of the intent; the rule must take place with respect to the 1500*l.* that fell under the same objection. And his lordship decreed the remainder over too remote.

Again,

Again, where *S.* by his will gave as follows, "*Item*, I give and bequeath to *T. M. S.*, during the term of his natural life, the interest of 1000*l.* 3*per cent.* consol. bank annuities, to commence the day after my death, to be regularly paid from time to time, in ten days, or as soon as possible after the same become due; at his decease it is to *devolve* to the *heir* of his body lawfully begotten, and in default of issue, I give and bequeath the same to the heirs of *A.* that shall be then living, in equal shares to be divided:" the Master of the Rolls held, that the legacy vested absolutely in *T. M. S.*

Robinson v. Fitzherbert, 2 Br. Ch. Rep. 127.

But where personalty is not so given, as that the words would create a clear tenancy in tail in land, the law is otherwise.

Therefore, where one, being possessed of a considerable personal estate, made his will in *India*, of his own handwriting, and gave several legacies, and *inter alia* to the heirs of his brother *R. W.* 300*l.*, and gave the residue of his estate to his brother *I. W.*, and to his heirs male, *equally to be divided among them, share and share alike*; three questions arose, first, Whether *I. W.* should take the whole, and the words *equally to be divided* be rejected? Secondly, Whether *I. W.* and his sons should take as tenants in common? Thirdly, Whether the father should take for life, and after his death the residue should go to all his sons equally? The Lords Commissioners, *Smythe* and *Bathurst*, were clear of opinion that, according to the true construction, the father should take the whole for life, and then it should go to his sons equally.

Wilson v. Vansittart, Ambl. 562. ||And see note, 2d edit.||

Again, *D.* being resident in *Calcutta*, and possessed of *only* personal property, made her will, and after giving some legacies, gave all the rest, residue, and remainder of her estate, both real and personal, unto *L.*, to be placed at interest until her age of twenty-one years or day of marriage, and then the whole thereof, together with the interest accumulating thereon, to be paid to and for her use, during her natural life; and, from and immediately after her decease, she gave, devised, and bequeathed the same unto the heirs of her body lawfully begotten, *equally to be divided between them*, share and share alike; and in default of such issue, or the death of the said *L.* before her said age of twenty-one years or day of marriage, she then gave, devised, and bequeathed the said residue and remainder of her estate unto her, the testatrix's, brother. The question was, Whether under this will *L.* took an estate for life, or an absolute interest in the personal property? And it was decreed at the Rolls, that *L.* took only an estate for life in the property in question. And that decree was affirmed on appeal to the Chancellor.

Jacobs v. Amyatt, 4 Br. Ch. Rep. 542.

And it hath been resolved, that if the first estate for life be a trust estate, and the remainder to the heirs of the body a legal estate, the latter will take effect; because, if such limitation had been applied to land, it would not have created an estate-tail.]

Knight v. Ellis, 2 Br. Ch. Rep. 570.

||Devises to charitable uses are void; see title "*CHARITABLE USES AND MORTMAIN.*" ||

¶(a) To avoid a will for uncertainty, it is not enough that the dispositions in it are so absurd and irrational that it is difficult to believe they could have been intended by the testator, but it must be incapable of any clear meaning. 2 Sim. & Stu. 295.¶

2. *By Incertainty (a) in the Description of the Thing devised.*

Lev. 130.
Sid. 191.
Raym. 97.
Bowman
and Milbank.
¶See Mohun
v. Mohun,
1 Swanst. 201.
& note 203.¶

Devises are void and rejected where the words of the will are so general and uncertain, that the testator's meaning cannot be collected from them; and therefore, where a man by will gave *all to his mother*, it was adjudged that these general words did not carry the lands to the mother; for since the heir at law has a plain and uncontroverted title, unless the ancestor disinherits him, it were severe and unreasonable to set him aside, where such intention of the testator is not clearly evident from the will; for that were to set up and prefer a dark, and at best a doubtful, title to a clear and certain one.

Rose v. Bartlett, Cro. Car. 293.

If one having lands in fee, and other lands for years, devises all his lands and tenements, the fee-simple lands only pass; but if a man had leases for years only, and no fee-simple lands, by the devise of all his lands and tenements the leases for years pass, for otherwise the will would be merely void.

Day v. Trig, 1 P. W. 286.

¶Testator devised all his *freehold* houses in *A. Street, London*. He had leasehold but *no* freehold houses in *A. Street*. Held, that the leasehold houses passed; for it was the intention of the testator to pass some houses, and he having no freehold houses there, the word "*freehold*" should rather be rejected than the will void.

Addis v. Clement, 2 P. W. 456. See Lowther v. Cavendish, in which leaseholds were from the presumed intention of the testator held to pass by similar words. 1 Eden, 99.

A. seised in fee of lands, and possessed of a renewable church-lease of other lands in *D.*, all in the possession of *B.* and *C.* as tenants, and which lands could scarcely be distinguished, devised "all his messuages, lands, and tenements in *D.* which he then stood seised or possessed of or any ways interested in, and which were in the possession of *B.* and *C.*, unto *J.* for life, remainder to *H.* in tail, remainder to *R.* for life with power to jointure, and remainders over in strict settlement; testator bequeathed all his goods and chattels, money and personal estate to *J.* Held, that the leasehold passed with the freehold.

Turner v. Hustler, 1 Br. C. C. 78.

Testator having tithes in fee, and leases of tithes perpetually renewable, devised all his lands, tenements, *tithes*, &c. to *A.* The limitations were fit for an estate of inheritance. Held, that the leasehold tithes passed.

Whitaker v. Ambler, 1 Eden, 151.

Testator bequeathed all his personal estate to his wife; then devised all his real estates to her for life with remainders over. Held, that leaseholds did not pass under the words real estates.

Davis v. Gibbs, 3 P. W. 26. See Lord Chancellor Eldon's observations upon this case, 2 Bos. & P. 514.

A. seised in fee of lands in *Kent*, and possessed of a mortgage term in *Essex*, devised all her manors, messuages, lands, tenements, hereditaments, or real estate whatsoever in *Kent* and *Essex* of which she was any way seised or entitled to. By a residuary clause she gave all her personal estate, and all mortgages, bonds, &c. Held, that the mortgage term passed by the residuary clause.

A. seised

A. seised of lands, &c. in the county of *H.*, and in possession as mortgagee of a leasehold messuage in the town of *K.*, and having other mortgage estates, devised all his freehold, copyhold, and leasehold messuages, &c. in the county of *H.* and town of *K.*; and gave all the residue of his real estate, and all other his estates and interests whatsoever vested in him as mortgagee. Held that the mortgage leasehold at *K.* passed under the first devise. There were, it was observed, mortgages to satisfy the residuary gift.

A. devised all his lands and tenements in or near *Fowey*, but his will was attested by two witnesses only. Held, that though testator should have leasehold it would not pass because there was freehold. The defective execution affords no evidence of the testator's intention.

Testator had 230 acres of freehold and 160 acres of church renewable leasehold, composing one farm, and let to one tenant, at one rent reserved to testator, his heirs and assigns. He devised all his manors, messuages, or tenements, houses, *farms*, lands, hereditaments, and real estate. He gave all the rest and residue of his ready money, rents in arrear, stock, jewels, and personal estate whatsoever. Held that leasehold passed under the first devise. The court relied upon the word *farms*. (*a*)

Testator seised of considerable freehold estates, and of two leasehold farms for a term of 1000 years each, devised all and every his several messuages, lands, tenements, and hereditaments whatsoever, which he was seised of, interested in, or entitled to, to uses in strict settlement. (*b*) Held that the leasehold did not pass.

Leaseholds will not pass by the words "messuages, lands, tenements, and hereditaments," unless intention appear that they shall. See Lord *Eldon's* judgment for a review of the prior cases.

Testator having leasehold and copyhold in *B.* and copyhold in *W.*, devised his messuages, lands, tenements, and hereditaments in *W.* and *B.* to his wife for life, and after her decease, "all his "estate in *B.*" over. After the death of the wife, it was held that the leasehold passed by "*all his estate.*" The leasehold and copyhold had been occupied together for some time.

A devise of messuages, lands, tenements, and hereditaments, and monies in the funds, to trustees, their heirs, executors, administrators, and assigns, according to the different estates, and to receive the rents and profits, subject to *ground-rents*, passes leasehold.

If a lease or leasehold premises be specifically bequeathed, and the lease expires and is renewed in the testator's lifetime, the legatee is not entitled to the renewed lease. But a testator may dispose of the future as well as his present interest in a chattel real; it is therefore a question of intention what is given — whether only the interest which he had at the time of executing the will; or all the interest, though subsequently acquired, which

Woodhouse v. Meredith,
1 Mer. 450.

Chapman v. Hart, 1 Ves. sen. 271.
Sampson v. Sampson,
1 Ves.&B. 337.

Lane v. Earl Stanhope, 6 T. R. 345. See *Hodgson v. Merest*, 9 Pr. 556.

(*a*) See *Doe v. Earl of Lucan*, 9 East, 448.

Pistol v. Richardson, 2 P. W. 459. in note.

(*b*) See Lord *Eldon's* observations, 6 Ves. 641. as to the limitations being inapplicable.

Thompson v. Lawley, 2 Bos. & P. 303.

Roe v. Bird, 2 W. Bl. 1301.

Hartley v. Hurle, 5 Ves. 540.

James v. Dean, 11 Ves. 394. & 15 Ves. 239.
Slatter v. Norton, 16 Ves. 197. See *Roper on Legacies*, ch. v. § 1.

he might have at his death in the leasehold premises : that intention is to be collected from the words used.

Colegrave v.
Manby,
2 Russell, 258.

A. assigned premises held under a hospital lease, and all his estate and interest terms of years yet to come and unexpired, benefit and advantage of renewal and property whatsoever, to trustees upon trust out of the rents and profits to renew ; then for *A.* for life, remainder for his children, and in default of children for *A.*, his executors, administrators, and assigns ; proviso if *A.* paid the rent and procured the renewals, he might take the rents and profits for his own use. *A.* afterwards devised the same leasehold premises to the same trustees upon trust for such persons as should be entitled to his freehold estates, which were in strict settlement : with power for the trustees, out of the rents and profits of the leasehold premises, to pay the rents and perform the covenants, as well in the then lease as in any lease thereafter to be obtained ; and to renew the lease when requisite. *A.* afterwards renewed the lease and died without issue. Held that the renewed lease passed by the will.

Haslewood v.
Pope, 3 P. W.
322. Byas v.
Byas, 2 Ves.
sen. 164. Haw-
kins v. Leigh,
1 Atk. 587.
Goodwyn v.
Goodwyn,
1 Ves. sen.
226. Tendril v.
Smith, 2 Atk.

It has been long established that general words in a devise, as "lands, tenements, and hereditaments," or "all my real estate," are not sufficient of themselves to pass copyholds. But if the testator having copyholds had surrendered them to the uses of his will, that was deemed evidence of his intention, and they were allowed to pass. And although they were not surrendered, yet if the implied or expressed intention of the testator required they should pass by a general devise, a court of equity would in favour of creditors, wife, and children, presume a surrender. (*a*)

85. Milbourn v. Milbourn, 2 Br. C. C. 64. Lindopp v. Eborall, 3 Br. C. C. 188. Brooke v. Gurney, cited 5 Ves. 559. Judd v. Pratt, 15 Ves. 395. See Doe v. The Earl of Lucan, 9 East, 448. (*a*) Hills v. Downton, 5 Ves. 557.

Now by 55 Geo. 3. c. 192. the will of a copyhold tenant will pass his copyhold tenements as effectually as if he had previously surrendered them to the uses of such will. This act, it is apprehended, merely supplies the formal surrender required by the customs of manors to give effect to a subsequent will : it cannot supply that evidence of intention which a court derived from the fact of a surrender being made. It may then perhaps be safely said, that even now general words in a devise will not pass copyholds unless the court can satisfy itself that such words should pass them in order to effectuate the intention of the testator. (*b*)||

(*b*) See Doe
v. Lucan,
9 East, 448.

2 And. 125.

So, if a man being seised of a messuage in *A.*, and of a messuage and several lands in *B.*, devises to *J. S.* his house in *A.* with all other his lands, meadows, pastures, with all and singular their appurtenances whatsoever in *B.*, yet the house in *B.* shall not pass ; for though by a feoffment or lease of lands in *D.* houses shall pass, because to be taken most strongly against the feoffor, &c. and the land passing, the house thereupon must also pass ; yet wills are to be taken according to the intention of the devisor ; and when he devises his house in *A.* and lands in *B.*, it

cannot

cannot be presumed that he would have more pass than by the words is expressed.

|| But it seems, if a man, having both lands and houses in *Dale*, devise all his lands in *Dale*, his houses will pass to the devisee.||

Ewer v. Heydon, Moor, 359. pl. 491. and see Godb. 352. pl. 447.

If a man is seised of lands in a vill, and in *A.* and *B.*, two hamlets within the same vill, and devises all his lands in the vill and in *A.*, and dies, no part of the land in *B.* shall pass; for his naming one hamlet only, fully shews his intent that the lands in the other should not pass.

Dyer, 261.

But where a man, having two several moieties of lands by purchase from the same person, one lying in *Kent*, and the other in *Essex*, devised all his moieties in *Kent*; it was held that both passed, for the words being *all his moieties*, they cannot be satisfied with one moiety only.

Bulst. 117. 2 Bulst. 176. Hob. 173.; vide Noy, 112. Cro. Eliz. 658. || See 5 Taunt. 323. ||

|| Testator devised his messuage in *High Street*, wherein his mother inhabited, and all and every his buildings and hereditaments in the same street. Testator had only one messuage in that street, but he had two cottages in a lane not a thoroughfare, to which the only entrance was from the *High Street*. Held, that the cottages passed. *Bayley J.* observed, "If the description is precise, and there are premises to satisfy it, and there are also other premises, then the others will not pass. If, however, the description is not precise, if you cannot satisfy the will, unless additional property passes besides that which is described, then you must presume that the testator intended to pass that property, and that his description is inaccurate."

Doe v. Roberts, 5 Barn. & A. 407.

Testatrix devised all her freehold and copyhold estates in or near *Latchingdon* near *Maldon* in the county of *Essex*. She had a copyhold estate at *Latchingdon*, and a freehold field in *Maldon*, between four and six miles distant from the copyhold. Held, that the freehold field did not pass. ||

Doe v. Pigot, 1 B. Moore, 274.

If one seised of land, called *Hayes Land*, lying in two vills, viz. *A.* and *B.*, devises all his land in *A.*, called *Hayes Land*, to his youngest son and his heirs; and in another part wills, that if his said son dies without issue, that his wife shall have *Hayes Land*, and dies, and the son dies without issue, the wife shall have only that part of *Hayes Land* which lies in *A.* because no more was devised to the son: but *per Popham*, if the devise had been to the eldest son, and if he dies without issue, perhaps he should have had all, because the eldest son had all, part by devise, and part by descent.

Cro. Eliz. 674.

If a man is seised in fee of two houses in *D.* adjoining the one to the other, and the one is in the possession of *A.*, and the other in the possession of *B.*, which is also the corner house in the street of the town; and he devises his corner house in the possession of *A.* and *B.*; by these words, only the house which is in the possession of *B.* shall pass, which is the corner house, and

Roll. Abr. 613. Cro. Car. 447. vide Styl. 261.

and not the other house which is in the possession of *A.*, though it be next adjoining thereto; for his intent appears to be so.

2 Leon. 120.
Throp and
Thompson.

A. sold land to *B.*, but before a conveyance was executed *B.* sold the same lands to *C.*, and then *A.* conveyed to *C.*, and *C.* being thus seised, devised the land to his younger son in these words, *I bequeath to R. my son all my land which I purchased of B.*, whereas in strictness of law he purchased them from *A.*, who conveyed them to him; yet this was allowed to be a sufficient description of the land, and, consequently, a good devise of it, because the purchase was really made from *B.*, the money being paid to him.

Welby v. Wel-
by, 2 Ves. &
B. 191.

|| Testator devised his manors, lands, tenements, and hereditaments situate at *Sapperton, &c.*, "*which were given and devised to me by my brother's will.*" The fact was otherwise; but *Sir W. Grant, M. R.* held that the words in italics were not words of intended restriction, but merely an erroneous description, and the lands passed.

Oxenforth v.
Cawkwell, 2
Sim. & Stu. 558.
But see Wil-
son v. Mount,
3 Ves. 191.

So, a testator who was seised of copyhold lands, part only of which he had surrendered to the use of his will, devised all his freehold and copyhold lands and hereditaments whatsoever and wheresoever, "the copyhold parts thereof having been duly surrendered to the uses of this my will." *Sir John Leach V. C.* said, — "This simply affirms that he had surrendered to the use of his will all the copyhold part of his gift; and because he happened to be in one particular mistaken in the fact affirmed by him, I cannot therefore assume that he had an intention which is neither warranted by the particular expression relied upon nor reconcileable to the other parts of the will." The unsundered copyholds passed.

Down v. Down,
7 Taunt. 543.

In a devise of a messuage and lands called *C. farm, now on lease to F.*, the words in italics were not allowed to circumscribe the former description; but a close formerly part of *C. farm* but not on lease to *F.* passed.

Doe v. The
Earl of Jersey,
1 Barn. & A.
550. S. C.
4 Barn. & C.
870. S. C. cited 2 Russell, 318.

So, a devise of "all my *B. F.* estate," was not restricted, though the same premises were in the will described as in the county of *G.* only, whereas they in fact extended into the counties of *B.* and *G.*

Pullin v. Pul-
lin, 3 Bing. 47.

But where a testator, after reciting that he was seised of divers freehold and copyhold lands in *Islington*, "and all which freehold and copyhold lands are subject to a mortgage thereof made by me for 1000*l.*," devised all and every his said freehold and copyhold lands;—held that freehold lands in *Islington* belonging to the testator but not subject to the mortgage did not pass.

Chalmers v.
Storil, 2 Ves.
& B. 222.

A devise in general terms is not restrained by a defective specification. ||

Cro. Car. 129.
Jon. 195. S. C.

If one devises his house wherein *J. S.* dwells, called *The White Swan in Old Street*, to *J. N. &c.* and dies, and at the time of his death and making the will *J. S.* occupied the entry only, and three of the upper rooms of the house, and others occupied the garden

garden and other parts of the house, yet all the house passes; for the house imports the whole house, and the sign of the *White Swan* makes it still more certain.

|| But on a devise of all my messuages in *T.* now in my occupation, and testator had two messuages in *T.* but only one in his occupation, held that that one only passed. *Doe v. Parkin*, 5 Taunt. 321.

So, too, in *Press v. Parker*, the court held that the words “in the occupation of” were not merely words of description, but denoted the quantity of the gift. 2 Bing. 456. See *Bodenham v. Pritchard*, 1 Barn. & C.

350. a similar decision on the words “as then enjoyed by him.”

A. being tenant for years of a house, gardens, stables, and coal pen, made the following bequest, “I give the house I live in and “garden to *B.*” Held that the stables and coal pen passed, though they were used for trade as well as for the convenience of the house. *Doe v. Collins*, 2 T. R. 498.

A testator devised all his manors, messuages, and lands, tenements and hereditaments, whether freehold, leasehold, or copyhold, in the parishes of *M.*, *C.*, and *W.*, or elsewhere in the kingdom of *England*. Testator had no property in *England* except a house and lands in the parishes enumerated; but he had a manor and about 7000 acres of land with an old mansion-house in *Wales*. *Quære*, whether the devise passed the *Welsh* estate? — Lord *Eldon C.* refused to compel a purchaser to take a title to that estate under the will. || *Okeden v. Clifden*, 2 Russell, 309.

If a man is seised of a messuage and two acres of land in *A.*, and of two acres of meadow in *B.*, and hath used and occupied the two acres of meadow, being four miles distant from his said house, together with his said house and lands in *A.*, and devises the house *cum omnibus et singulis pertinentiis suis adinde spectan.* to *J. S.*, the two acres of meadow shall not pass; for by the words *cum pertinentiis* lands pass not (*a*), but such thing only as may be properly appertaining; otherwise, if the words had been *cum terris pertinentibus*, for then the lands used therewith should have passed. *Cro. Car. 57.* 1 P. Wms. 605. [(a) But see the case of *Doe v. Martin*, 2 Bl. Rep. 1148. where, in compliance with the manifest intent of the testator, land was holden to pass

with a house under the word appurtenances. And in the case of *Gulliver v. Poyntz*, 5 Wils. 141. under a devise of *messuages, with all houses, barns, stables, stalls, &c. that stand upon or belong to the said messuages*, lands which were purchased with the messuages, and which, as well as the messuages, were in the testator’s possession at the time of making the will, were allowed to pass.] || And see *Co. Litt. 5. b.* and *Harg. note 1.* *Buck v. Norton*, 1 Bos. & P. 53. ||

|| Lands will not pass under the word “appurtenances” in its strict technical sense; they will pass if it appears that a larger sense was intended to be given to it. *Per Eyre C. J.* in *Buck v. Norton*, 1 Bos. & P. 53.

Under a devise of a rectory with the messuages, lands, &c. thereunto belonging, lands which had for a long period been occupied with the rectory were held to pass. || *Ongley v. Chambers*, 1 Bing. 485. See *Townsend*

v. Champernown, 1 You. & Jer. 538.

If *A.* devises several pecuniary legacies, and also some lands, and then devises all the rest and residue of his money, goods, and chattels, and other estate whatsoever, to *J. S.*, whom he makes *Chan. Ca. 262.*

makes executor, he having other lands, they shall pass by the will.

Roe v. Harvey,
5 Burr. 2638.

¶ Testator devised all the rest and residue of his estate whatsoever and wheresoever to his wife. Held that certain land, being the only real estate which testator had, passed by this devise. Lord *Mansfield* observed, the word "estate" carries every thing, unless tied down by particular expressions.

Doe v. Chapman, 1 H. Bl. 232. But see Doe v. Hurrell, 5 Barn. & A. 18.

In a subsequent case similar words passed real estate, though they were accompanied with limitations peculiar to personal property.

(See further as to the construction of the words "estate," "property," "effects," &c. &c. *division* (C) *ante*.)

Doe v. Tofield, 11 East, 246.

Under the phrase "*personal estates*" real property may pass, if it is clear that such was the testator's intention.

Dean v. Ke-meys, 9 East, 366.

And where by a will, giving the estate a local description and a name, the property was mistakenly called leasehold, the testator's freehold was held to pass, there being no other property answering the description.

Hardacre v. Nash, 5 T. R. 716. See *Silberschildt v. Schiott*, 3 Ves. & B. 45. 50.

So, the word *legacy* has been allowed to comprise real estate.¶

Roll. Abr. 613.
¶ See *Clement v. Cassy*, Noy, 48.¶

But if a man seised in fee of three tenements, and possessed of divers goods, and of a lease for years, devises one tenement to one of his sons, and another tenement to one of his daughters, and then adds, *Item, I make my two sons executors of all my goods, moveable and immoveable, and all my lands, debts, duties, and demands*; by this clause, no estate in the three tenements of which the devisor was seised in fee passed to the executors by force of the words, *and all my lands*; because that these words might well be satisfied by the lease for years of land which passed by it.

Abr. Eq. 209,
210. *Piggot and Penrice*, Pr. Ch. 471.
¶ *Doe v. Gildard*, 5 Barn. & A. 785.
Thomas v. Thomas, 3 Barn. & C. 125.¶

A. devised in the following manner: *I make my niece executrix of all my goods, lands, and chattels*; the testator had a real and personal estate, but no leases or interest for years in any lands whatsoever; and the question was, Whether any or what estate passed in the lands by this devise? And my Lord Chancellor was clearly of opinion, that the real estate did not pass by these words; and that the word *lands* was not (as objected) useless, and to be rejected, for that in all probability there might be rents in arrear of those lands, which would pass to the niece by her being made executrix.

Skin. 130.
pl. 5. *Barrow and Gameath*.

If *A.* devises certain lands to his youngest son in fee, and devises all his lands in *D.* to his wife for life: *Item, I give to her for life the lands which I hold of G. T.* *Item, I give to her all the lands which I purchased of J. S.* *Item, I give my lands to my son E. and his heirs for ever*; not only the lands purchased of *J. S.*, but also the reversion of all the others pass by these words.

Wheeler v. Walroon, Allen, 28. 3 Atk. 492.

If *A.* being seised of the manor of *B.*, and of other lands in the county of *S.*, devises the manor of *B.* for six years, and part of the other lands to *J. S.* in fee; and then comes this clause, and the

the rest of my lands in the county of S., or elsewhere, I give to my brother, &c.; by this devise he shall have the reversion of the manor.

S.C. cited, and S. P.

A. seised in fee, devised a certain house by name to J. S. for life; and by another clause he devises to his wife, the better to enable her to pay his legacies, all his messuages, lands, tenements, and hereditaments *not above disposed of*. Adjudged, that by these words the reversion of the house devised to J. S. passed. (a)

2 Vent. 285. Willow and Lydcot, adjudged upon a writ of error in the Exchequer Chamber. Carth. 50. S.C.

where it is said to have been adjudged in King James II.'s time, that the reversion did not pass; but a note is added, that these were King James's judges, and that Mich. 1 W. & M. it was adjudged, that the reversion passed; which judgment was affirmed in the Exchequer Chamber by all the judges; and the rather, because it appeared that the heir at law had 20*l.* per annum devised to him; so that he being taken notice of, the intent was more apparent. *Vide* Lev. 212. S. P. adjudged, and 3 Mod. 228. which seems contrary, but has been denied to be law. || (a) Morgan v. Surman, 1 Taunt. 289. S. P. ||

A. seised in fee, devised *Black Acre* to B. for life, and, devised to C. all his lands not before devised, to be sold, and the money to be divided between his younger children: the question was, Whether the reversion of *Black Acre* passed by the devise of all his lands not before devised? And it having been referred to the judges of the Common Pleas, they unanimously agreed and certified, that the reversion was well devised.

2 Vern. 461. Rooke and Rooke, decreed accordingly. Pr. Ch. 202. S.C.

[A. having devised a farm to J. S. for life, and, after other legacies, devised all other his personal estate, lands, tenements, and hereditaments, not before devised, to the defendant; it was made a question, Whether the reversion of that farm passed by this general devise? *Per Cur.*—The reversion well passed.]

Kingsman v. Kingsman, 2 Vern. 559.

A. by virtue of several settlements being tenant in tail, after possibility of issue extinct, of some lands, remainder in fee to trustees, in trust for him and his heirs; and as to some other lands being tenant for life, remainder to his first and other sons, remainder to trustees in fee, in trust for the right heirs of B., whose heir A. was; and as to other lands being tenant in tail, remainder to the right heirs of his father, whose heir he likewise was; and being likewise seised of a very considerable real estate of his own purchase, and possessed of a large personal estate, made his will, and devised some part of his lands to his wife for life, and gave several legacies, and having no issue, devised all other his lands, tenements, and hereditaments, *out of settlement*, to his nephew, provided he took on him his surname, subject to raise 4000*l.* in case the testator left a daughter;—and it was held, that all the estates thus settled passed by the will, notwithstanding the words *out of settlement*, for the word *hereditament* comprehends a remainder or reversion, as well as an estate in possession.

2 Vern 621. between Sir Litton Strode and Lady Russell, decreed by my Lord Chancellor, assisted with the Master of the Rolls, Trevor C. J. and J. Tracey.

So where A., being seised in fee of lands in D., upon the marriage of his eldest son settled those lands on him in tail-male, remainder to his own right heirs; and being seised in fee in possession of other lands in M., L., and N., devised all his messuages, lands, tenements, and hereditaments in M., L., N., or *elsewhere*, not by him formerly settled, for the payment of his debts; and

Abr. Eq. 211. Chester and Chester, decreed by my Lord Chancellor, assisted by Raym. C. J.

Reynolds
C. B. and
Price J. 5 P.
Wms. 56. S. C.
|| *Glover v.*
Spendlove,
4 Br. C. C. 557.
and see and
distinguish
Goodtitle v.
Miles, 6 East,
494. And see
Attorney General
v. Vigor,
8 Ves. 295. ||

Freeman v.
Duke of Chandos,
Cwpp. 563.

Atkyns v.
Atkyns, Cwpp.
809.

2 Bos. & P.
609.

Goodright v.
Downshire,
2 Bos. & P.
600. Though
the purposes
for which a
devise is made
are immediate,
that will not
prevent a re-
version pass-
ing. Attorney
General *v.*
Vigor, 8 Ves. 256.

after debts paid, then to *J. S.* a second son, and his heirs for ever, and died, and soon after the eldest son died (not having barred the remainder) without issue male, but left several daughters; it was held, *first*, That the word *elsewhere* was a sufficient description of the lands in *D.*, though of a greater value than those in *M.*, *L.*, and *N.*; that it was of itself a significant and expressive term; and the rather so in this case, because there were no lands or outskirts not particularly enumerated to which it could be applied but to those in *D.* *Second*, That the words, *messuages*, *lands*, *tenements*, and *hereditaments*, were sufficient to pass the reversion of the lands in *D.*, notwithstanding the exception, or restrictive words *not formerly settled*.

[One devised all his estate, &c. in the counties of *G.* and *W.*, and *elsewhere in the kingdom of England*, to trustees, subject to certain charges thereon, and limitations in his marriage settlement, in trust to stand seised of the said estates in *G.* and *W.*, or *elsewhere*, to certain uses. His estates in *G.* and *W.* were his only estates charged or mentioned in his marriage settlement; but he was also entitled to the reversion of certain estates in the counties of *O.* and *M.* It was holden, that this reversion passed by the words, "*elsewhere in the kingdom of England.*"

One seised for life, with remainder in tail to his first and other sons, of a considerable estate in the county of *N.*, and being also seised in fee of the manor of *C.*, and a small estate at *P.* in the county of *G.*, and entitled to the reversion in fee of another estate in that county, after several estates-tail in different persons, one of whom had a son aged eighteen years, devised "all that his manor of *C.*, &c., and also all that his capital messuage, and all and every his lands, tenements, and hereditaments whatsoever, situate and being in or near *P.* or elsewhere in the said county of *G.*, to his executors, in trust to sell, and to divide the money arising from the sale equally among his younger children," of whom he had three. It was resolved, that this remote reversion passed to the trustees.]

|| A general residuary clause, applicable to real estate, carries a reversion or any other real interest of any kind whatsoever, whether known or unknown to the testator, provided it be not manifestly excluded. This exclusion must be proved either by it being repugnant to the particular provisions of the testator's will, or to his general intent, that the reversion should pass.

A. was tenant for life, and had the reversion in fee, expectant upon the decease and failure of issue of *B.*, of certain lands; of which lands *A.* had granted a lease to *D.*, which was defeasible by *C.* or his issue. *A.* was also seised in fee in possession of other lands. *A.* by will devised if *C.* and his issue would confirm *D.*'s lease, and on its expiration grant a similar lease to his (*A.*'s) wife, that his (*A.*'s) unsettled lands should, after the decease of his wife, be to the same uses as the settled lands; and all the rest of his real estate he devised to his wife in fee. Held, that the testator's reversion passed to his wife by this residuary clause.

Lands

Lands were settled to the use of *Panton* for life; remainder to his first and other sons in tail; remainder to his daughters in tail; remainder to duchess of *A.* for life; remainder to duke of *A.* for life; remainder to marquis of *L.* in fee. The marquis (then become duke of *A.*) seised in fee in possession of large estates, devised some of them specifically. He then gave an annuity to the duchess for her life, and two other life annuities, and charged them upon all his lands and hereditaments not thereinbefore devised. He then devised all his lands and hereditaments, and other his real estate, not thereinbefore devised, so charged with the annuities as aforesaid, to *Denshire* in fee. Held, that the reversion passed.

Testator being in possession of lands settled upon himself for life, remainder to his wife for life, remainder to children of marriage in tail, remainder to himself in fee; and of other land of which he was seised in fee absolutely; devised all his land of which he was in the immediate possession to his wife for life, remainder to his daughter in fee. Testator had only one child, the daughter mentioned in his will. Held, that the land in settlement passed, though the devise was to a person entitled to take under the settlement.

The words "all my late father's lands," include land settled by the father upon a son in fee, but which had descended upon the devisor.

Testator devised to *M. W.* the income of four shares in the corn market for his life; and all the rest of his estates, with all monies, &c., to be divided equally between *E. S.* and others. Held, that the word *estates* passed the reversionary interest in the shares.

A devise of rents and profits carries the land itself. So a devise of a ground-rent passes the reversion.

Laxon, 1 Br. C. C. 76. *Allan v. Backhouse*, 2 Ves. & B. 74.

Premises is a word of reference, and may comprise a variety of subjects, having no connection among themselves.

So, a testator having given four tenements and a garden to his daughter, and half his books, in a certain event directed "her part aforesaid" to be equally divided amongst his four brothers and sisters. Held, that "her part aforesaid" carried *all* that was given to the daughter.

Nor will a general residuary devise carry a reversion which is in the same will devised to the testator's right heirs, unless under special circumstances.

But the whole interest of the devisor, not before disposed of, may pass by a residuary devise to one to whom an estate for life was before given.||

[But notwithstanding these cases, general sweeping words will not carry a reversion, where the testator's intent manifestly appears to the contrary from the whole complexion of the will.]

P. C. 496. *S. C.* *Roe v. Avis*, 4 Term Rep. 605. || *Goodtitle v. Miles*, 6 East, 494. *Welby v. Welby*, 2 Ves. & B. 195. *Doe v. Bartle*, 5 Barn. & A. 492. *Church v. Mundy*, 12 Ves. 426. ||

2 Vent. 551.
Sir Thomas
Littleton's
case, decreed;
but the re-
porter says
there were

other circumstances in the case which shewed it was not his intention that the mortgaged lands should pass; and Vern. 5. S. C. it appears, that there were some small parcels of land not specified, and of the same nature of those devised; to which the court held the word *elsewhere* was applicable, and not to the mortgaged lands, which were of a different nature, and of greater value; and that the testator had charged the lands devised with a rent-charge of 80*l.* *per annum*, which he could never intend should issue out of lands which were every day redeemable. || See *Okeden v. Clifden*, 2 Russell, 309. ||

If *A.* devises lands to *B.* in *D.*, *S.*, and *T.*, and all his lands elsewhere, and he hath a mortgage of lands, not lying in *D.*, *S.*, or *T.*, which is of more value than the lands in *D.*, *S.*, and *T.*, the mortgaged lands will not pass, for he could not be thought to mean to comprehend lands of so much value under the word *elsewhere*, which is like an &c. that comes in *currente calamo*.

Davis v.
Gibbs, 5 P.
Wms. 26.

[Where a testator seized of lands in fee, and possessed of a term for years in *B.*, devised all his lands, tenements, and *real estate* whatsoever in *A.* and *B.*, or elsewhere, of which he was *any way seized or entitled to*, to *J. S.* and his heirs, and in a subsequent clause of his will disposed of the rest of his personal estate, and of all his *mortgages, bonds, specialties, and credits*; it was adjudged, that the term did not pass to *J. S.*]

2 Vern. 623.

By a general devise of all lands, tenements, and hereditaments, mortgages in fee, though forfeited, will not pass; nor will they pass by such a general devise, though the equity of redemption is *after* the making of the will foreclosed or released.

Lord Bray-
brooke v. In-
skip, 8 Ves.
417. See
8 Ves. 276.
2 Powell, Dev.
ch. 9. (5d edit.)
Thompson v.
Grant,
4 Madd. 438.

|| It seems to be now settled, that a trust or mortgage estate will pass by a general devise, unless a contrary intention can be collected from expressions in the will, or from the nature of the purposes or objects of the testator. Any purpose or expression inconsistent with his duty as a testator or mortgagee is sufficient to shew that he did not intend the estate to pass. Testator was mortgagee in fee of two estates, and had obtained a decree for an account, but had not got the final order of foreclosure at the time of making his will. He was seized in fee of other estates absolutely, and he devised all his estates in general terms to uses in strict settlement, and also devised all estates vested in him, as mortgagee, upon the trusts to which they were subject. Before his death he obtained the final order of foreclosure. Held that the mortgage estates did not pass by the general devise, because, at the time of the making of the will, they could not be subjected to the uses in strict settlement, and that they did not pass under the devise of the mortgaged estates; because by the foreclosure the testator became absolute owner of them.

Silvester v.
Jarman,
10 Price, 78.
See in the
matter of
Horsfall,
McCl. &
You. 292.

A testator, who was a mortgagee, devised all the rest and residue of his *freehold, leasehold, and copyhold estates in possession or reversion*, together with all his goods, chattels, &c. *mortgages* and debts, to a legatee, *subject to the payment of his debts, &c.* and also appointed the legatee executor of his will;—held that the legal estate in the mortgaged premises did not pass to such legatee, but descended to the heir at law; because, although the words of the devise would, standing alone, have been sufficient to have carried the legal estate in the mortgaged premises, which may be so devised,

devised, yet being qualified by the subjection to the payment of debts, a purpose to which the money secured was alone applicable, and not the premises, it must be taken not to have been the intention that the legal estate should pass.||

A. having settled all his estate of inheritance upon his wife for life, for her jointure, makes his will, and thereby devises several pecuniary legacies to several persons, and then says, "All the rest" and residue of my estate, chattels real and personal, I give and "devise to my wife, whom I make sole executrix;" and the only question was, Whether by this devise the reversion of the jointure lands passed to the wife? And my Lord Keeper, having taken time to consider of it, delivered his opinion, that it did not, because the precedent and subsequent words explain his intent, to carry only his personal estate; for in the first part of his will having given only legacies, and no land whatsoever, the words all the rest and residue of his estate are relative, and must be intended estate of the same nature with that he had before devised, which was only personal; for having before given no real estate, there could be no rest or residue of that out of which he had given away none; then the words *chattels real and personal* explain the word *estate*, and shew what sort of an estate he meant, and make the devise as if he had said, all the rest of my estate, whether chattels real or personal, &c. and so confine and restrain the extended sense of the word *estate*.

[But where a testator devised to his wife, to whom he had before given life-estates in part of his lands, all the rest, residue, and remainder of his goods, chattels, and personal estate, *together with his real estate, not therein before devised*, it was holden, that these words, *together with the real estate*, carried the land and inheritance; for though there are cases where it has been doubted, whether the word *estate* joined to goods, &c. will carry the real estate, yet when a testator says, *together with my real estate*, it puts it out of all doubt. In the case of *Markant v. Twisden*, *suprà*, the words were *chattels real and personal*; and chattels real are not called so as being real estate, but because they are extractions out of the real, as Lord Chief Justice *Holt* called them.]

|| Testator devised the rents of one house in *A.* to *C. B.* for life, and after the decease of *C. B.* he devised same rents, *together with the rents of all other his houses in A.*, unto his three nephews for their lives; and after the decease of the survivor, he devised all his said houses to trustees upon trust to sell. And testator devised, after giving a pecuniary legacy, all other his estate to *C. B.* in fee. Held that the nephews, on the death of testator, took an immediate estate for their lives in all the houses, except that devised to *C. B.* for his life.

It is clear the word tenement or hereditament will pass an *advowson*.

In a devise of a perpetual advowson, the word "perpetual" may be considered as descriptive of the property, and not of the *quantum* of interest intended to be devised: and therefore a

Abr. Eq. 211,
212. *Markant*
& *Twisden*,
Gilb. Eq. Rep.
30.

Ridout v. Pain,
5 *Atk.* 486.

Doe v. Brazier,
5 *Barn. & A.*
64.

5 *Atk.* 460.
2 *Ves. jun.* 477.
4 *Bing.* 290.

Pocock v.
Bp. of Lincoln,
2 *Brod. & B.*
27.

devise, "I give my son *R.* the perpetual advowson of *H.* and "my manor of *S.*," gives only a life estate in the advowson.

The word *farm* will pass all such premises as are let together, though they consist of different descriptions of estate, as freehold, copyhold, &c.

Holdford v. Pardoe, 2 W. Bl. 975. *Laue* v. Earl of Stanhope, 6 T.R. 345. *Doe* v. Lucan, 9 East, 448. *Thompson* v. Lawley, 2 Bos. & Pull. 317.

Down v. Down, 7 Taunt. 343. 1 B. Moo. 80. S. C., and see *Goodtitle* v. Southern, 1 Maul. & S. 299. *Sed vide* *Doe* v. Parkin, 5 Taunt. 321., which, however, is distinguishable.

A testator having a messuage and lands, which in two leases, one prior and the other subsequent to his will, he had demised as the *C.* farm, excepting a certain close formerly part of the farm (and which close testator kept in his own occupation), devised his messuage, farm, and lands, called the *C.* farm, then on lease to *M. F.* Held that the close excepted in the leases passed to the devisee.

Eade v. *Eade*, 5 Madd. 118. As to devises of remainder of testator's estate or property, see *Ball* v. *Kingston*, 1 Mer. 314. *Surman* v. *Surman*, 5 Madd. 123. 1 Powell, Dev. 352. (3d edit.) and cases there collected.

Testator gave residue to his wife, "requesting she would at "her death leave 200*l.* to each of the Miss *Nortons*, and leave "the remainder of her property to his nephews, *G.* and *W.* "*Eade*." Sir John *Leach* V. C. said, "If the testator had "requested his wife, at her death, to leave the remainder of his "property to *G.* and *W. Eade*, there would have been a clear "trust in their favour, because the remainder of the testator's "property could have been ascertained. I cannot say that, by "the remainder of *her* property at her death, he meant the remainder of *his* property. His request as to the uncertain property of which she might be possessed at her death, cannot "create a trust." ||

3. By Incertainty in the Description of the Person to take.

|| A devise is void if the object of testator's bounty is not sufficiently denoted. But if devisee be described by two circumstances, as relationship and name, or name and residence, and either the one or the other may be affirmed of a known person, and the other cannot, this error does not render the devise uncertain and void; for there is only one person who can claim, and he comes within the description given by the testator, though he does not satisfy it altogether. But if there be two known individuals to whom parts of the description given of the devisee respectively apply, it is a question which is intended; and if their claims are nearly equal, the devise is uncertain and void. ||

Abr. Eq. 212. (a) A devise to the eldest son of *J. S.* is good,

If *A.* devises lands to the eldest son of *J. S.* by the name of *William*, when in truth his name was *Andrew*, the devise is (a) good.

or to his second or youngest; so a wife is a good name of purchase without a christian name and so it is if a christian name be added and mistaken, as *Em.* for *Emlyn*, and to *Robert* Earl of, &c., though his name was *Henry*. Co. Lit. 3.—A devise to the stock, family, or house is good, and it shall be intended of the heir. Hob. 53. Dy. 333. b. [Upon the same principle, if lands be devised to the posterity of *A.*—the lineal heir, if there be any, shall take them under the word posterity; but if *A.* die without issue, and there be no lineal heir of *A.*, the collateral heir of the whole blood shall take them. 2 Eq. Ca. Abr. 290-7.—And a devisee may be described as the next of the name of the testator, and the next relation of his name, whether it be male or female, shall take as devisee described thereby. Bon v. Smith, Cro. El. 532.—

So,

So, a devisee may be described as next of kin. Thus it was adjudged, where one devised lands in tail, the remainder to the next of kin of his name, that his brother's daughter should take by that description. Jobson's case, Cro. El. 576.—And nearest relation of the name is likewise a good description of the devisee, and operates as *nomen collectivum*: and in these cases where *nomina collectiva* are used to describe the devisee, the term used comprehends all the testator's family that are nearest to him in the degree mentioned. Pyot v. Pyot, 1 Ves. 335.—And if the deviser explains who he means by nearest relation, persons may take under that description who are not strictly so circumstanced in point of kindred.—As, if lands were devised to be divided between the nearest relations of the testator; namely, the *Greenwoods*, the *Everetts*, and the *Downs*; the *Everetts* it seems might take, though not in the same degree of relation as the *Greenwoods* and *Downs*, nor within the degree of nearest relationship. *Greenwood v. Greenwood*, cited in 1 Br. Ch. Rep. 52.—If one, being married, make his will, and thereby describe his devisee by the term nearest relation, according to the statute of distributions, his wife cannot take thereby; for she is no relation to her husband in the sense in which that word is here used, because it is transferred to a personal sense, and as if he had said kindred; and kindred, in the statute, means kindred by blood only, and the wife is no relation by blood or affinity. The wife *non affinis est sed causa affinitatis*; *affinis ab eodem stipite*. *Davies v. Bailey*, 1 Ves. 84. *Worsley v. Johnson*, 5 Atk. 759. Skin. tit. *Cognatio Parentela*. Calvin's Lexicon.—And there would be no difference in such a case as that last mentioned, whether the terms used by the testator were, "my relations generally," or, "my own relations." In both cases, relations by blood only are included. And if the reference to the statute of distributions be omitted in such a devise, the wife cannot even then take within the description of a near relation; for, in the case of *Thomas and Hale*, Lord King determined, upon the authority of Lord *Macclesfield*, in the case of *Brown and Brown*, that the word "relations" should be confined to such relations as were within the statute of distributions, because of the uncertainty of the word "relations." 2 Eq. Ca. Abr. 332. q. 368. Ca. temp. Talb. 251.]

[So where one, having a reversion in fee expectant on an estate-tail, devised it to *William Pitcairne*, eldest son of *Charles Pitcairne*, in tail-male, remainder over, and died; it was insisted, on a bill exhibited by the eldest son, to have the writings, and to receive the profits, &c. that the devisee had no title, because his name was not *William* but *Andrew*; but the court was of opinion that the plaintiff should have relief: the reason of which was, that there were other words, viz. *eldest son of*, &c. sufficient to point him out with certainty.

So, where a devise was to *Margaret*, the daughter of *W. K.*, and her name was *Margery*, it was held that she should take thereby, *quia constat de personâ* by the description.]

|| Testator bequeathed to the Rev. *Charles Smith* of *R.* There was a Rev. *Richard Smith*, incumbent of *R.*, and also a Captain *Charles Smith*, known to testator. Held that the former was intended. Here the profession and residence stated in the description applied to one, and the christian name only to the other.

Testator devised to his granddaughter *Mary Thomas*, of *L.* Testator had a granddaughter *Elinor Evans*, of *L.*, and a great-granddaughter *Mary Thomas*, of *G.*, a place some miles from *L.*;—Held that this devise was void for uncertainty. The relationship and the evidence were in favour of the claim of *Elinor Evans*, and the name only of that of *Mary Thomas*; but the distinction between granddaughter and great granddaughter is not great, and the name seems more important than the residence.

Testator devised to "my nephew *R. C.*, the son of *Joseph C.*" It appeared that testator had two nephews named *R. C.*; one the son of *John*, and the other the son of *Thomas C.* Here then the name and relationship belonged equally

Pitcairne v. Brase et al.
Finch, Chan. Rep. 405. et vid. Dallison, 78. 8. Owen, 35. Rivers's case, 1 Atk. 410.

Gynes v. Kemsley, 1 Freem. 293.

Smith v. Coney, 6 Ves. 41.

Thomas v. Thomas, 6 T. R. 671.

Careless v. Careless, 19 Ves. 600. 1 Mer. 384. S. C. and see Beaumont v.

Fell, 2 P.
Will. 141.
1 Powell, Dev.
487. (3d edit.)
and cases there
collected.
(a) 19 Ves. 654.

equally to *two* persons, and the superadded description was inapplicable to either. So that, there being two persons equally answering the description in the will, the rule of law admitted parol evidence to shew which was intended. (a) On the evidence *R. C.* son of *John* took.

1 Ves. sen. 337.

Doe v. Huthwaite, 2 B.
Moore, 504. S.C.
3 Barn. & A.
632.—If testator devises to *W.* eldest son of *C. W.* of *T.*, and the eldest son is named *Andrew*, yet he shall take.
Com. Dig.
“Estates by
“Devise,” (I).
See Stockdale
v. Bushby,
19 Ves. 381.

Testator devised to *S. D.* for life, with remainders over in the usual way to his first and other sons and daughters in tail; remainder to *G. H.*, the eldest son of *J. H.*, for life, with remainders over as before to his sons and daughters; remainder to *S. H.*, the second son of *J. H.*, for life, with remainders as before to his sons and daughters; remainder to *J. H.*, the third son of *J. H.*, for life, with remainders as before to his sons and daughters; with remainders over. *S. H.* was the *third* son, and *J. H.* the *second* son of *J. H.*—The court of C. P. gave judgment on a special verdict that *S. H.*, being rightly named, was entitled to take, though wrongly described as the *second* son. The case being carried into K. B. by writ of error, a *venire de novo* was awarded, in order that evidence might be adduced to enable a jury to find whether the mistake was in the name or description. ||

Coop. 229. S. C. Doe v. Westlake, 4 Barn. & A. 57.

10 Mod. 571.
1 Vin. Abr.
tit. Dev.
T. B. pl. 2.
Plowd. 344.

[So, if one devise land to the wife of *J. S.*, and *J. S.* die, and she take to husband *J. D.*, and then the devisor die, she shall take the land; and yet she is not the wife of *J. S.* when the devisor dies, nor shall she take it as his wife; but the intent is, that she who *was* the wife of *J. S.* at the time of making the will should have it, and the person is clear by the description.

Vin. Abr.
tit. Corp.
G. 6. pl. 11.
tit. Devise.
W. c. pl. 4.
Plowd. 344.

Again, if a man had devised land to *Alexander Nowel*, dean of *St. Paul's*, and to the chapter there and their successors, and *Alexander* had died, and a new dean had been made, and afterwards the devisor had died, the land had vested in the new dean and chapter; and yet it would not have vested according to the words, but according to the intent; for the chief intent was to convey it to the dean and chapter and their successors for ever, and the single person of *Alexander Nowel* was not the principal cause, though it might have been one of the causes of the devise.

Jaggard v.
Jaggard,
Pre. Ch. 175.

Upon the same principle it was decreed by Lord *Somers*, where one, his wife being *ensient* with a child, (was taken sick and made his will, and thereby devised that if his wife should have a posthumous daughter she should have 500*l.* &c.) had a daughter born, and afterwards died; that this daughter, though born in the life of her father, was a posthumous child within the meaning of the will.]

Chambers v.
Brailsford,
18 Ves. 368.
Affirmed on
appeal to Lord
Chancellor
Eldon, 19 Ves.
652. 2 Mer.
25. S. C.

|| Testator after making several bequests to *Thomas Brailsford*, described as “the son of my nephew *Samuel Brailsford*,” and without mentioning any other *Thomas Brailsford*, devised an estate in remainder to “the said *Thomas Brailsford* and his “assigns for his life, and after his decease to the said *Thomas Brailsford*, son of my nephew *Samuel Brailsford*, his heirs and “assigns for ever.” It appeared that testator, besides his great nephew *Thomas Brailsford*, had a nephew *Thomas Brailsford*.

Held,

Held, notwithstanding the peculiarity (a) of giving by the same devise an estate for life, and also an estate in fee to the same person, that the great nephew was entitled to both estates under the devise, in remainder. ||

(a) See
15 Ves. 103.
9 East, 405.

If a man has issue two sons, and devises his land to his son, without specifying which he means, this is void for the uncertainty; for to construe it a devise to the eldest, is to make it an impertinent devise, that being no more than *actum agere*; and to construe it a devise to the youngest, seems still more unreasonable, because that is to disinherit the heir at law without an apparent intention of the testator to warrant it, and to set up a doubtful title in destruction of a clear one.

Cro. Eliz. 742.

If a man has two sons named *J.*, and devises to his son *J.* all his lands, this is a void devise for the uncertainty, unless it can be proved that the testator meant one of them in particular — by the elder son's being beyond sea, probably dead, &c.; for these circumstances clear up the intent of the testator, and such averment is (a) admitted, because it is consistent with the will; and the construction and judgment thereon must be genuine, because taken from the words of the will.

5 Co. 68.

(a) But for
this *vide* head
of *Evidence*.

If a man hath issue two sons and two daughters, and devises his land to his wife for life, and that after her death the same shall remain to his issue; this is a void devise as to the remainder; for having several children, it is (b) uncertain what issue intended.

Cro. Eliz. 742.
Taylor and
Sayer.

(b) But *vide*
Raym. 83.
S. C. cited

and denied to be law; and that it should go to the eldest son, for issue is *nomen collectivum*; and so is 3 Lev. 455. and 6 Co. 17.

|| "ISSUE." — This word *prima facie* takes in all descendants; but if upon fair reasoning, *deduced from the words of the will*, it appears that testator used it in a more confined sense, that sense must be given to it.

Leigh v. Nor-
bury, 13 Ves.
540. Bernard
v. Mountague,
1 Mer. 424.

Davenport v. Hanbury, 3 Ves. 257.

Testator bequeathed to several persons, and in case of their death before him, he willed that the lawful issue of every one of them so dying should have the legacy which their respective parents, if living, would have had. From this clause (the word "parent" being considered in its ordinary sense as father or mother), and other expressions in the will, Lord *Eldon* decided that *issue* should be confined to *children*.

Sibley v. Perry,
7 Ves. 522.

"Issue is an ambiguous term. It may mean, and frequently does mean, children only: it may mean all descendants; but in this case has not the testator himself distinctly explained what he meant? By confining the disposition to children and grandchildren, he has in effect said, that by 'issue' he meant children of children. Speaking of no other issue, the inference is, that no other was in his contemplation. It would be against all rules of construction, to control the operation and effective part of a clause by ambiguous words occurring in the introductory part of it. The words in the operative part of the clause, 'children and grandchildren,' are unambiguous: are they to be controlled by the ambiguous word 'issue,' which occurs only in the introduction?"

Verba Sir W.
Grant, M. R.
3 Ves. & B.
67.

Hampson v.
Brandwood,
1 Madd. 387.
Palm. 305.
vide Styl. 240.

In a limitation to the first male issue, lawfully begotten by the said *J. A. G.*, "male issue" was held to mean "sons."||

If a man has issue eight daughters by three several venters, and one son, and devises his land to his youngest daughter, the remainder to his son in tail, the remainder to his two daughters by the middle venter for life, the remainder *proximo de sanguine* of the devisor, and dies, and after the eldest daughter has issue, and dies, and after the son, and all the other daughters, except the two daughters by the middle venter, to whom it was given for life, die without issue, the issue of the eldest daughter shall have it.

Leigh v. Leigh,
15 Ves. 92.
See Doe v.
Plumtre,
5 Barn. & A.
474. as to the
construction
of the words,
"the nearest
of kin of
the name;"
and see
5 Barn. & A.
544. 1 Dow.
& R. 187.
2 Swanst. 375.

|| Testator devised, after several limitations, "unto the first and nearest of my kindred, being male, and of my name and blood, that shall be living at the determination of the several estates hereinbefore devised, and to the heirs of his body lawfully begotten." The being of a man's *kindred* is being of his *blood*, as the word consanguinity, which is the same as kindred, imports. Being of a man's kindred *and* of his blood, must, to give some force to the addition, mean, being of that blood which with some propriety may be called HIS; namely, that which in tracing an heir is considered the most worthy. Being of a man's kindred and blood, then, ascertains a certain stock or family; and being male, and of a name, certain individuals in that stock or family. "First" and "nearest" may, perhaps, be considered as meaning the same thing. The "name" required must be inherited, and not merely assumed, by virtue of the king's licence.

Hob. 33.
Wright v.
Atkins,

"FAMILY." — A devise to *A.* for life, remainder to testator's family, operates as a devise to the heir at law of testator.

17 Ves. 255. S. C. Coop. 111. S. C. 19 Ves. 299. S. C. 1 Turn. & Russ. 156. M'Leroth v. Bacon, 5 Ves. 166. Barnes v. Patch, 8 Ves. 604. Doe v. Smith, 5 Maul. & S. 126.

Wright v.
Atkins, *supra*.
Turn. & R. 158.
and see
Cruwys v.
Colman,
9 Ves. 319.

But if a trust be created, or power given, which requires or implies a selection from a class of persons, and the class be designated as the *family* of testator, in such a case the term has not received a legal definition. Thus, a testator devised to his mother, her heirs and assigns for ever, in the fullest confidence she would, at her decease, devise the property to his family. In this devise, Lord *Eldon* thought that the context shewed that "family" must mean a class.

Woolmore v.
Burrows,
1 Simons,
512. 529.

A limitation to *Arnold*, or his nearest relative in the male line, was confined to the issue of *Arnold* and his brothers.

Doe v. Over,
1 Taunt. 263.
S. C. cited
19 Ves. 301.;
and see
cases cited
5 Swanst. 319.
and Crosley
v. Clare, *ibid*.
320. in note;
also Turn. & Russ. 161., and title *Legacies*, *post*, (B).

"RELATIONS." — Testator devised all his freehold estates to his wife for her life, and at her decease to be equally divided amongst the *relations* on his side. Held, that the word "relations" having received a construction as to personal estate, *viz.* those entitled under the statute of distributions, that it should have the same signification when applied to real estate; and that in the case above, the next of kin of the testator, at the time of his death, whether in the maternal or paternal line, were entitled.

Testator gave real and personal estate to *A.* in fee, with an executory devise to her nearest relation of the name of *Pyot (a)*, his or her heirs, administrators, executors, and assigns. Held, that "relation" was *nomen collectivum*, and that persons constituting the stock of the *Pyots*, who were nearest, should take, females who had changed their name included; the continuance of name not being regarded by testator.

Pyot v. Pyot, 1 Ves. sen. 335. S.C. from MS. 6 Cru. Dig. 185. (a) It was "of the *Pyots*" Mr. J. Lawrence said, 15 Ves. 99.; and it appears by Mr. *Belt's* supplement to Ves. sen. 161., that the words "of the name," are not in the registrar's book.

Testator gave the residue of his fortune to be laid out in land, as contiguous as practicable to *Stradone*, to be added and CLOSELY ENTAILED to the family estate there, in the possession of his relative *Thomas Burrows*. By a codicil testator declared, "My object in wishing to improve the *Stradone* estate is to have a head to the family. Should *Thomas Burrows* die without leaving male issue, or dispose of *Stradone* out of the family line, it is my desire that the residue of my fortune should go to *Arnold B.*, son of Colonel *B.*, or to his nearest relative in the male line." The *Stradone* estate was in settlement, by which *Thomas Burrows* was tenant for life, remainder to his first and other sons in tail-male, remainder to his daughters as tenants in common in tail, with cross remainders between them in tail, with the ultimate remainder to *Thomas Burrows* in fee. *Thomas Burrows* had one son living at the death of testator, who was named *Robert*. The settlement of estates purchased with the residue of testator's fortune, was directed to be to the use of trustees and their heirs for the life of *Thomas Burrows*, in trust for him; remainder to the use of *Robert Burrows* for life; remainder to trustees to preserve, &c.; remainder to first and other sons of *Robert*, in tail-male; remainder to every other son of *Thomas*, in tail-male; remainder to *Arnold B.* for life; remainder to trustees to preserve; remainder to his first and other sons, in tail-male; remainder to a brother of *Arnold*, for life; remainder to trustees; remainder to his first and other sons, in tail-male; remainder to every other son of the father of *Arnold*, in tail-male; remainder to *Arnold* in fee.

Testator devised all his real and personal estate, subject to his debts and other charges, to his wife for life; and that after her decease the same should be divided according to the statute of distribution in that case made and provided. Held, that the devise over of the real estate was not sufficient to designate the persons intended to take, and was therefore inoperative.

"CHILDREN." — This word cannot be extended to include grandchildren, or issue in general, unless the object of the testator, as expressed in his will, would otherwise totally fail.

Thomas v. Thomas, 3 Barn. & C. 825. *Royle v. Hamilton*, 4 Ves. 437. *Reeves v. Brymer*, 4 Ves. 692. *The Earl of Orford v. Churchill*, 3 Ves. & B. 69. *Radcliffe v. Buckley*, 10 Ves. 200.

Upon a devise to a man and his children, it was held, that if there were no children at the time, the father would take an estate-

10 Ves. 200. *Wylde's case*

cited; and see *ibid.* 201. for cases in which it appeared that testator used children in the same sense as issue.

Clarke v. Blake, 2 Ves. jun. 672.; and see 1 Ball. & B. 486.

Marwood v. Darrell, Cases temp. Hardw. 91.

Crosley v. Clare, Amb. 397. S. C. 3 Swanst. 320. in note.

Barnes v. Patch, 8 Ves. 605. See Doe v. Joinville, 5 East, 172.

Doe v. Hallett, 1 Maul. & S. 124.

Raym. 82. Bate and Amherst, adjudged.

2 Vent. 363.

Vern. 362. Huckstep and Mathews.

estate-tail, and "children" would mean "issue;" for it was evident something was intended for children; but none being *in esse*, they could take nothing except through the father; and he could transmit to them nothing, unless he had an estate of inheritance. It was necessary, therefore, to construe the word "children" issue, on account of the general apparent intention.

Under a devise to all the children of *A.* living at his decease, except *B.*, a posthumous child was held to be included.

Testator devised to the first son of *A.*, who was not heir at law to *A.*; — Held a good devise to the second son.

A devise to "descendants" is not restrained, but includes all who can trace their pedigree from the ancestor named.

Butler v. Stratton, 3 Br. C. C. 367. See Turn. & Russ. 162.

Under a bequest to *A.*'s and *B.*'s families, the children are entitled exclusive of their parents, and *per capita*.

Testator devised to *W. Head*, only surviving son of Sir *T. Head*, for life, with remainders in tail to his children; and for default of such issue to the first, second, and all and every other son and sons of the said Sir *T. Head*, lawfully to be begotten. *W. Head* was not the only son of Sir *T. Head*; he had a brother who was known to testator at the time of making his will. Held that the brother, though born before the date of the will, should take, as included in the limitation, to the first, second, and other sons; the words "to be begotten," meaning the same as "begotten," and embracing all those whom the parent should have begotten during his life, *quos procreaverit*.||

If a man devises all his lands to one of his cousin *Nich. Amherst*'s daughters, that shall marry a *Norton* within fifteen years, and dies, and *Nich. Amherst* having three daughters, one of them marries a *Norton* within the fifteen years; this is a good devise to her, notwithstanding the uncertainty, and the law supplies the words, *who shall first marry*.

If a man devises lands to *J. S.* in trust for *A.* and the heirs of his body, remainder to *B.* for life; and further wills that if *A.* die without issue, and *B.* be then deceased; then, and not otherwise, he gives the lands to *J. N.* and his heirs; though *A.* dies without issue, and *B.* survives, yet after the death of *B.* *J. N.* shall take, for the words, if *B.* be then deceased, express the testator's meaning that *B.* should be sure to have it for life, and also shew when *J. N.* should have it in possession.

A. devises lands to trustees in fee, in trust to pay debts and legacies, and after those debts paid, then to sell; and if any of the testator's name would buy, such person to have the lands 200*l.* less

less than the value; one of the testator's name brings a bill for this benefit of pre-emption, but not till the testator had been dead twenty-five years; but the bill was dismissed; for if two of the testator's name should claim the benefit of the devise, who must have it?

A. devised lands to trustees, in trust to his daughter for life, remainder to the second son of her body to be begotten in tail-male, and so to every younger son; and in default of such issue male, to her eldest daughter, and to the first son of her body, taking upon him the name and arms of the testator; and adds further, that he did not by his will devise the estate to the eldest son, because that he expected that his daughter would marry so prudently, as that the eldest son would be provided for; the daughter married, and had issue a son, who died in twelve months after his birth; she afterwards had another son born, after the death of the first; this second must take according to the words of the will, though contrary to the intention of the testator.

A., *B.*, and *C.* being aliens and brothers, *A.* has issue a son, and *B.* and *C.* are naturalized, and *B.* purchases lands, and devises them to the heir of his brother *A.* and his heirs, and *B.* dies, leaving *A.* and his son; the devise is void for the uncertainty who is intended thereby, for *A.*, being an alien, can have no heir, or however, being living, can have none during his life; but *per Glyn C. J.*, — If it had been found that the son of *A.* was the reputed heir of *A.*, though *A.* was an alien, yet his son might have taken by this devise.

A man had issue a son and a daughter, the daughter was married and had issue two daughters; the father devised, that all his lands should descend to his son, provided that if his son died without issue of his body, then my land to go to my right heirs male of my name and posterity for ever; the son died without issue; and upon ejectment between the brother of the devisor and the daughters, this was held a void devise, because neither could claim under the description of the will; not the brother, because, though he was of his name, yet he was not his (*a*) heir; and though the daughters were his heirs, yet they were not of his name, and so not within the words of the will, and consequently the limitation void for the uncertainty.

or complete heir: for instance, if lands are devised to the heirs of *J. S.*, and *J. S.* is living at the death of the testator, the devise is void, for *non est hæres viventis*: so, if lands are devised to the right heirs male of *J. S.*, and the heir of *J. S.* is a female, the devise is void; or if the devise were to the heirs female, and the right heir had been a male, it would be void in the same manner; to which purpose *vide Moor*, 860. Co. Lit. 24. b. 2 Leon. 70. Dyer, 99. Hob. 33. 1 Co. Archer's case. 1 Co. 103. Shelley's case. [Ford v. Lord Ossulston, Mich. 7 Ann. B. R. Hargr. Co. Lit. 27. b. note. Dawes v. Ferrars, 2 P. Wms. 1. and Pr. Ch. 589. and Mr. Hargrave's notes in his Co. Lit. 24. b. 27. b. 164. a.] But notwithstanding these authorities, this doctrine has been shaken by the following more modern resolutions, in which it is held that a special heir may take by purchase; and that a description of a person by the name of heir, though not heir general, operating with the intention of the testator, is sufficient to ascertain the person to take. *Vide Abr. Eq.* 214, 215. Beaumont and Long, 2 Vern. 729. Newcomen and Barkham. ||See, too, cases cited 2 Jac. & W. 107. and Fearn's C. R. 214. ||

2 Vern. 660.

Trafford and Ashton, decreed.

||See this case cited and commented upon by Lord Ellenborough C. J. in Driver v. Frank, 3 Maul. & S. 58. ||

Sid. 23. 51. Forster and Ramsey.

Hob. 29. 50. Cownden and Clerk, Moor, 860. S. C.

(*a*) This resolution is founded on a rule laid down in the old books, viz. That he who taketh by description or purchase as heir, must be heir general,

2 Jon. 99. adjudged between James and Richard-son in *B. R.* but reversed in the Exchequer Chamber; but the judgment of reversal was reversed in the House of Lords. 2 Lev. 232. S. C. and *per Levinz*, this point was tried again upon a new ejectment; and like judgment given as at first in *B. R.*, which was confirmed in the Exchequer Chamber, and likewise in the House of Lords, Vent. 334. S. C. by the name of Burchet and Durdant. 2 Vent. 311. S. C. Raym. 330. S. C. 3 Keb. 52. S. C. Pollex. 457. S. C.

Abr. Eq. 214. Baker and Hall, adjudged in *C. B.* 1 Ld. Raym. 185. S. C. by the name of Baker v. Wall, Pr. Ch. 468. S. C. cited by Lord Chancellor.

If a man devises lands to *A.* and his heirs, during the life of *B.*, in trust for *B.*, and after the decease of *B.* to the heirs male of the body of *B.* now living, *B.* having one son then living; by this devise a remainder is immediately vested in the son, for the words *heirs male now living*, in a will, are a full description of the son, who then was the heir apparent of *B.*, and known by the devisor (who was his uncle and godfather) to be so.

A. devised in this manner: — I give to my eldest heir male, and his heirs male for ever, all my lands in such a place; and if there be a female, she to have 12*l.* *per annum* as long as she lives; the testator had two sons, the eldest of which died in his lifetime, leaving issue; and it was adjudged, that the lands should go to the second son, and not to the daughter of the eldest, though she was heir general.

2 Vern. 729. Newcomen and Barkham, and this matter well debated. [1 Eq. Abr. tit. Devises, 215. pl. 14. S. C. Pr. Ch. 442. 461. S. C. by the name of Brown v. Barkham. On a bill of review brought before Lord Hardwicke, in November

J. S. devised to trustees in trust, after debts and legacies paid, to convey to *A.* his cousin, and the heirs male of his body, and for want of such heirs male, then to the heirs male of the body of *B.* his great-grandfather, and for want of such heirs male, to his own right heirs for ever, and gave to his sister 2000*l.* to be put out at interest during her life, she to receive the interest, and after her death to her children, and died; and soon after *A.* died without issue; and *C.* being heir male of *B.*, the testator's great-grandfather, but not heir general, there being a daughter of an elder brother, the question was between him and the testator's sister, and the heir at law, who had the 2000*l.* devised to her, Whether the devise was void, or not? and my Lord Chancellor held the devise good, and that *C.* should take as a person sufficiently described and intended by the testator.

1741, the decree in this case was affirmed; but according to a note of it in Hargr. Co. Lit. 27. b. his Lordship considered the case as an exception to the general rule. But the opinion of Lord *Couper* has been since confirmed by a decision of the Court of King's Bench on a case sent by the Court of Chancery. The question arose on both a will and a deed, Whether *A.* took by purchase under the description of *heir male of the body of B.* not being heir general? *B.* being in the deed the *grantor*, the court certified that *A.* took an estate-tail by *descent*; but they added in the certificate, that if a *third person* had been the grantor, they should have thought that *A.* would have taken by *purchase* as heir male of the body of *B.*: and they also certified, that he did so take under the will. *Wills v. Palmer*, 5 Burr. 2615. And the same point was resolved on a marriage settlement in the case of *Evans v. Weston*, in the Exchequer, M. 1774, and H. 1775.]

Darbishon v. Beaumont, 1 P. W. 229. 1 Br. P. C. 489. S. P. in *Goodright v. White*, 2 W. Bl. 1010. See these cases cited and exa-

|| Testator devised, after several limitations (but none of which gave a vested freehold), "to the heirs male of the body of his aunt *Elizabeth Long*, lawfully begotten; and in default of such issue, remainder to testator's own right heirs." Testator noticed that *Elizabeth Long* was then living, and that she had three sons, for he gave them all legacies: he gave also an annuity charged on the estate devised to his heir at law. *Elizabeth Long*

Long survived testator; and, therefore, if the estate to her heirs was a contingent remainder, it failed, for there was no preceding freehold to support it. It was, however, held, that "heir" in this case should be considered as "heir apparent," and that the eldest son of *Elizabeth Long* should take under the remainder. *mined by Little-
dale, Hol-
royd, and
Bayley Jus-
tices, in Doe v.
Perratt,
5 Barn. & C. 61. et seq.*

Testator devised to several persons successive estates of freehold, with remainder "to the first male heir of the branch of my "uncle *R. C.*'s family who lived at *H.*" *R. C.* was dead at the time testator made his will, and left no son, but five daughters all married. Held by *Littledale* and *Holroyd* Js., that the eldest son of the daughter who died first was the "first male "heir." But Mr. *J. Bayley* thought that the testator meant the male descendants of *R. C.* to take, according to their proximity to *R. C.* and the seniority of their lines, without reference to the question, whether their mothers were living or not; and, therefore, that the eldest son of the eldest of the daughters who had a son was entitled. *Doe v. Perratt,
5 Barn. & C.
48.*

Testator requested his wife to devise to such of his father's heirs as she might think best deserved her preference. It seems that those who answered the description at the wife's death were entitled. *1 Simons, 558.
565.*

Testator devised to the eldest son of his son for life, and for want of heirs in him, to the right heirs of himself, the testator, his son excepted. Held *Dom. Proc.* that no person took any estate under this limitation, and that it was inoperative. *Doe v. Pugh,
5 Br. P. C. 454.
S. C. Fearne
C. R. App.
575. and cited.*

2 Mer. 348, and 2 Jac. & W. 102.

A. seised in fee of estates derived from his maternal ancestor, *Samuel Rolle*, to whom he was heir at law, settled them upon himself for life, remainder to the heirs of his body, remainder as he should appoint, remainder to the use of the right heirs of *Samuel Rolle*. Held by Sir *W. Grant* M. R., and by the Court of K. B., *Bayley J. diss.*, that the remainder to the right heirs of *S. R.* vested in the settlor as right heir of *S. R.* *Contrà*, Sir *Thomas Plumer* M. R. held that such remainder was contingent, and would vest in the person who happened to be the right heir of *S. R.* at the expiration of the prior estates. *Cholmondeley
v. Clinton,
2 Mer. 173.
S. C.
2 Jac. & W. 1.
2 Barn. & A.
62.*

A devise to the right heirs of husband and wife, is a devise to such person as answers the description of heir to both, *i. e.* a child of both. *Roe v. Quart-
ley, 1 T. R.
630.*

Testator devised all his estates except *S.* to certain persons successively, in strict settlement, with the ultimate remainder to his own right heirs. He also devised *S.* to some of the same persons successively, in strict settlement, but in a different order of succession, with remainder "to such person and persons, and "for such estate and estates as should at that time [*i. e.* on the "death and failure of issue male of the lastly-named devisee of *S.*], "and from time to time afterwards, be entitled to the rest of his "real estate, by virtue of and under his will." Held, that the ultimate remainder in fee of the estate *S.* vested by descent in the person who was the testator's heir at the time of his death, and *Doe v. Maxey,
12 East, 589.*

and did not remain in contingency under the will till the death of such lastly-named devisee without issue, as aforesaid.||

||2 Sim. & Stu.
295.||

[A devise is never construed absolutely void for uncertainty, but from necessity; for, if there be a possibility to reduce it to a certainty, the devise is good.]

Ungly v.
Peale, 2 Ld.
Raym. 1312.
10 Mod. 103.
2 Eq. Ca. Abr.
358. 8 Vin.
Abr. tit. Dev.
D. Ca. 19.
Note. This
case was first
adjudged in
C. P. and that
judgment af-
terwards con-
firmed on writ
of error in
K. B.

One seised in fee of a house at *Ludgate*, devised the same "to S. and his brothers successively for their lives;" and then the testator, after mentioning another matter, went on and said, "And as for my house at *Ludgate*, I do not leave it to S. nor his brothers afore to be entered on and enjoyed till one month after their marriages." S. at the time of making the will had two brothers, R. and O.; S. was the eldest, R. the second, and O. the third son; R. died in the lifetime of S. and O.; and the question was, Whether this was a good devise, or void for uncertainty? And it was argued against the devise, first, that it was void for uncertainty, by reason of the word *successively* not shewing which should take first and which second in succession: second, that the condition in relation to marriage made it more uncertain; for till marriage none could take; and suppose the second brother had married, and neither of the other two, who must have taken? Certainly none of them; for if he that was married should take first, then that would overthrow the other construction of *successive*, that the oldest ought to take first, and then the second, and then the third. *Sed per totam curiam*, the will was good and certain enough; for, being in the case of brothers, the common law was a guide to the exposition of the word *successive*, viz. that the eldest should, after his marriage, enjoy it first for his life, then the second, and then the third; and the court agreed, that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general; and, therefore, that if the second son had married before the eldest, yet he could not have taken by this devise.]

Doe v. Join-
ville, 3 East,
172.

|| Testator, having a brother with a wife and children, a sister with a husband and children, and several nephews and nieces by a deceased sister, after giving legacies to all these persons, devised the residue of his estate to his wife for life, remainder as to one moiety "to his wife's family," and as to other moiety to "his brother and sister's family," equally to be divided between them, share and share alike. Held, that the devise was void for uncertainty.

Mohun v.
Mohun,
1 Swanst. 201.

A devise in these words: "I leave and bequeath to all my grandchildren, and share and share alike," held void as uncertain, both in the object and objects of the bequest.

1 Ves. & B.
462.

The description "child," "son," "issue," every word of that species must be taken *primâ facie* to mean *legitimate* child, son, or issue. But if a testator devises to his children, and by a sufficient description superadded, or by necessary implication, arising from the language or provisions of his will, it appears he meant *illegitimate* children, persons who, by extrinsic evidence, are proved had, at the date of the will, acquired the reputation of being children of the testator, will be entitled.

Testator

Testator devised to "the children which I may have by *Ann Lewis*." Lord *Eldon* thought, upon a consideration of the will, that this expression, though obviously future, was intended to describe illegitimate children in existence at the date of the will.

Wilkinson v. Adam, 1 Ves. & B. 422. See many prior cases cited and examined in this.

It is settled illegitimate children may take under a general description, and as a class, provided it be clear the testator intended his description to apply to such children, and it be proved that at the date of the will they have attained the character of children by reputation.

Beachcroft v. Beachcroft, 1 Madd. 450. Lord Woodhouselee v. Dalrymple, 2 Mer. 419. Bayley v. Snelham, 1 Sim. & Stu. 73.

Testator devised to all the children of his late son *Thomas Swaine*, deceased, as tenants in common. *Thomas S.* left three children; one legitimate, and the others illegitimate. Lord *Eldon* said, "No person except the legitimate son can take under 'this devise, for this reason, that the will itself does not prove 'that the testator meant an illegitimate child.'"

Swaine v. Kennerley, 1 Ves. & B. 469. Harris v. Lloyd, Turn. & Russ. 310.

An illegitimate child cannot take under the general description of "the child of which *A.* is *ensient* by me;" for to shew who was the person to take, might require indecent evidence. "You shall not be allowed to prove whose the child is, but 'only whose it is reputed to be.'" The gift failed, on account of its requiring proof that the object of it was the child of the testator.

Earle v. Wilson, 17 Ves. 528.

But if an illegitimate child *en ventre sa mère* be described as "the child with which *A. B.* is now pregnant," it may take under that description. ||

1 Mer. 152
1 Ves. & B. 435. 466.

Gordon v. Gordon, 1 Mer. 141.

4. By the Devisee's dying in the Lifetime of the Devisor.

If a man devises lands to *A.* and his heirs, and *A.* dies in the lifetime of the devisor, the heir of *A.* shall take nothing by the will; for the heirs of *A.* were not named as immediate takers, but only to express the quantity of the estate that *A.* should take.

Plow. Com. 345. Bret and Rigden. [Goodright v Wright, 1 Str. 25. and 1 P. Wms.

397. S. P. Warner v. White, Dougl. 344. and 1 Br. Ch. Rep. 219. note, S. P. Ambrose, Dougl. 336. S. P. Doe v. Kett, 4 Term Rep. 601. And the law is the same in the devise of a copyhold. Busby v. Greenslate, 1 Str. 445. Duke of Marlborough v. Lord Godolphin, 2 Ves. 77. And that a new publication of the will after the death of *A.* would not make such a devise good. See 4 Term Rep. 601. 2 Lev. 243. Sir T. Jon. 155. Sir T. Raym. 408. 1 Mod. 267. 2 Mod. 513. Pollex. 546. 1 Vent. 341.]

Hodgson v. Cro. Eliz. 422. 423. || S. P. Wynn v. Wynn, 6 Br. P. C. 95. White v. Warner, 11 East, 551.

If a man devises lands to *A.* his second son, and to the heirs of his body, and after his death without issue, then to *B.* his third son, in tail, &c. if *A.* hath issue and dies in the lifetime of the devisor, and then the devisor dies, *B.* shall have the lands presently; for the devise to *A.* being void, it is as if it had never been made.

in note. S. C. 3 Br. P. C. 433. ||

Goodright v. Wright,
1 P. Wms. 597.
S. C. 1 Str. 25.
10 Mod. 370.

|| So, if there be a devise to *A.* in tail, remainder to *B.* in tail, remainder to the right heirs of *A.*, and *A.* and *B.* die in the lifetime of testator, the heir of *A.* cannot take under the ultimate remainder; because, by the rule in *Shelley's* case, that remainder would have vested in *A.*, and his heir could only have taken by descent. And this remainder cannot vest in the heir as a purchaser, though in the event void as to *A.*, because the construction of a will must be according to the import and meaning of the words at the time of making the will (*a*), which in the present case was plainly to devise a fee-simple to *A.* by way of remainder.

(*a*) 1 P. Wms. 400. Doe v. Underdown, Willes' Rep. 293.

Hodgson v. Ambrose, Doug. 537. S. P. Doe v. Colyear, 11 East, 548. 11 East, 557. note.

So, if there be a devise to *A.* for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of *A.*, remainders over; and *A.* dies in the lifetime of testator, his issue can take nothing. Nor is it material whether the first devisee be the heir of testator or a stranger; in either case the next in remainder takes upon his (the first devisee) dying in the lifetime of testator.||

Leon, 253. Cro. Eliz. 243. Hartop's case.

If a man devises to *A.* and his heirs, to the use of *C.* and his heirs, and *C.* dies in the lifetime of the devisor, his heir can take nothing; but the devise will be to the use of the devisor and his heirs.

Plow. 344. Cro. Eliz. 425. Co. 101. a.

But if there be a devise to *A.* for life, remainder to *B.* in fee; though *A.* dies in the lifetime of the devisor, *B.* shall take; or if *A.* refuses, he shall take.

2 Sid. 53. 78. Packman and Cole.

If a man devises his lands to his wife for life, and after to his four daughters and heirs, equally to be divided between them, share and share alike, to hold to them and their heirs for ever; and one of the daughters dies, having issue a son, and then the devisor dies, the will is void for a fourth part.

Doe v. Sheffield, 13 East, 526. and see Doe v. Scott, 3 Maule & S. 300.

|| But where testator devised "to the sisters of *John Howard*, "to hold the same to them, their heirs and assigns for ever, as "tenants in common, and not as joint-tenants;" the court, conceiving from the scope of the will, that he, the testator, "looked "to the class, and not to the number of individuals who might "happen to compose it," held, that an only sister who survived the testator took the whole. It seemed that the testator was ignorant as to the family of *John Howard*, who had three sisters, but two of them were dead before testator made his will.||

2 Vern. 722. Hutton and Simpson. [Pr. Ch. 459. S. C. by the name of Sympton v. Hornsby. Doe v. Kett, 4 Term Rep. 601.]

So, if *A.* has issue two daughters *B.* and *C.*, and he devises some tithes and money to *B.*, and gives legacies to her children; but declares that she having married without his consent, she should have no part of his real estate, and devises his real estate to *C.* in tail, remainder to *B.* for life, and to her first, &c. and *C.* dies in the lifetime of the testator, leaving issue; though afterwards *A.* makes a codicil to his will, and devises some particular legacies out of his personal estate, yet, as that does not amount to a republication of his will, *B.* must have the lands immediately after the death of the devisor, though contrary to the intention of the devisor, the authorities being so.

If a man devises lands to *A.* and *B.* and their heirs, and *A.* dies in the life of the devisor, *B.* shall take the whole lands. Carter, 4, 5.
Davis and
Kemp. §8 Vin.
Abr. "Devise," (W. c.) 373. pl. 14.¶

¶ In a case where there was a devise of a testator's real estate to his mother and sister as joint-tenants, and the sister was dead at the time of making the will, *Mr. Madocks*, of *Lincoln's Inn*, in 1777, advised as follows: "Although the sister was dead " when the will was made, yet I think that the mother took the " whole, as the estate devised to them was in joint-tenancy."¶

* What circumstances are necessary to devises by the 32 H. 8. c. 1. and 34 & 35 H. 8. c. 5. and 29 Car. 2. c. 3., and what shall be a revocation and a new publication, *vide tit.* "WILLS AND " TESTAMENTS."

LEGACIES.

¶ See generally *Roper on Legacies*, 3d edit.¶

In treating of Legacies, we shall consider,

- (A) What a Legacy properly is: ¶ And herein of Donations *Mortis Causâ*.¶
- (B) Where a Legacy shall be said to be well given: And herein,

1. *What Words make a good Bequest.*
2. *What shall be a sufficient Description of the Person to take.*

¶ 1. When Children living at the Date of the Will shall alone take.

2. When Children living at the Death of the Testator shall take.

3. As to Children *en Ventre sa Mère*.

4. When Children living when the Fund becomes divisible are alone entitled.

5. Younger Children.

6. The term "Children" may include Grandchildren and other Issue, if the Intention were so.

7. When natural Children shall take, see *ante*, "LEGACIES AND DEVISES," (L) 3. *in finem*, and 1 *Roper on Legacies*, 70. *et seq.*

8. Heirs.¶

3. *What shall be a sufficient Description of the Thing given, and what shall be said to be bequeathed.*

(C) What shall be an Ademption or Extinguishment of a Legacy.

(D) Where a Legacy shall be presumed to be a Satisfaction of a Debt or Duty owing from the Testator.

(E) Of Legacies vested or lapsed: And herein,

1. *Where it shall be a lapsed Legacy by the Legatee's dying in the Lifetime of the Testator, and where in such Case it shall vest in another Person, to whom it is limited over.*

2. *Where a Legacy shall be said to be vested or lapsed, being to be paid at a future Time, to which the Legatee did not arrive.*

(F) Of Conditional Legacies, and how far the Condition must be complied with, otherwise the Legacy will be forfeited.

(G) Of Specific and Pecuniary Legacies, and the Difference between them.

(H) Of abating, refunding, and giving Security for that Purpose.

(I) Of Residuary Legacies and Legatees.

(K) Of the Payment of Legacies: And herein,

1. *What shall be a good Payment, and to whom to be made.*

2. *At what Time a Legacy is to be paid.*

3. *Where the Legatee shall have Interest and Maintenance in the mean Time.*

(L) Of the Executors' Assent to a Legacy.

(M) Legacies, in what Court, and how properly recoverable.

(A) What a Legacy properly is: ||And herein of Donations *Mortis Causâ*.||

Swinb. 17.
Godolph.

271. (a) The word *devise* is specially ap-

propriated to a gift of lands, the word *legacy* to a gift of chattels, though both are used promiscuously. Godolph. 271. (b) For if a man dispose or transfer his whole right or estate upon another,

A (a) Legacy is defined a gift or bequest of a (b) particular thing by testament, in which an executor is (c) named, or by a writing in nature thereof, called a codicil, in which no executor is named.

another, this, according to the civil law, is called *hereditas*, and he to whom it is transferred is termed *hæres*; but by our law, he only is called *heir* who succeeds to lands and tenements. Godolph. 271-2. (c) But though a writing in which a person expresses his mind to grant such and such things after his death, cannot be called a testament, unless an executor is named, yet it is of force and effect sufficient to pass what he therein declares, and administration shall be granted, with the said writing or codicil annexed, to the next of kin, and such administrator is obliged to observe the directions of such writing, and pay the legacies as far as he has assets. *Vide tit. Executors and Administrators.*

A *donatio causâ mortis* is a gift in *præsenti*, to take effect in *futuro* after the party's death, and is in nature of a legacy, and waits upon the death of the testator, and is ambulatory and open till his death, and may therefore be revoked, as a will may, but has no dependence on the will; and therefore by a general revocation of all former wills seems not to be revoked, without added, and all gifts, legacies, &c. But if one just before his death give any money, or other goods, to another absolutely, this is not a *donatio causâ mortis*, because not revocable; otherwise, if he had said, *This shall be yours, if I die*, or any thing to that purpose.

Swinb. 22.
Prec. Chan.
269. 300.
[In considering the doctrine of donations *mortis causâ*, one cannot help remarking how closely the decisions of the courts of

this country have followed the Imperial Constitutions. Bracton in treating of this subject uses the very language of the Roman law. Lib. ii. c. 26. It seems therefore not to be altogether improper, or to be digressing too far from the limits of our work, to enter into a short comparison of the Imperial and English laws upon this subject.

A donation *mortis causâ* is described in the Institute, "*Cum quis ita donat, ut si quid humanitûs ei contigisset, haberet is, qui accipit; sin autem supervivisset is, qui donavit, reciperet; vel si eum donationis pænituisset, aut prior decesserit is, cui donatum sit.*" And in another part, "*Cum magis se quis velit habere, quam eum, cui donat, magisque eum, cui donat, quam hæredem suum.*" So with us, a donation of this kind must have relation to the death of the donor, is perfected by his death, and until his death is merely conditional, liable to be defeated by the death of the donee in the lifetime of the donor, by the revocation of the donor; and, as Bracton states it, by the donor's recovery, or escape from the danger he apprehended himself to be in; and see acc. *Lawson v. Lawson*, 1 P. Wms. 441. but see *Hill v. Chapman*, 2 Br. Ch. Rep. 612. *semb. contr.* And as with us, if it be not made with reference to death, if it be to take effect presently, if it be revocable, it is then, not a donation *mortis causâ*, but a donation *inter vivos*, and therefore cannot have place between husband and wife; (and a proper donation *mortis causâ* may, like a legacy, pass between persons in that relation). *Tate v. Hilbert*, 2 Ves. jun. 111. 4 Br. Ch. Rep. 286. *S. C.* *Lawson v. Lawson*, 1 P. Wms. 441. *Miller v. Miller*, 3 P. Wms. 356.; so, by the Imperial law, "*Ubi ita donatur mortis causâ, ut nullo casu revocetur, [MORS] (which must be supplied), causa donandi magis est, quam mortis causâ donatio; et ideo perinde haberi debet, atque alia quævis inter vivos donatio; ideoque inter viros et uxores non valet.*" D.L. 39. tit. 6. l. 27.—By both laws a donation of this kind may be made by a person in *periculo mortis*, not only from sickness, but from whatsoever other cause. D.L. 39. tit. 6. l. 3, 4, 5, 6. Bract. lib. 2. c. 26. And as, by the English Law, it is subject to the debts of the donor, and fraudulent as against creditors, *Drury v. Smith*, 1 P. Wms. 406., so by the Imperial law, "*Sicuti legata non debentur, nisi deducto ære alieno, aliquid supersit; nec mortis causâ donationes debentur; sed infirmantur per æs alienum. Quare, si immodicum æs alienum interveniat, ex re mortis causâ sibi donatû nihil aliquis consequitur.*" D.L. 35. tit. 2. l. 66. § 1. "*Et si debitor consilium creditorum fraudandorum non habuisset, avelli res mortis causâ ab eo donata debet. Nam cum legata ex testamento ejus qui solvendo non fuit, omnimodo inutilia sint; possunt videri etiam donationes mortis causâ factæ rescindi debere, quia legatorum instar obtinent.*" D.L. 39. tit. 6. l. 17.—Whether, by the Imperial law, a delivery either actual or symbolical of the subject of the donation were absolutely necessary, nowhere distinctly appears, and hath indeed been a matter of controversy among civilians. Whether by our law, an actual delivery be in all cases requisite, hath not yet been adjudged; in general, it certainly is so. *Ashton v. Dawson*, Sel. Ca. in Can. 14. *Drury v. Smith*, 1 P. Wms. 404. *Hedges v. Hedges*, Pr. Ch. 269. *Ward v. Turner*, 2 Ves. 441. And a mere symbolical delivery will clearly be of no effect; unless indeed the symbol be such as enables the party to come at the possession of the thing which it represents, such as the key of a trunk which contains the thing given. *Jones v.*

Selby, Pr. Ch. 300. 2 Ves. 445. Hence it hath been determined, that the delivery of a promissory note, not payable to bearer, *Miller v. Miller*, 3 P. Wms. 357., and of receipts for S. S. annuities, *Ward v. Turner*, 2 Ves. 459., is not a sufficient delivery to effectuate a gift of this kind of the money due on the note or of the annuities, the property neither in the note nor in the stock passing thereby; and yet the delivery of a bond, though a *chose in action*, hath been holden to amount to a gift (*mortis causâ*) of the debt itself. *Snellgrave v. Bailey*, 3 Atk. 214. But see 3 P. Wms. *ubi supra*. — That a donation *mortis causâ* was good without delivery, where it was evidenced by writing, was admitted by the Imperial law. — *QUIDAM* (which must be supplied) *avunculo suo debitori mortis causâ donaturus quæ debebat, ita scripsit. TABULÆ, VEL CHIROGRAPHÆ TOT, UBIQUE SUNT, INANES ESSE; neque cum solvere debere. Quæro, an hæredes, si pecuniam ab avunculo defuncti petant, exceptione doli mali tueri se possint? Marcellus respondit, posse: nimirum, enim contra voluntatem defuncti hæres petit ab eo.* D. L. 39. tit. 6. l. 28. And with us in a late case, Lord Chancellor *Loughborough*, in speaking on this subject, is reported to have said, “It is not necessary in this case to discuss, whether delivery is necessary in all cases. Perhaps, it might not be difficult to conceive that such a gift might be by deed or by writing. It is clear it could not be by mere parol; because saying, ‘I give,’ without an act, does not transfer the property. So far I concur with the reasoning of Lord *Hardwicke*, in *Ward v. Turner*. It might be considered, if the case should arise, whether there would be any objection to a formal deed. I should think it not within the jurisdiction of the ecclesiastical court, and that the property so given is not to be possessed by the executor.” *Tate v. Hilbert*, 2 Ves. jun. 120. And an instance of such a gift by deed occurs in the case of *Johnson v. Smith*, 1 Ves. 314. Indeed, a devise of lands seems to be nothing else but a conveyance or disposition *mortis causâ*. 1 Burr. 429. — A delivery to a third person to hold in trust for the donee, to be given to him in the event of the donor’s death, was allowed to be sufficient by the Imperial law; D. L. 39. tit. 6. l. 8. § 2.; but it may be doubted, whether it would be so by our law, by reason of the maxim, *donatio perficitur possessione accipientis*, *Jenk. 109. ca. 9.*, whence gifts with us have the semblance of contracts. — To effectuate gifts of this kind the Emperor Justinian required the testimony of five witnesses, *Cod. lib. 8. tit. 57. l. 4.* — a caution which hath been thought reasonable, and in some degree followed by our own courts; *Ward v. Turner*, 2 Ves. 438.; though it must be admitted, that such a gift has been supported upon the testimony of only one witness. *Hill v. Chapman*, 2 Br. Ch. Rep. 612. — By the Roman law, every thing was capable of being the subject of a donation *mortis causâ*, but by our law the necessity of delivery excludes all those things, the property wherein does not or cannot pass by delivery; 3 P. Wms. 357. 2 Ves. 456-7.; though if, according to the inclination of Lord *Loughborough*’s opinion, *suprà*, such a donation may be effectual by deed or writing without livery, it seems to follow, that even those things which are of too complex a nature to pass by delivery, such as the whole or residue of personal estate, may be so disposed of.]

Tate v. Hilbert, 2 Ves. jun. 111. S. C. 4 Br. C. C. 286. Bunn v. Markham, 7 Taunt. 224. S. C. 2 Marsh. 532. S. C. cited 2 Barn. & A. 553. *Walter v. Hodge*, 2 Swanst. 29.

|| *A donatio mortis causâ* is a gift made by a man during his last illness or in peril of death, which is perfected by an actual delivery, but which is revocable during the donor’s life, and is only intended to be absolute in case of the donee’s surviving.

(a) *Smith v. Casen*, 1 P. W. 406. 2 Ves. sen. 434. (b) 36 Geo. 3. c. 52. § 7. (c) *Thomson v. Hodgson*, 2 Str. 777. See 2 Ves. sen. 439. 2 Ves. jun. 120. 1 P. W. 441.

Such a gift is subject to the donor’s debts in case of a deficiency of assets (a), and to legacy duty (b); but it does not vest in executors, nor is it subject to the jurisdiction of the ecclesiastical court. (c)

Tate v. Hilbert, 2 Ves. jun. 111. S. C. 4 Br. C. C. 286. *Gardner v. Parker*, 3 Madd. 184.

The gift must be made with a view to donor’s death; but this is implied if made during his last illness.

There must be an actual delivery, or at least such a delivery as gives the donee possession of the gift.

Bryson v. Brownrigg, 9 Ves. 1.

A selection of a mortgage and a bond from other securities, and a placing of them in a separate drawer, accompanied by a declar-

declaration that they were for a particular person, is not a sufficient delivery.

A verbal gift of a coach and two horses, but no delivery, held not sufficient.

Miller v. Miller,
3 P.W. 356.
358.

Delivery of the key of the place wherein bulky goods are deposited has been held sufficient.

Ward v. Turner, 2 Ves. sen. 443.

The delivery of bank-notes (*a*), promissory notes payable to bearer (*b*), exchequer notes (*b*), exchequer bills indorsed in blank (*b*), or any security (*c*) the mere possession of which will entitle the donee to the money specified, may be a good *donatio causâ mortis*.

(*a*) Miller v. Miller,
3 P.W. 357.
Hill v. Chapman, 2 Br. C.C. 612.
5 Barn. & C. 45.

(*b*) See Wookey v. Pole, 4 Barn. & A. 1. (*c*) See Gorgier v. Mieville, 5

A check on a banker though payable to bearer cannot be delivered as such a gift, for it is revoked by the death of donor, and the money vests in the personal representative.

Tate v. Hilbert, 4 Br. C.C. 286.

A mortgage deed (*d*), receipts for South Sea annuities or stock (*e*), a promissory note not payable to bearer (*f*), cannot pass as a *donatio causâ mortis*, for the possession of such securities will not enable the donee to recover the money secured. But a bond (*g*) is an exception from this rule.

(*d*) Duffield v. Elwes, 1 Sim. & Stu. 243.
but see Hurst v. Beach,
5 Mad. 351.,

where the delivery is to the mortgagor. (*e*) Ward v. Turner, 2 Ves. sen. 451.; see also 3 Madd. 185. (*f*) Miller v. Miller, 3 P. W. 356. (*g*) Gardner v. Parker, 3 Madd. 184.

If the donor resume the gift it is revoked.||

Bunn v.

Markham, 7 Taunt. 224. See 2 Ves. sen. 433.

If one by his will in writing devise a certain legacy in money, and afterwards say to his executor, *I have by my will given such particular legacies; I would have you increase the same to such a sum*; this by the civil law is termed *commissum fidei*, and a good legacy.

Cro. Jac. 345-6.
2 Buls. 207.
Godb. 246.
but vide now the

statute 29 Car. 2. c. 5. and tit. *Wills and Testaments*.

If a man covenants with *J. S.* to pay him 20*l.*, and afterwards by will he devises to him 20*l.* in discharge of the said covenant, this is not a legacy suable in the spiritual court, but remains still a debt, recoverable at common law.

2 Leon. 119.

But if *A.* covenants with *J. S.* that he will pay 20*l.* a-piece to *B.*, *C.*, and *D.*, and afterwards he devises 20*l.* a-piece to *B.*, *C.*, and *D.*, in discharge of this covenant, these are good legacies, and recoverable in the spiritual court, the covenant in this case being with a stranger, and therefore *B.*, *C.*, and *D.* have no remedy, but by applying as legatees.

2 Leon. 119.
Davies and Percie's case;
et vide infra,
letter (M).

(B) *Where a Legacy shall be said to be well given:*
And herein,

1. *What Words make a good Bequest.*

HERE we must observe, that although in grants and deeds of gift the law requires a set form of words, yet in last wills and testaments, which are presumed to be made at the time when

Godolph. 281.
2 Vern. 467.

the testator is *inops concilii*, the law regards chiefly the intention of the testator, and therefore any words, which manifest his intention to create or give a legacy, will be sufficient for that purpose.

Godolph. 281.

[(a) If a testator desire his executor to give another 200*l.*, without prescribing any time of payment, it is

As, if a man by his will says, *I do give, bequeath, devise, order, or appoint to be paid, given, or delivered*; or, *My will, pleasure, or desire is (a), that he shall have and receive, or keep or retain*; or, *I dispose or assign, or leave such a thing to such a one*; or, *Let such a person have such a thing*; these, or the like words, are sufficient to create a good bequest.

a good bequest.

Brest v. Offley, 1 Ch. Rep. 246. For where the property and the person are ascertained, *recommendatory* bequests are considered as *imperative*. Harding v. Glyn, 1 Atk. 469. Richardson v. Chapman, 1 Burn's E. L. tit. "Bishops," p. 220. 5 Br. P. C. 400. Earl of Bute v. Stuart, 5 Br. P. C. 554. Palmer v. Scribb, 2 Eq. Ca. Abr. 291. Harland v. Trigg, 1 Br. Ch. Rep. 142. Wynne v. Hawkins, *Id.* 179. Nowlan v. Nelligan, *Id.* 489. Pierson v. Garnet, 2 Br. Ch. Rep. 45. 230. Malim v. Keighley, 2 Ves. jun. 333. 529.]

Godolph. 282.

Where it is said, that a

So, if the testator says, *I depute such a thing to A. B.*, or, *I assign such a thing to C. D.*; these are good bequests or legacies.

legacy may be given by signs, becks, or nods; by the head, hands, or eyes; or by shewing a pleased or displeased countenance, or by other motion of the body; because the law regards more the meaning and intention than the words of the testator. Godolph. 282-3.

Godolph. 282.

So, if a man by will gives 100*l.* besides the cloak, &c.; this is a good bequest of the cloak, &c. as well as of the 100*l.*

Godolph. 282.

So, if a man says, *Out of the 100*l.* which I bequeathed A. I give B. 50*l.**; this a good bequest of the 50*l.* to B., because only a false demonstration in an immaterial circumstance, which shall not vitiate the legacy; but in this case A. takes nothing; for words of diminution shall never be construed to give a legacy by implication.

Godolph. 282.

But if the demonstration be totally false, as if the testator says, *I bequeath to A. the 100*l.* which I have in my chest*, and there is not any money in the chest, the legacy is void.

Godolph. 283.

If the testator says thus, *If my son A. marries B., let not my executor give him 100*l.**; these words, on A.'s not marrying B., are said to be sufficient to give him the 100*l.*

Crowder v.

Clowes, 2 Ves. jun. 449.

||So, testator bequeathed to his niece 1000*l.*, to be paid at his death, if she were then married; but if not, then the interest for her life or until she married; *but if she died unmarried*, the legacy was to lapse. Niece was *not* married at death of testator, but married soon after; she was held entitled to the legacy.

Wainewright

v. Wainewright, 3 Ves.

558. Good-

right v. Hos-

kings, 9 East, 306.

So, a bequest of maintenance during minority, with power to advance 200*l.* of principal, with a bequest over if the minor should die under age, was held to vest the principal in the minor absolutely on attaining twenty-one.

Peat v. Powell,

1 Eden, 479.

Hale v. Beck,

2 Eden, 229.

Again, if testator bequeaths his residue to trustees for his son till twenty-one, and then the trust to cease, the son is absolutely entitled on attaining twenty-one.

Hamley v.

Gilbert, Jacob,

354., and see

Testatrix gave residue to her niece, to be paid and expended by her at her discretion, for the education of her son F. G., and that

that she should not thereafter have to account to her son or any person: and among other legacies, testatrix gave 200*l.* to her niece. Sir *T. Plumer* decided, that the niece was entitled to the residue, subject to a trust, to apply such part to the education of her son as the master should approve.

Testator gave interest to be paid to educate *M. M.*, and *M. M.* was to have the interest so long as she lived single, and no child; and when it pleased God to call her, the money was to go to testator's brother's children. Held, that *M. M.*, though she married and had a son, was entitled to the interest for her life.||

If a legacy be given by the testator to the son of one who is indebted to him, and the testator add these words, *I should or would leave him more, if his father had paid me what he owes me*, it is held, that if afterwards that son happens to be his father's executor, he is by these words freed from that debt which his father owed the testator.

If there be a devise of a personal thing to *A.* for life, directing him at his death to give it to *B.*; this amounts to a devise of the use of it only to *A.* for life, remainder to *B.*

||WORDS OF RECOMMENDATION, DESIRE, &c. CREATE A BEQUEST, OR RATHER RAISE A TRUST.

But it is necessary that the words be imperative, and the objects and property certain. Thus a bequest of 2000*l.* to *R. M.* generally, with a "*desire*" that at his death he would give it over, *R. M.* dying in testator's life, the parties to whom it was to be given over were entitled.

So, a "*desire*" that legatee would appoint amongst a class. The legatee did not appoint: on her death the class were held entitled.

stated 5 Ves. 501. cited 8 Ves. 571.

So a devise, testator "*not doubting*" but that devisee would dispose of same amongst his children.

So in case of a devise and bequest, testator "*knowing*" that devisee would provide for his daughter; with a *request*, in case of devisee's death, that *A.* and *B.* would take charge of estate for the daughter.

So, where testator "*requested*," (a) "*recommended*" (b) legatee to dispose of the gift among certain persons.

cited 8 Ves. 575. 10 Ves. 556. (b) *Malim v. Keighley*, 2 Ves. jun. 533. and see 387. 18 Ves. 41.

So where testator, after charging the rents of an estate, "*authorized and empowered*" *J. B.* to dispose of residue among such of the children of *S.* as he should think fit; *J. B.* died in testator's lifetime, yet the children were held entitled.

So, where the words were "*will and desire*," with a power of selection.

Tibbits v. Tibbits, 19 Ves. 656. *Jacob*, 317. *Forbes v. Ball*, 3 Meriv. 457. 1 Russell, 511.

Hammond v. Neame, 1 Swanst. 35.

Bird v. Hunsdon, 2 Swanst. 542., and see *Crawford v. Trotter*, 4 Madd. 361.

Godolph. 234.

2 Vern. 467.

Mason v. Limburgh, cited in *Vernon v. Vernon*, Amb. 4. and see 1 Turner, 157.

Harding v. Glyn, 1 Atk. 468. S. C.

Massey v. Sherman, Amb. 520.

Nowlan v. Nelligan, 1 Br. C. C. 489.

(a) *Pierson v. Garnet*, 2 Br. C. C. 226.

1 Sim. & Stu.

Brown v. Higgs, 4 Ves. 708. 8 Ves. 561. 18 Ves. 192.

Birch v. Wade, 3 Ves. & B. 198.; see also

Broad v. Bevan,

So,

(a) *Prevost v. Clarke*, 2 Mad. 458. So, where the words were "*entreat*," (a) "*desire*," (b) with a power of selection.

(b) *Conwys v. Colman*, 9 Ves. 319.

Robinson v. Smith, 6 Mad. 194. Bequest of residue to Miss *E. S.*, under the following restrictions: — If Mr. *Ince* should marry and have children, she will give 500*l.* *per annum* to her niece *H. S.*, and afterwards divide the remaining property among the brothers and sisters equally; "unless any one shall be afflicted with vice or prodigality in her opinion, let him or her not have a shilling of what she can leave." Held to be an interest vested in the brothers and sisters, subject to be defeated by an appointment by *E. S.*

But if the words of recommendation, &c. are not imperative, but simply empower a gift to be made to the objects specified, nothing passes to or vests in them till the power is executed.

Bull v. Vardy, 1 Ves. jun. 270. Thus, testator gave his wife several houses, but did not give her any interest in the general produce of his estate, and then proceeded: "I further empower my wife to give away at her death 1000*l.*: 100*l.* to *E. T.*; 100*l.* to *C. D.*; and 800*l.* to *R. L.*" The wife died without making any appointment. Held, that nothing passed to these legatees.

And the court will not allow any words recommendatory, or precatory, or expressing the hope or confidence of the testator, to create a bequest, or raise a trust, unless the fund or property to which they refer is certain or ascertainable. Thus, if after a bequest to *A.* such words refer to, "so much as shall remain," (c) — "so much as he shall have at his death," (d) — "what shall be left," (e) — "all that is remaining that he has not necessary use for," (f) — "the remainder of his (*A.*'s) property, after giving 200*l.* to each of the Miss *Nortons*," (g) — the court will not attach a trust upon so uncertain a *residuum*.

(c) *Attorney General v. Hall, Fitzg.* 314. cited 1 Ves. sen. 9. See *Pushman v. Filleter*, 3 Ves. 7. *Wilson v. Major*, 11 Ves. 205., and see 1 Mer. 314. (d) *Bland v. Bland*, Pre. Ch. ed. Finch, 201. (e) *Wynne v. Hawkins*, 1 Br. C. C. 179. (f) *Strange v. Barnard*, 2 Br. C. C. 586. (g) *Eade v. Eade*, 5 Madd. 118. affirmed on appeal by Lord *Eldon*. See 1 Sim. 540. *Curtis v. Rippon*, 5 Madd. 434.

Le Maitre v. Bannister, Pr. Ch. ed. Finch, 201. note. So, the same decision was made where testatrix gave her fortune to *B.*, and if he died without issue, she recommended it to him to do justice to *A.* and her children; but if any unforeseen accident should make the whole or any part acceptable to himself, he might dispose of it as he thought proper.

Abraham v. Alman, 1 Russell, 509. So, where the words were, "I bequeath to my son *Isaac Jacobs* the sum of 60*l.* *per annum* for ever; also to provide for the two daughters of my child *Hannah*, and the remainder of my property to the two children of my daughter *Sukeey*." Held, that the daughters of *Hannah* took nothing.

Harland v. Trigg, 1 Br. C. C. 142. It is necessary, too, that the objects of the recommendation be distinctly ascertained, as well as the property.

Meredith v. Heneage, 1 Simons, 542. 559.

Sale v. Moore, 1 Simons, 534. Testator bequeathed all his worldly substance to his wife upon trust, for the following purposes, and then gave several legacies, and proceeded: — "The remainder of what I die possessed of, after payment of the aforesaid debts and legacies, I leave to my
" dear

"dear wife, recommending to her, and not doubting, as she has no relations of her own family, but that she will consider my near relations, should she survive me, as I should consider them myself in case I should survive her." Held, that the wife took the residue absolutely.

"Whenever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shew clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it."

Verba Lord
Alvanley
M. R., in
Malim v.
Keighley,
2 Ves. jun. 335
1 Simons, 565.

Again, where testator, after giving his real and personal estates to his wife in fee, said, he had so given the same to her, unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate together and entire to such of his father's heirs as she might think best deserved her preference. Held, that no trust was created.

Meredith v.
Heneage,
Dom. Proc.
A. D. 1824,
1 Simons, 542.

It was admitted, too, in the above case, that an *entreaty* by the testator that his wife would at her decease settle part of the real estate for securing to *Jenny Piggott* a competent income, "leaving the amount of such income to the entire discretion of my said wife," was not imperative upon the wife. Lord *Eldon* observed, "There was a certainty as to the person, but not as to the quantity of property to be given." ||

1 Simons, 553.

A. devises his land to *B.* in fee, paying 400*l.*, whereof 200*l.* to be at the disposal of his wife, in and by her last will and testament, to whom she shall think fit to give the same; these words vest an absolute interest in the wife, so that, though she dies intestate, her administrator shall have the 200*l.*

1 Simons,
565.

2 Vern. 181.
Robinson v.
Dusgate; and
vide Hob. 9.
|| Maskelyne
v. Maskelyne,

Amb. 750. *Hixon v. Oliver*, 15 Ves. 108. ||

|| So, where testator gave 2000*l.* to his son *James*, payable at twenty-one; "and in case *James* should not receive or dispose of by will or otherwise, in his lifetime, the said 2000*l.*, it should go to the heir in tail for the time being of *S.* estate." Held, that *James* took absolutely, and though he died before he received the legacy, it did not go over, but went to his representative.

Ross v. Ross,
1 Jac. and W.
154.

But when an estate for life is given to the legatee, though followed by a declaration that he may dispose of the fund by will, the absolute interest will not vest in him, and if he does not appoint the fund, it will not vest in his representatives. ||

Nannock v.
Horton, 7 Ves.
392.

If a man gives legacies to his children, to be paid at twenty-one or marriage, and if any of them die before twenty-one or marriage, the legacy of such child to be disposed of to two or more of the children then living, in such manner as his wife (whom he makes executrix) shall think fit, and one of the children dies under age, and unmarried, the mother (*a*) may appoint such legacy to any one of the other children, and it will be good.

2 Vern. 513.
Thomas and
Thomas.
(a) But if an
executor has a
general power to
distribute a
sum of money
amongst chil-
dren at discre-

tion, and he makes an unreasonable or indiscreet disposition, it will be controlled in a court of equity. 2 Vern. 513.—As, where a man having two daughters, one by a former wife, and another by

by

by a second wife, devised his estate to his wife, to be distributed between his daughters as his wife should think fit, and she having given 1000*l.* to her own daughter, and but 100*l.* to the other, the court decreed an equal distribution. Vern. 355. Cragrave and Perrost; and *vide* 2 Vern. 421. S. P. [Alexander v. Alexander, 2 Ves. 640. Menzey v. Walker, Ca. temp. Talb. 72. S. P.] ||Butcher v. Butcher, 9 Ves. 382. S. C. 1 Ves. & B. 79.||

2 Chan. Ca.
198. Martin
and Clerk.

If a man devise 40*l.* to be paid *J. S.*, by him to be disposed of in such manner as the testator should, by a private note, acquaint him with, and die without such appointment, this is said to be a good bequest to the party.

3 P. Wms. 40.
Trin. 1730.
Davies and
Dewes *et al.*
decreed.
||See Roper,
vol. ii. 587.
Attorney
General v.
Johnstone,
Amb. 577.
Baker v. Hall,
12 Ves. 497.||

But it has been held, if *A.* by will gives a house at *F.* to *B.* his wife, for life, and declares that he will dispose of the goods and furniture in that house, after the death of *B.*, by a codicil, and makes *B.* residuary legatee of all the *residue of his personal estate whatsoever not before disposed of, or reserved to be disposed of by his codicil*; then makes two codicils, but takes no notice of the goods and furniture in the house at *F.*, and makes his wife one of his executors, that the wife should not have the absolute interest in the goods and furniture in the house at *F.*, but that it should be distributed after her death as an undisposed interest, and she to have her widow's part thereof only.

2 Vern. 153.
Wareham
and Brown.
||See Wain-
wright v.
Waterman,
1 Ves. jun. 311.
French v. Davidson, 3 Madd. 396.

If one devise his land for payment of his debts and legacies, and devise 400*l.* a-piece to two of his sisters, and to his third as much as his executor shall think fit; the third shall have 400*l.* also, and be made equal to her other sisters, if the estate will hold out.

2. What shall be a sufficient Description of the Person to take.

1. When Children living at the Date of the Will shall alone take.

Dyer, 177.
Co. Litt.
112. b.
Preced.
Chanc. 470.
1 P. Wms.
340. 2 Ves. 84.
But, in

It seems agreed, that if a man devises legacies to all his children and grandchildren, that this extends only to those who were *in esse* at the time when the will was made; for then the will speaks, and none born after are to be let in, unless there had been future words in the will, *to all his children or grandchildren which should be born or be living at his death.*

2 Vern. 105. where a man devised 20*l.* a-piece to all the children of his sister; it is there said to have been decreed, that a child born after the will, and before the death of the testator, should take, the word *children* comprehending all.

2 Vern. 710.
Musgrave v.
Parry.

If a man devise the surplus of his estate to his grandchildren living at his death, grandchildren born after his decease shall not take it; for if he had so intended it, he would not have restrained it to children living at his death.

2 Vern. 705.
Weld v.
Bradbury.

If one devise the surplus of his personal estate to the children of *A.* and *B.*, and neither of them have a child at the time of making the will, or the death of the testator, the devise is executory, and shall extend to any children that *A.* and *B.* shall afterwards have; and the children of each shall take *per capita*, and

and not *per stirpes* (a), they claiming in their own right, and not as representing their parents.

(a) See *acc. Northey v. Strange*, 1 P. Wms. 345.

¶ The court, in general, is anxious to include all children, especially if the testator be their father; but if the bequest is expressly confined to children living at the date of the will, it cannot be extended.

Testator bequeathed to the *children* of his sisters *Esther, Martha, and Tamar*; "but if any of them shall die in my life-time, leaving issue, such issue shall be entitled to the same legacy the parent would have been entitled to, if living at my decease." *Martha* had children, but they all died before testator made his will, leaving issue: held, that such issue were not entitled, for their parents were never entitled.

Christopher-son v. Naylor, 1 Mer. 320.
See *Matchewick v. Cock*, 3 Ves. 609.
Freemantle v. Taylor, 15 Ves. 365.

So, under a bequest to the *six* children of *John* and *Mary*, a seventh child cannot take, though one of the six die, and afterwards the will is republished.

Sherer v. Bishop, Br. C. C. 55.

So, under a bequest to the *seventh* child, a child who was in fact the eighth, but before whose birth the seventh child had died, was held not entitled.

West v. Lord Primate of Ireland, 3 Br. C. C. 148.
2 Cox, 258. S. C.

But a bequest to all the children *Joseph Ringrose* hath by his wife, will include children born *after* the date of the will and before the death of testator.

Ringrose v. Bramham, 2 Cox, 384.

2. When Children living at the Death of Testator shall take.

If there be a bequest to children begotten, or to be begotten, and it vests and is divisible, (though subject to be divested by death under age (b)), at the death of testator, children born subsequently are not entitled: and it matters not that part of the fund cannot be actually divided, being charged with and appropriated for the payment of annuities. (c)

Roberts v. Higman, 1 Br. C. C. 532.
in note.
Viner v. Francis, 2 Br. C. C. 658.
2 Cox, 190.

S. C. Sprackling v. Rainer, 1 Dick. 344. *Heath v. Heath*, 2 Atk. 122. (b) *Davidson v. Dallas*, 14 Ves. 576. See *Scott v. Harwood*, 5 Madd. 332. (c) *Hick v. Chapman*, 1 Ves. jun. 405.

Of course, if testator manifests an intention, though not directly expressed, that *all* the children shall take, they will all be included.

Shepherd v. Ingram, Amb. 488. S. C. 1 Ves. sen.

485. *nom. Gibson v. Rogers*.

If a legacy of 500*l.* is given to the eldest son of *A.* to be begotten, to place him out apprentice, and *A.* has a son born after the testator's death, the legacy shall be paid him though not born in the testator's life, and though it was given to him for a particular purpose, for which he was unfit.

2 Vern. 431.
Nevil and Nevil, decreed. See 1 Roper, 552.

3. As to a Child *en Ventre sa Mère*.

A posthumous child may take under the description of children living at testator's death, or at the death of any other person, or of children born in testator's lifetime. (a)

Doe v. Clark, 2 H. Bl. 399.
Rawlins v. Rawlins,

2 Cox, 425. (a) *Trower v. Butts*, 1 Sim. & Stu. 181.

4. When

4. When Children living at the Time the Fund becomes divisible are alone entitled.

If a fund be given to the children of *A.* born, or to be born, the shares to be payable on their respectively attaining twenty-one, or on the youngest attaining that age (*b*), no child who is not in existence when the first share is payable is entitled. Children of a second marriage may take with those of a former marriage. (*c*)

Gilmore v. Severn, 1 Br. C. C. 582. Prescott v. Long, 2 Ves. jun. 690. Hoste v. Pratt, 3 Ves. 750. Whitbread v. Lord St. John, 10 Ves. 152. Gilbert v. Boorman, 11 Ves. 258. (*b*) Hughes v. Hughes, 5 Br. C. C. 352. (*c*) Barrington v. Tristram, 6 Ves. 345.

But children born after the first share is payable shall take, if the testator manifest that such is his intention. Thus, where testator, after bequeathing a residue to the children of *A.* and *B.*, his daughters, payable at twenty-one, declared that, if any child married and died before their mothers, leaving issue, they should stand in the places of their parents; and in case his daughters died without issue, or having had such, they should die without issue in the lifetimes of his daughters, the residue should go over. Held, that *all* the children of daughters were entitled, including those who came *in esse* after the eldest attained twenty-one.

Mills v. Norris, 5 Ves. 535.

So, if a fund is given to a class, payable upon the death of a person named; generally, all the class who come *in esse* before the death of the tenant for life are entitled, but not those born after.

Ellison v. Airey, 1 Ves. sen. 111. Attorney General v. Crispin, 1 Br. C. C. 586. Devisme v. Mello, 1 Br. C. C. 537. Walker v. Shore, 15 Ves. 122. Tebbs v. Carpenter, 1 Madd. 290.

Again, if a legacy be given to *B.* for life, and then to the eldest child of *C.*, and if he have none, then to *D.*; should *C.* have no child at the death of *B.*, but one is afterwards born, it will be excluded, and *D.* will be entitled to the legacy.

Godfrey v. Davis, 6 Ves. 45. 48.

But, of course, children born after the period of distribution may take, if it is clear that such was the testator's intention.

Hutcheson v. Jones, 2 Madd. 124.

5. Younger Children.

Provisions made by parents, or persons *loco parentum* for younger children, are divisible amongst those who are younger children at the period when the fund is distributable; thus, a second son becoming an eldest son before that period is excluded.

Chadwick v. Doleman, 2 Vern. 528. Teynham v. Webb, 2 Ves. sen. 198. Broadmead v. Wood, 1 Br. C. C. 77. Lady Lincoln v. Pelham, 10 Ves. 166. Bowles v. Bowles, 10 Ves. 177. Matthews v. Paul, 3 Swanst. 328. See Windham v. Graham, 1 Russ. 331. In this case, upon the words of the settlement, a second son became an eldest son after the vesting, but before the division of fund was *not* excluded. See also Leake v. Leake, 10 Ves. 477.

An *eldest* daughter may take as a younger child.

Beale v. Beale, 1 P. Wms. 244. Butler v. Duncombe, 1 P. W. 449. Heneage v. Hunlocke, 2 Atk. 456. Pierson v. Garnet, 2 Br. C. C. 38.

An only child, a son, may take under a bequest to the youngest child.||

Emery v.
England,
3 Ves. 232.

If money is devised to younger children, where there are divers daughters, and a son, who by birth is a younger child, but is heir at law to a considerable estate of inheritance, he shall not be considered as a younger child, so as to take by the devise.

5 Chan. Rep. 1.
Bretton v.
Bretton.

||So, where testator bequeathed to the *children* of his *late* brothers and sister, and at the date of the will and death of testator there were children of the brothers, but of the sister there were *no* children, but only grandchildren; Sir *W. Grant* decided, the grandchildren took nothing.

Radcliffe v.
Buckley,
10 Ves. 195.

6. The term "*Children*" may include Grandchildren and other Issue, if it appear that such was the Testator's Intention.

Thus, where the testator used the words *children* and *issue* indiscriminately, and shewed that he did not intent to restrict the latter by the former.

Wythe v.
Blackman,
1 Ves. sen. 196.
cited 3 Ves.

258. Gale v. Bennet, Amb. 681. Royle v. Hamilton, 4 Ves. 437. See *ante*, *Legacies and Devises*, (L) 3.

But the word "*issue*" may be confined to mean children, or children and grandchildren only.

Earl of Ox-
ford v.
Churchill, 5 Ves. & B. 59.

Grandchildren will not include great-grandchildren, unless such be the intention of the testator.

Hussey v.
Berkeley,
2 Eden, 196.

So, great nieces cannot take together with nieces under a bequest to them.||

Shelley v.
Bryer, Jacob,
207.

If *A.* devise 1500*l.* in trust for the children of *B.*, and *B.* have only one child, and several grandchildren, the child only shall take, and the grandchildren shall not come in for shares; but if *B.* had not a child living, the grandchildren might have taken by the name of children.

2 Vern. 106.
Crook v.
Brooking.
||Reeves v.
Brymer,
4 Ves. 692.

Radcliffe v. Buckley, 10 Ves. 195. ||

|| 7. When "*natural*" Children shall take, see *ante*, "*LEGACIES AND DEVISES*," (L) 3. *in finem*; and 1 *Roper on Legacies*, 70. *et seq.*

HEIRS. — Under a bequest to *Edward's* "*heirs*," in case of his death in testator's lifetime (*a*), — or, under a residuary bequest to the testator's next of kin or heir at law (*b*); the next of kin living at testator's death are entitled.

(*a*) Vaux v.
Henderson,
1 Jac. & W. 588.
(*b*) Lowndes
v. Stone,
4 Ves. 649.

But "*heirs*," from the language of the will, is frequently held to mean children. Thus, under a bequest, "*I give to my sister L.'s heirs 4000*l.*; I give to my sister B.'s children 1000*l.*;*" *L.* had two daughters only, who were held entitled to the legacy.

Loveday v.
Hopkins,
Amb. 273.

So, if there be a bequest to *A.*, for life, with remainder to his heir or heirs of his body, as he shall appoint (*c*); or, to the heirs or heirs male of his body, as tenants in common (*d*); or, to the heirs or heirs male of his body, their executors, adminis-

(*c*) Target v.
Gaunt, 1 P W.
452. and see
5 Maul.
& S. 100.
(*d*) Jacobs v.

trators,

Amyatt, 4 Br. C. C. 542.; and see 5 Maul. & S. 95. (a) *Donne v. Merrefield*, cited *Forest*, 56. *Hodgeson v. Bussey*, 2 Atk. 89.

Law v. Davis, cited 1 Ves. jun. 145. See *Wilson v. Vansittart*, Amb. 362. So, where an express estate for life was not given to the parent, as upon a bequest to *B.* and his heirs male, equally to be divided between them, share and share alike; *B.* had four children, and he was held entitled to a life interest, with remainder to his children, being sons.

Crawford v. Trotter, 4 Madd. 361. Again, upon a bequest "to Lady *Scott* and to her heirs (say "children)," Lady *S.* had children; and it was held, that she was entitled for life, with the remainder to her children.

Gwynne v. Muddock, 14 Ves. 488. But personal estate may go to the heir, properly and technically such, if that be the testator's intention. As, where testator bequeathed to his daughter all his real and personal estates for her life, and to be enjoyed after her death by his "next heir."||

Vern. 35. Danvers v. Earl of Clarendon. A man by will devised all his goods in such a house to *G.* for life, and after his decease, to the heir of *J. S.*; and the point was, whether he that was heir of *J. S.* should take these goods as devisee, and the said goods to go to his executors, although such heir die in the lifetime of *G.*; or whether he, who was heir to *J. S.* at the time of *G.*'s death, should have them: and though it was urged that those goods were only the furniture of the capital house, yet my Lord Chancellor was of opinion, that they absolutely vest in him that was heir of *J. S.* at the time of the death of *J. S.*, and decreed accordingly.

||ISSUE. — As to the construction of this word, see *ante*, "LEGACIES AND DEVISES," (L) 3.||

2 *Vern. 546. Townshend v. Windham.* SERVANTS. — The Duke of *Bolton*, by will, devised in these words, *viz.* Item, *I give and bequeath unto such of my servants, as shall be living with me at the time of my death, one year's wages. Per Lord Keeper:* Stewards of courts, and such as are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will; but I will not narrow it to such servants only as lived in the testator's house, or had diet from him.

Chilcot v. Bromley, 12 Ves. 114. ||So, a coachman provided for the testator by a job-master, together with a carriage and horses, is not a servant of testator. and see *Laugher v. Pointer*, 5 Barn. & C. 547.

Herbert v. Reid, 16 Ves. 486. Parol evidence is admissible to shew that a servant was in the service of testator at the time of his death, though he had left the house for a short period.||

2 *Vern. 381. Jones & Beale. See Ambl. 640.* *A.* gave legacies of 15*l.* a-piece to each of his relations of his father and mother's side, and gave the surplus of his personal estate to *B.*, and made *C.* his executor; the executor paid 15*l.* to the testator's cousin-german, and 15*l.* a-piece to her four children; and the court allowed the payment to the children, and would not restrain the devise to the relations within the statute of distributions.

Preced. Chan. 401. Roach v. Hammond. But, notwithstanding this case, it seems the established doctrine of the court of Chancery to make the statute of distributions the

the rule and measure of such general devise; as where *A.* devised all his real and personal estate for the use of his RELATIONS, without specifying any in particular, or using any other words; it was agreed to be the rule of the court, in the construction of such devises to relations, that those who by the statute of distributions would be entitled to the personal estate in case he died intestate, should, upon such general devises, be let into the same proportions only; and my Lord Chancellor said, he thought it the best measure for setting bounds to such general words, and that it had been often ruled accordingly.

¶ RELATIONS.—Under a bequest to relations, or to *near* (a) relations, the next of kin, according to the statute of distributions, in existence at the death of testator are alone entitled, unless from the nature of the bequest, or the testator having authorized a power of selection, a different construction is allowed. Thomas v. Hole, Forrest, 251. Green v. Howard, 1 Br. C. C. 31. Devisme v. Mellish, 5 Ves. 329. Pope v. Whitcombe, 3 Mer. 689. (a) Whithorne v. Harris, 2 Ves. sen. 527.; and see 19 Ves. 403.

The courts will not allow this construction of *relations* to be altered by parol evidence of what was the understanding of the testator respecting the word; as, that he intended *second* cousins as well as first. Green v. Howard, 1 Br. C. C. 31.

Nor by the circumstance of testator, after bequeathing to relations, *excepting* a person who was *not* entitled as one of the statutable next of kin. Rayner v. Mowbray, 3 Br. C. C. 234.

But though next of kin alone take as relations, yet if the bequest is "equally to be divided," the direction is observed, and all (as brothers and children of a deceased brother) take *per capita*. Thomas v. Hole, Forrest, 251.

Again, if the bequest is to "poor" or "necessitous" relations, the court selects those of the next of kin who are in want of assistance. Anon. 1 P. Wms. 327. Brunsden v. Woolredge, 1 Dick. 380. S. C. Amb. 507. Widmore v. Woodroffe, Amb. 636.

But in some cases, from the nature of the bequest, as where the bequest is to provide a perpetual fund for charity, *all* relations are entitled, though not next of kin according to the statute.

As where the bequest was, "for the purpose of putting out our (b) White v. White, 7 Ves. 423. (c) Attorney General v. Price, 17 Ves. 371. "poor relations apprentices (b):" and again, "for ever to divide among my poor kinsmen and kinswomen, and among their (c) offspring and issue, 20*l.* a year." (c)

So, if the testator gives a power of selection to any person, he may appoint to a relation who is *not* one of the statutable next of kin. Mahon v. Savage, 1 Sch. & L. 111.; and see 16 Ves. 43. Spring v. Biles, 1 T. R. 455. note. Bennett v. Honeywood, Amb. 708.

If, however, such a power is not exercised, the fund is divided among the next of kin at the death of the donee of the power. Harding v. Glyn, 1 Atk. 469., cited 5 Ves. 501. See Cruwys v. Colman, 9 Ves. 325. Cole v. Wade, 16 Ves. 27.

If the bequest be to the *nearest* relation, the nearest next of kin are entitled, whether they be one or more. Marsh v. Marsh, 1 Br. C. C. 293. Smith v. Campbell, 19 Ves. 400. Coop. 275. S. C. See tit. *Legacies and Devises*, (L) 3. VOL. V. K A widow

Davies v. Baily, 1 Ves. sen. 84. Worseley v. Johnson, 3 Atk. 758. A widow or relation by marriage is, generally speaking, not entitled under a bequest to relations, for she is not one of the next of kin. Maitland v. Adair, 5 Ves. 231. See 14 Ves. 582.

Falkner v. Butler, Amb. 514. and see 1 Jacob, 208. Upon a bequest to "such of his relations, sisters, nephews, " and nieces, as his wife should appoint," it was held that the power could not be exercised in favour of *great* nephews and nieces.

Brandon v. Brandon, 5 Swanst. 312. Bird v. Wood, 2 Sim. & Stu. 400. NEXT OF KIN.—Upon a bequest to the "next" or "nearest of kin," these words are construed literally and without reference to the statute; so that brothers and sisters take, to the exclusion of nephews and nieces. Pitcher, 12 Ves. 453. Anon. 1 Madd. 36.

Garrick v. Lord Camden, 14 Ves. 382. The words "next of kin" *primâ facie* exclude the widow; but a bequest, "to be divided as if I had died intestate," may admit her claim.

Evans v. Charles, Anst. 128. Price v. Strange, 6 Madd. 159. Bridge v. Abbot, 5 Br. C. C. 224. LEGAL PERSONAL REPRESENTATIVES.—A bequest to these persons is given to the executors or administrators of the person named, unless a contrary intention is shewn, and they take beneficially and as *personæ designatæ*: but the courts anxiously lay hold of any circumstance to displace the legal title, and to infer an intention in favour of the next of kin, or the children, grandchildren, &c. Jennings v. Gallimore, 3 Ves. 146. Long v. Blackall, 3 Ves. 486. See 19 Ves. 404. Roper, ch. 2. sec. 7.

Saunders v. Franks, 2 Madd. 147. Wilson v. Mount, 2 Sim. & Stu. 493. EXECUTORS AND ADMINISTRATORS.—A bequest to *A.* for life, remainder as she should appoint, remainder to her executors and administrators for their own use and benefit; the whole interest does not vest in *A.*, but the executors and administrators take as purchasers in their own rights, subject to the appointment.

DESCENDANTS. See title "LEGACIES AND DEVISES," (L) 3.

FAMILY.—See *Ibid.*

Mayott v. Mayott, 2 Br. C. C. 125. FIRST AND SECOND COUSINS.—Under a bequest to first and second cousins of the name of *M.*, first cousins of that name once removed, living at the testator's death, were held entitled with a first cousin of the same name; there appeared to be no second cousin.

Newland v. Attorney General, 3 Mer. 684. GOVERNMENT.—A legacy to government in exoneration of the national debt, or otherwise, for the benefit of the public, is to be disposed of under the king's appointment, by sign manual.

Humphreys v. Humphreys, 2 Cox, 186. Omission of name may be supplied from context of the will.—Testator bequeathed to his *seven* children, *A., B., C., D., E.,* and *F.* (naming only six), the name of the seventh was supplied.

Tomkins v. Tomkins, 19 Ves. 126. note. So, upon a bequest "to my sister's three children of 50% a-piece," where the sister had four children, each of the four was held entitled.

Garvey v. Hibbert, 19 Ves. 125. Again, upon a bequest to the three children of *D.*, and *D* had four children, the legacy was decreed to the four. Sir *W. Grant* M. R. said, the meaning was "*all* children."

If a legatee is described as ——— *Price*, son of ——— *Price* (a),—or, as Mrs. G. (b), this is sufficient; parol evidence is admissible to supply the Christian name.

(a) *Price v. Page*, 4 Ves. 680. (b) *Abbot v. Massie*, 5 Ves. 148.

But a *blank* of both names cannot be supplied—that would be a bequest by parol.

Baylis v. Attorney General, 2 Atk. 239. *Hunt v. Hort*, 3 Br. C. C. 311.

If bequests are made to *Anne Collins* of S., and *Anne Collins* of B., and then a bequest is made to the said *Anne Collins*, the court will endeavour to discover from the whole will for which *Anne Collins* the last bequest is intended; if this is impossible, such bequest will be void, for parol evidence cannot in this case be received, it being a patent ambiguity.]]

Fox v. Collins, 2 Eden, 107.

3. *What shall be a sufficient Description of the Thing given, and what shall be said to be bequeathed.*

|| See *Roper*, c. iv. § 1. 3d edit. ||

Godolphin says, that in order to find out the testator's meaning, with respect to the things he intended to give away, it is necessary chiefly to regard the (a) time when the will is made; for it is a presumption of law that the testator's mind was not altered, unless it otherwise appear by sufficient evidence; therefore, says he, if a father bequeath to his son (who is a student) all his books, and afterwards buy other books, the books so bought pass not.

Godolph. 272. (a) But in another place he says, that this rule must be understood as the testator makes use of words in the present tense

or future tense; and that if it be doubtful, whether they refer to the time past or the time to come, they shall be understood to relate unto the time that is to come; and that, therefore, if a man devise his corn indefinitely, it shall be understood all such as he hath at the time of his death. *Godolph. 274.* [The rule must certainly depend upon the particular expression of the bequest, as, where the testator gives a specific thing as being then in his possession, and which, in its nature, is not fluctuating, and he gives it by a particular appellation. Thus, if he bequeaths the leases which he now has, or all the horses now in his stable, or the arrears of an annuity now due, in such cases, subsequent leases, or after-purchased horses, or arrears afterwards accrued due will not pass. 1 P. Wms. 597. *Attorney General v. Bury*, 1 Eq. Ca. Abr. 201. *Baugh v. Read*, 1 Ves. jun. 260.] || See *Howe v. The Earl of Dartmouth*, 7 Ves. 147. ||

But it seems clear, both by our law and the civil law, that a devise of all a man's personal estate passes whatever he died possessed of, and not that only which he had at the time of making his will; for the personal estate being transient and fleeting, and, from the necessity of dealing and traffick, liable to daily alterations, if the contrary resolution should prevail, it would put men under the difficulty of making a new will every day, and create the greatest perplexity imaginable.

Swinb. 418. *Salk. 237.* pl. 16. and *vide tit. Legacies and Devises*, letter (B).

Also, it hath been determined in Chancery, that if a man devises to his wife all his personal estate at a place called *W.*, all his personal estate, as coaches, horses, &c. there at the time of his death shall pass, though not there at the time of making the will, the personal estate being fluctuating and varying until the time of the testator's death.

2 Vern. 688. *Sayer v. Sayer*.

If a man devise his house, and all his goods and furniture therein, to his wife for life, and after her decease, to his son *R.* and his heirs, except his pictures, which he gives to his sons *A.* and *B.*, and he has pictures in boxes as well as those hung up in the

2 Vern. 538. *Gayre and Gayre*.

the house, and likewise pictures at his death, which he had not at the time of making his will; and it is proved in the cause that he had skill in pictures, and frequently bought pictures and sold them again; the exception of the pictures shall extend as well to the pictures hung up as furniture as to those in boxes, and as well to those in the house at the time of the will, as to those bought in after the will made.

All Souls' College v. Codrington, 1 P. Wms. 597.

Dean of Christchurch v. Barrow, Amb. 641.

Abr. Eq. 201. Trafford and Berrige. [See acc. Cook v. Oakley, 1 P. Wms. 302. Timewell v. Perkins, 2 Atk. 103. Cornforth v. Boon, 2 Ves. 279. Cavendish v. Cavendish, 1 Br. Ch. Rep. 467.]

1 Atk. 180.

182. 3 Atk. 62. Moore v.

Moore, 1 Br. C. C. 128. Swinb. pt. 7. § 10. Anon. 1 P. Wms. 267.

Moore v.

Moore, 1 Br. C. C. 127.

Green v.

Symonds, 1 Br. C. C. 129. note.

See Wookey v. Pole,

4 Barn. & A. 1.

(a) Portman v. Wills, Cro. Eliz. 387.

See Trafford v. Berrige, and other cases in margin *supra*, and Woolcombe v. Woolcombe, 3 P. Wms. 112.

Hotham v. Sutton, 15 Ves. 319.

Crichton v. Symes, 3 Atk. 61. Roberts v. Kuffin, 2 Atk. 113. Anon. Pre. Ch. 8. See 11 Ves. 666. 1 Russell, 149.

Popham v. Aylesbury, Amb. 68.

|| So, under a bequest of my library of books *now* in the custody of C., after-bought books pass; *now* merely describing the situation and not the extent of the bequest.

And there was a similar decision upon a bequest of "all his pictures, drawings, and prints to C., to be kept, and none of them to be sold, they being a good collection." ||

But where a man devised to his niece all his goods, chattels, household stuff, furniture, and other things which then were or should be in his house at the time of his death; and some time after died, leaving about 265*l.* in ready money in the house; it was decreed, that this ready money did not pass, for by the words *other things*, shall be intended things of like nature and species of those before mentioned.

|| GOODS. — "Goods" is *nomen generalissimum*, and may pass *all* the personal estate of testator.

But the operation of this word is frequently restricted. If there be a reference to a house or a county, then bonds and choses in action will not pass by this word, for such things have no locality. As a bequest of "all my goods and chattels in *Suffolk*." But money passes and bank-notes. It would seem, too, that promissory notes payable to bearer, exchequer bills, and bills of exchange indorsed in blank would pass. Leaseholds also pass. (a)

The term "goods" is also restricted by a specification of chattels of a particular denomination either preceding or following it.

Upon a bequest of furniture, plate, linen, china, books, and other *goods*, money will not pass, because not *ejusdem generis* with the preceding articles. But if there be an exception of money, as, "other goods except money," the disposition must be taken to comprehend all that testator has not excluded, which is money only.

And after a specification of particular articles, the term "goods" is especially to be restricted to those *ejusdem generis*, and not to be extended to money if a money legacy is also given to the legatee.

So, "EFFECTS," "PROPERTY," "CHATTELS," "THINGS," if accompanied by words savouring of the locality, will not pass choses in

in action; and their generality will also be restricted by a specification to articles *ejusdem generis*.

& Lef. 518. *Stuart v. Bute*, 3 Ves. 212. 11 Ves. 657. *Hotham v. Sutton*, 15 Ves. 319. *Rawlins v. Jennings*, 13 Ves. 59. *Michell v. Michell*, 5 Mad. 71. *Henderson v. Farbridge*, 1 Russell, 479.

By "all goods and chattels in my house," those things only pass which shall be in the testator's house at his decease, unless the same be removed for some necessary purpose.

Moore, 1 Br. C. C. 128. *Heseltine v. Heseltine*, 5 Madd. 277.

HOUSEHOLD GOODS include all moveables in the house contributing to the convenient occupation or ornament of the same.

But consumable articles, as victuals, wine, malt and hops, &c. do not pass; nor personal articles, as apparel, jewels, &c.; nor do guns and pistols used in shooting game; nor books. (a)

5 Ves. 315. (a) *Bridgman v. Dove*, 3 Atk. 201.

Plate passes, if in common use, or suitable to the situation and quality of the testator. So pictures hung up, linen, and china. (a)

cited in *Porter v. Tournay*, 3 Ves. 315. (a) *Boon v. Cornforth*, 2 Ves. sen. 279. 430. *Kelly v. Powlet*, Amb. 605.

But household goods, in the possession of testator *in the way of trade*, do not pass.

Le Farrant v. Spencer, 1 Ves. sen. 97.

"Household FURNITURE," and "household STUFF," receive the same construction as "household goods."

Under a bequest of all household goods, and all books, and all stores and implements, and other goods and chattels whatsoever, which should be in and about the dwelling-house and outhouses at B., RACE-HORSES were held to pass.

By the words "household furniture, and other household effects of or belonging to the testator's dwelling-house and premises at his decease," all property in the house or on the premises, intended for use or consumption therein, or for ornament, was held to pass, including pistols, turning apparatus, pictures, &c. but not a poney or cow.

PLANTATION. — A devise of a plantation in the *West Indies* will pass the cattle, stock, and implements thereon.

LIVE AND DEAD STOCK. — If these words are preceded by a disposition (though ineffectual) of all in-door property, they will be confined to out-of-door stock, as horses, corn, hay, &c., but used alone they would have a wider meaning.

STOCK OF CATTLE, means not only carriage-horses but farming cattle.

STOCK UPON A FARM, carries as well all moveable property on a farm as crops of corn. And if a malt-house were included in the lease, and all the stock upon the premises were given, a stock of malt would pass.

Fleming v. Brook, 1 Sch.

Chapman v. Hart, 1 Ves. sen. 273.

Moore v.

Slanning v. Style,

3 P. Wms. 334.

See also

Porter v.

Tournay,

5 Ves. 315.

(a) *Bridgman v. Dove*,

3 Atk. 201.

Kelly v.

Powlet,

Amb. 605.

Kelly v.

Pratt v. Jack-

son, 1 Bro.

P. C. 222.

Le Farrant v. Spencer,

1 Ves. sen. 97.

"Household FURNITURE,"

and "household STUFF,"

receive

the same construction

as "household goods."

Under a bequest

of all household goods,

and all books, and

all stores and implements,

and other goods and chattels

whatsoever, which

should be in and about

the dwelling-house and

outhouses at B.,

RACE-HORSES were

held to pass.

By the words "household

furniture, and other household

effects of or belonging

to the testator's dwelling-house

and premises at his

decease," all property

in the house or on the

premises, intended

for use or consumption

therein, or for orna-

ment, was held to

pass, including

pistols, turning

apparatus, pictures,

&c. but not a poney

or cow.

PLANTATION. — A

devise of a plantation

in the *West Indies*

will pass the cattle,

stock, and implements

thereon.

LIVE AND DEAD

STOCK. — If these

words are preceded

by a disposition

(though ineffectual)

of all in-door property,

they will be confined

to out-of-door stock,

as horses, corn, hay,

&c., but used alone

they would have a

wider meaning.

STOCK OF CATTLE,

means not only

carriage-horses but

farm

cattle.

STOCK UPON A

FARM, carries as

well all moveable

property on a farm

as crops of corn.

And if a malt-house

were included in

the lease, and all

the stock upon the

premises were

given, a stock of

malt would pass.

- Dyer, 59. **UTENSILS**, includes every thing which is necessary for household purposes, or for the trade with reference to which it is used.
 pl. 15. Latimer's case.
 Fitzgerald v. Field, 1 Russell, 427.
- Gallini v. "All my money in the Bank of *England*," passes stock in the
 Noble, funds, if the testator never had any cash in the bank.
 3 Mer. 691.
- (a) Door v. Funded property may pass, though the fund is mis-stated,
 Geary, 1 Ves. provided there was not any stock of the description given be-
 sen. 256. longing to the testator at the date of his will (a); and though
 Pentecost v. stock be standing in the name of trustees, it may pass under a
 Ley, 2 Jac. & bequest of stock "standing in my name," the testator not having
 W. 207. any stock standing in his name at the date of this will, or at his
 (b) Hewson v. death (b); but a *bonus* will not pass with a *specified* quantity of
 Reed, 5 Madd. stock. (c)
 451.
 (c) Norris v.
 Harrison, 2 Madd. 268.; but see *Paris v. Paris*, 10 Ves. 185.
- Dicks v. **SECURITIES FOR MONEY** passes stock in the funds, mortgages,
 Lambert, &c.; but it is doubtful as to bank stock, the owner of that being
 4 Ves. 725. a partner in the company.
 Bescoby v.
 Pack, 1 Sim. & Stu. 500.
- Bridgman v. **MEDALS** will include current coin, if kept with them.
 Dove, 5 Atk. 202.
- Smallman v. **DEBTS.** — Under a bequest of "all debts," all monies, however
 Goolden, secured, which are due to the testator pass.
 1 Cox, 329.
 Stonehouse v. Mitchell, 11 Ves. 352. *Essington v. Vashon*, 3 Mer. 454.
- Collins v. But a sum of money to which testatrix is entitled under an
 Doyle, intestacy, where no administration has been taken out to intestate,
 1 Russell, 135. does not pass under a bequest of all sums of money due to testa-
 trix at the time of her death.
- Stanton v. **USURIOUS DEBT.** — Testator gave a share of the residue to the
 Knight, son of *T.*, but the debt due from *T.* to testator was to be de-
 1 Sim. 482. ducted from the share. This debt was void on account of usury;
 held, nevertheless, it should be deducted.
- Stonehouse v. If the bequest be of "all debts, whether by bond, mortgage, or
 Mitchell, "open account," *all* debts, however secured, may pass.
 11 Ves. 352.;
 and see *Chalmers v. Storil*, 2 Ves. & B. 222. and 1 Roper, 254, 3d edit.
- Roberts v. Bequest of 200*l.* secured by a mortgage does not pass the
 Kuffin, interest due; nor does a bequest of the *arrears* of a debt pass the
 2 Atk. 112. principal. (d)
 (d) Hamilton
 v. Lloyd, 2 Ves. jun. 416.
- (e) Hale v. By "*arrears of rent and interest*," arrears of an annuity pass (e);
 Gilbert, 2 Ves. but a bond to secure arrears of rent will not pass. (g)
 sen. 430.
 (g) Jones v. Lord Sefton, 4 Ves. 166.
- Hill v. Mason, By bequest of a "*balance*" in the hands of *A.*, a sum directed
 2 Jac. & W. by testator to be invested by *A.*, but which was not actually
 248. invested before his death, passed.
- Hunt v. Hort, **LINEN**, alone, comprises all kinds of linen; but if accom-
 3 Br. C. C. 311. panied by the word "*clothes*," it is restricted to body linen.

HOUSE.—Bequest of a house does not include pictures or other ornaments, or furniture therein.

Beck v. Rebow, 1 P. Wms. 95. See Brod. & B. 54.

Buckland v. Butterfield, 4 B. Moo. 440. S. C. 2

GROUND-RENTS, a bequest of, carries a reversionary term as well as the rent.

Kay v. Laxon, 1 Br. C. C. 76.

CABINET OF CURIOSITIES, a bequest of, consisting of coins, gems, &c. and other valuable things, does not pass ornaments of the person, though the same were usually shewn therewith, but were occasionally worn.||

Cavendish v. Cavendish, 1 Cox, 77. 1 Br. C. C. 467. S. C.

If *J. S.* bequeaths all his household goods and furniture which should be in his house at *R.* at his death to his wife, and afterwards going beyond sea, his steward gets the head landlord of the house to accept of a surrender of the lease of the house, and removes the goods to another house, and writes an account of this to *J. S.*, who approves of it, the goods will not pass by the will to the wife: otherwise, if they had been removed by fraud to defeat the legacy, or by any tortuous act without the privity of the testator.

2 Vern. 747. Gilb. Eq. Rep. 172. decreed between the Earl and Countess of Shaftesbury. || Heseltine v. Heseltine, 5 Madd. 277.||

So, if a man bequeaths to his son the furniture of his house at *D.*, and two years afterwards orders goods which he had bought in *London* to be carried to his house in *D.*, and agrees with carriers for that purpose, but dies before the goods are removed from *London*, these goods shall not pass by the will as part of the furniture of the house at *D.*

2 Vern. 739. decreed between the Duke of Beaufort and Lord Dundonald. [Lord Hardwicke, alluding

ing to this case, says, "there was very little opposition, being between a mother and a son, "and I lay no stress upon it." 3 Atk. 202.] || See Grandison v. Pitt, 2 Vern. 740. in note, by Raithby.||

If a man who has debts due to him by bond, and who is likewise possessed of a term for years, bequeaths one moiety of his personal estate to his wife, and afterwards several legacies to other persons, and the residue to *J. S.*, the wife shall have one complete moiety, if the other is sufficient to pay the debts, and she shall have a moiety of the lease, though it was objected that a lease was not usually reckoned personal estate.

Chan. Ca. 16. Lee and Hale.

If a man possessed of a lease for years bequeaths several legacies of plate and other goods to several persons, and after devises all the residue of his goods to his wife, his debts and legacies being paid, and makes her sole executrix; by this will, the lease passes to her as legatee; for though by a grant of *omnia bona* a lease passes not, yet, by the civil law, *bona* including all chattels, and this being a legacy, the judges of the common law in this case ought to be guided by that law.

Portman v. Willis, Cro. Eliz. 587. But see Godolph. 592. 7.

If a man bequeaths 1200*l.* to *J. S.*, and by general words gives all his goods, chattels, and household stuff in and about his house to the said *J. S.*, money in the house will not pass, he having a particular legacy devised to him.

2 Chan. Rep. 190.

If a nobleman possessed of a collar of SS., and of a garter of gold, and a buckle annexed to his bonnet, and many other buttons of gold and precious stones annexed to his robes, and of many other chains, bracelets, and rings of gold and precious stones, bequeath all his jewels to his wife, and die, the garter and collar

Owen, 124. Earl of Northumberland's case. S. C. cited in Style, 289.

of SS. pass not, because they are not properly jewels, but ensigns of honour and state; and the buckle in his bonnet and buttons pass not, because annexed to his robes; but all the other chains, rings, bracelets, and jewels pass.

Abr. Eq. 200.
Mich. 1705.
Franklin and
Earl of Burling-
ton,
2 Vern. 502.
S. C. ill re-
ported. Pre.
Ch. 251. S. C.

J. S. by will devises thus:—*Item*, my will and pleasure is, that the furniture and pictures in my houses at *A.*, *B.*, and *C.* shall always remain there, and not in the power of my executors to dispose of, but shall go with my said houses to such of my grandchildren as shall be in the possession thereof; and then appoints that the plate gilt with gold, belonging to his chapel at *A.*, together with the ornaments thereof, should remain to the perpetual use of the said chapel, and makes *D.* executor, to whom he gives all his personal estate, except what is before bequeathed, of what nature or kind soever, for his own proper use; and the question was, if the plate the testator constantly used, and removed with him when he went from one house to another, should go to the executor by the last clause, or belong to the houses under the word *furniture*? And my Lord Keeper was of opinion, that furniture in a large sense takes in plate, but not here, because he distinguishes the chapel plate from the furniture; and the plate of ordinary use that was carried with him could no more be said the furniture of one house than of the others, and he meant only the particular furniture of each house; so the plate went to his executors, and was liable to plaintiffs who were creditors.

Abr. Eq. 201.
Mosely, 47.
S. C. S. P.
Hunt and
Berkley.
2 Chan. Ca.
198. Martin
and Clerk.

If a man devises his silver tea-kettle and lamp, with the appurtenances, nothing shall pass but the kettle and lamp, and the box wherein the lamp was placed, and not the silver tea-pot, milk-pot, tongs, strainer, or canisiers.

If a man devises 40*l.* to be paid to *J. S.*, by him to be disposed of in such manner as the testator should by a private note acquaint him with, and dies without such appointment, this is a good bequest to the party.

Berkley v. Pal-
ling, 1 Russell,
496.; and see
Courtney v.
Ferrers,
1 Simons, 137.

|| If a fund is given to a class of persons, in terms which shew that the testator intended the class to take the *whole*, but the specific shares allotted to such persons do not, in fact, exhaust the whole, the part so undisposed of shall be divided amongst the class in proportion to their specified shares.||

(C) What shall be an Ademption or Extinguishment of a Legacy.

Swinb. 522.
526.

SWINBURNE distinguishes between the ademption and translation of a legacy: the first, he says, is the taking away a legacy which was before bequeathed, which may be done by an express revocation thereof; or it may be done secretly and by implication, as by giving away, or voluntarily alienating the thing devised. Translation of a legacy is the bestowing of the same upon another, which is likewise an ademption; and therefore there may be an ademption without a translation, but there can be no translation without an ademption.

Swinb. 522.

The ademption of a legacy is no more to be presumed than the revocation of the testament, unless it be proved; and therefore if
the

the testator bequeath all the corn in his barn, and live after the making of his will till the corn is spent, and other corn be put in the place thereof, this spending of the corn is no ademption of the legacy, and therefore the legatee shall have such corn as is found in the barn when the testator dieth, unless the corn found in the barn at the death of the testator be greater in quantity than was the corn at the time of the will made; for so much is due, but not a greater quantity than was the first.

So, if the testator bequeath a ship, and afterwards, by piece-meal, repair and renew the same, so that there remain nothing of the old ship but only the bottom tree, here is no ademption of the legacy, but the legatee may recover the whole ship. Swinb. 522.

If a man bequeath a house, which afterwards he voluntarily pulls down, or which is blown down by the wind, or is consumed by fire, and afterwards he erect a new house where the old house stood, *Swinburne* is of opinion, that the legatee in neither of these cases can have the new house; it being a general rule of the civil law, that a house bequeathed being destroyed, if the testator build another in the same place, the legacy is extinguished, unless the meaning of the testator were otherwise. Swinb. 523, 524.

But if the testator bequeath a house, and afterwards, by piece-meal, repair the same, so that there is no part of the old matter or stuff remaining, the will of the testator is not hereby presumed to be changed; and therefore the legatee may recover the house so repaired, for it is deemed to be the same house still in law. Swinb. 523.

Also, if the testator, being constrained by necessity, as for the payment of his debts, supplying himself or his family with food and necessaries, &c. alienate the thing bequeathed; this is no ademption of the legacy, and therefore is the executor bound to redeem the same, or to pay the just value to the legatee. Swinb. 524.

So, if the thing bequeathed be not fully alienated, as if it be pledged or pawned, the legacy is not thereby extinguished; and therefore the executor in this case is bound to redeem the same, and to restore it to the legatee, or to pay the price thereof, if he suffer it to be forfeited. Swinb. 525. || 2 Br. C. C. 113. ||

|| So, where *A.* bequeathed “500*l.* now in *B.*’s hands,” having previously drawn bills upon *B.*, which reduced the 500*l.* to 400*l.*, it was held that the full sum of 500*l.* which was secured by a note, which was in force at testator’s death, was payable to the legatee; and that there was not a partial ademption as to the sum for which it was pledged or mortgaged. || Crocket v. Crocket, 2 P.Wms.164.

If a legacy be given to one person, and afterwards in the (a) same will the same thing be given to another, this is not an ademption of the legacy as to the first person, for the utmost constancy shall be presumed in the testator till the contrary appears; and therefore in this case they shall divide the legacy between them. Swinb. 528. (a) So if by testament he had given it to one person, and by codicil to another, this would be

no ademption, unless it appeared the testator’s intention that it should be so; as if he had said, *that which I did bequeath to A. I give B.*, these or the like words wholly take away the legacy. Swinb. 529.

If a man bequeath a legacy in these words, *viz. I give to my niece A. 500*l.* which my sister B. hath now in her hands of mine,* Raym. 335. Pawlett’s case.

mine, as by bond appears ; and after the money be paid, and ten years after payment thereof the testator die, yet the legacy is good, though the security is altered ; for by the words, no more is intended but that the legacy should be as sure as he could make it.

Abr. Eq. 502.
Orme and
Smith. 2 Vern.
681. S. C.

Again, a man devised in the following manner ; *viz. I give and devise to my good and only uncle the sum of 500l.* ; that is to say, that bond and judgment he gave me for 400l., and 100l. in money, and made his wife executrix, and desired her to be kind and assisting to his uncle, that he might live as became a gentleman ; the uncle some time after sold an estate, and with the money paid off 320l., and took up the bond, and had the judgment vacated, and gave a new bond for the remaining 80l. ; and some time after the testator died, and the uncle having notice of this will, brought his bill for this legacy of 500l. For the executrix it was insisted, that this was a specific legacy of that particular bond and judgment, and they being cancelled and altered before the testator's death, it was an ademption of the legacy as to so much ; and besides, they urged that this payment of the 320l. amounted to a release, so that he could only be entitled to the residue. On the other side it was insisted, that the diversity is where the money is voluntarily paid in by the person who owes it, and where the testator sues for and recovers it : in the first case, the legacy continues still good, because the money only comes home to the personal estate ; but in the other case, the testator suing for it, shews that he intended to make it his own, and therefore would not leave it to the legatee to recover ; and the justice of the uncle ought not to prevent the affection of the nephew ; and no alteration of his intention appeared. My Lord Keeper was clear of the same opinion, and decreed the 80l. bond to be delivered up, and the residue of the legacy to be paid.

Abr. Eq. 502.
Ford and
Fleming, [2 P.
Wms. 469.
S. C. 2 Str.
825. S. C.]

One by will devised thus : — *Item, I give and bequeath to my granddaughter Mary Ford (the plaintiff) the sum of 40l., being part of a debt due and owing to me for rent from G. M., she allowing what charges shall be expended in getting the same. Item, I give and bequeath unto my grandsons A. and B. the rest and residue of what is due and owing to me from the said G. M., which is about 40l., to be equally divided between them, they allowing charges as aforesaid.* Afterwards the testator received the whole debt owing for rent from G. M. ; and for the plaintiff it was insisted, that there was a difference between a specific and a pecuniary legacy ; that though the disposing of a specific legacy might be an ademption of it, yet this being a pecuniary legacy, the paying of the money to the testator would not be a loss of it. On the other side it was insisted, that there was a difference between a voluntary and compulsory payment, that though the first was no ademption, yet the second was, and that the testator obliged G. M. to pay in the money. But my Lord Chancellor was of opinion, that there was no foundation for the difference taken in the books between a voluntary and compulsory payment, for the latter might be with an intent to secure the legacy at all events, and decreed the plaintiff the 40l. legacy.

¶ If a testator bequeath a DEBT due to him, and he afterwards receives the whole, or part of it, this is considered as a total or a partial ademption of the specific legacy, and this rule is wholly independent of what might be the intention of the testator. The only inquiry is whether the specific things remain at the testator's death.

108. *Badrick v. Stevens*, 3 Br. C. C. 431. *Stanley v. Potter*, 2 Cox, 182. *Fryer v. Morris*, 9 Ves. 360.

And it is immaterial whether the testator receive the debt upon a voluntary or a compulsory payment; the distinction which was made on this ground being overruled.

So, if there be a specific legacy of STOCK, and it is not found at testator's death, the legacy is adeemed.

103. *Humphreys v. Humphreys*, 2 Cox, 184.

But this rule does not operate when,

1. The fund is altered by act of law (*a*), as a statutory change in the fund. (a) *Partridge v. Partridge*, Ca. temp. Talb. 226. *Bronsdon v. Winter*, Amb. 590.
2. When altered fraudulently, or without testator's concurrence. (b) See 2 Vern. 748. ed. Raithby.
3. When there is a mere change of trustees, or a transfer from trustees to testator. (c) (c) *Dingwell v. Askew*, 1 Cox, 427. See Amb. 260. 3 Br. C. C. 416.
4. When the stock is lent upon condition of being replaced. (d) (d) See *Roper*, ch. v. § 1.

LEGACIES OF POLICIES OF INSURANCE are adeemed if the money be received by testator.

Of course a specific bequest is not adeemed, or rather is not lost to the legatee, if testator sufficiently expresses a contrary intention.

Or, if the words of the bequest are sufficient to pass the fund in its altered state.

A bequest of GOODS in a certain house is adeemed by their removal, unless they are removed for their preservation, or by fraud, or without authority.

Symonds, 1 Br. C. C. 129. note. *Heseltine v. Heseltine*, 3 Mad. 276. *Ward v. Turner*, 2 Ves. sen. 431.

If a person having two houses *A.* and *B.*, but only one set of furniture, which he removed from one house to another from time to time, bequeaths his furniture in *A.*, it passes, though it happens to be in *B.* at his death.

A share in a partnership is not adeemed though new articles are entered into after date of will, altering the shares.

When the bequest of leasehold premises is adeemed by the renewal of the lease, see *ante*, "LEGACIES AND DEVISES," (L) 2.

Where

Birchv. Baker, Mose. 474.
Rider v. Wager, 2 P. Wms. 329.
Ashburner v. M'Guire, 2 Br. C. C.

James v. Johnson, 4 Ves. 574. *Fryer v. Morris*, 9 Ves. 360.
Ashburner v. M'Guire, 2 Br. C. C.

(b) See 2 Vern. 748. ed. Raithby.

(c) *Dingwell v. Askew*, 1 Cox, 427. See Amb. 260. 3 Br. C. C. 416.

(d) See *Roper*, ch. v. § 1.

Barker v. Rayner, 5 Madd. 208.

Earl of Thomond v. The Earl of Suffolk, 1 P. Wms. 462.

Pulsford v. Hunter, 3 Br. C. C. 416.

Shaftesbury v. Shaftesbury, 2 Vern. 747.
Green v.

Ward v. Turner,

Land v. Devaynes, 4 Br. C. C. 557.

Backwell v. Child, Amb. 260.

- Ex parte*
Dubost, 18 Ves. 151. Where a father, or a person *loco parentis*, gives a legacy to a child, it must be understood as a portion, although not so described, because it is a provision for the child; and if the father or person afterwards advance a portion for that child the legacy will be adeemed, though there may be slight circumstances of difference between the advancement and the portion, and a difference in the amount.
- Watson v. Lord Lincoln, Amb. 325.*
Grave v. Salisbury, 1 Br. C. C. 427.
- Hartopp v. Whitmore, 1 P. Wms. 681. Thus a legacy of 300*l.* has been held to be wholly adeemed by a portion of 200*l.*
- Clarke v. Burgoine, 1 Dick. 353. So a legacy of 7000*l.* by a portion of 6000*l.* (2000*l.* *in presenti* and 4000*l.* on death of testator).
- Hartopp v. Hartopp, 17 Ves. 184. A slight difference in the time of payment of the legacy and portion will not prevent the ademption.
- Holmes v. Holmes, 1 Br. C. C. 555. But there is no ademption if the legacy and portion are not *ejusdem generis*; as where the legacy was money, and the advancement was of stock in trade (jewellery).
- See Spinks v. Robins, 2 Atk. 493, 2 P. Wms. 553. Or, if the portion be contingent.
- Baugh v. Read, 1 Ves. jun. 257. Or, if the legacy be given in lieu of a right.
- Farnham v. Phillips, 2 Atk. 215. Or, if the legacy be uncertain in amount, as a residue or part of a residue.
- Free-mantle v. Bankes, 5 Ves. 79.
- See Alleyn v. Alleyn, 2 Ves. sen. 38. Or, where the portion is only for *life*.
- Ex parte*
Dubost, 18 Ves. 152. When a person is considered to be *loco parentis*, so that his advancement will adeem his legacy to a child, see cases in margin.
- Shudal v. Jekyll, 2 Atk. 516. *Primâ facie*, if the father of a child be living, no other person, however nearly related he may be, can be considered to be *loco parentis*.
- Powel v. Cleaver, 2 Br. C. C. 499. Roome v. Roome, 3 Atk. 183. 6 Ves. 546. Monck v. Monck, 1 Ball & B. 298.
- Shudal v. Jekyll, 2 Atk. 516. A legacy by a person not a parent, or *loco parentis*, is *primâ facie* not adeemed by a subsequent advancement.
- v. Cleaver, 2 Br. C. C. 499. Wetherby v. Dixon, Coop. C. C. 279.
- Grave v. Lord Salisbury, 18 Ves. 152. cited; and S. C. 1 Br. C. C. 425. The father of natural children is not considered in this respect as their parent or *loco parentis*, though he may place himself in that situation. (a) ||
- (a) Trimmer v. Bayne, 7 Ves. 508.
- Swinb. 530. If testator bequeath 100*l.* to a man, and in the same testament Greenwood v. Greenwood, 1 Br. Ch. Rep. 30. note. give him 100*l.*, without taking notice of the first 100*l.*, the second disposition is understood to be but a repetition of the former, and all but one legacy, unless it appears that the testator intended ||Holford v. Wood, 4 Ves. 79. 91. him 200*l.* in all.
- But where the legacies differ in amount, the legatee is intitled to both. Curry v. Pile, 2 Br. C. C. 225. ||

|| Where a testator leaves two testamentary instruments, and in each has given a legacy *simpliciter* to the same person, the court considering that he who has given twice, must *primâ facie* (a) be intended to mean two gifts, awards the legatee both legacies; and it is immaterial whether the second legacy be of the same amount, or less, or larger than the first. (b) But if, in such two instruments, the legacies are *not* given *simpliciter*, but the nature of the gift is expressed, and in both instruments the *same* motive is expressed, and the *same* sum is given; the court considers the two coincidences as raising a presumption, that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift. The court raises this presumption only where the *double* coincidence occurs, of the *same* motive and the *same* sum in both instruments. It will not raise it if in either instrument there be no motive, or a different motive expressed, although the sums be the same (c); nor will it raise it, if the same motive be expressed in both instruments, and the sums be different. (d)

the civil law there cited. (c) *Ridges v. Morrison*, 1 Br. C. C. 538. *Currie v. Pye*, as to the annuity to Sarah Pye. (d) *Hurst v. Beach*, 5 Madd. 351. *Mackenzie v. Mackenzie*, 2 Russell, 262.

Though the sums be the same in amount, yet if they be not *ejusdem generis*,—as, if one be contingent, and the other vested (e); (or, if they be not payable at the same time, and equally beneficial) (f),—the court will not presume that the testator intended to substitute one for the other.||

v. Mackenzie, 2 Russell, 262. 272.

A. devises to his younger son 750*l.*, and afterwards buys him a cornet of horse's commission, and paid 650*l.* for it; and it was proved to be intended this 650*l.* should be discounted out of the legacy, and that he would strike so much out of his will as soon as the accounts came from *London* to him, but he died before they came, without altering his will; and it was held, that this money paid for the commission should go in diminution of the legacy, and be taken in payment and satisfaction for so much.

If A. by will devise 200*l.* to his daughter, and afterwards on her marriage gives her more than that sum, this is an extinguishment of the legacy.

of *Elken Head* cited, where payment in the testator's lifetime was adjudged a satisfaction of the like sum devised.

So, where the testator directed that 400*l.* should be laid out in finishing a house which he was building; and lived, after the making of the will, to expend a greater sum in that service; it was decreed against the heir at law, that this was an extinguishment and satisfaction of the 400*l.*, although the house was not completely finished at the testator's death.

|| Lord *Thurlow* said, "If a legacy be given for a particular purpose, and the testator advances money for the *same* purpose; "it is too late to say, it is not a *presumption* that he meant to "execute it."

See *Hurst v. Beach*, 5 Madd. 351. (a) See *Currie v. Pye*, 17 Ves. 462. as to the legacy to Dr. Currie. (b) *Ridges v. Morrison*, 1 Br. C. C. 538. *Hooley v. Hatton*, *Ibid.* note. S. C. 2 Russell, 269. note. Masters v. Masters, 1 P. W. 423. *Roper*, ch. 16. s. 2., and the authorities in

(e) *Hodges v. Peacock*, 3 Ves. 735. *Wray v. Field*, 2 Russell, 257. (f) *Mackenzie*

Prec. Chan. 265. *Hoskins and Hoskins*.

2 Vern. 115. *Jenkins and Powell*, and there the case

Vern. 95. *Husbands v. Husbands*.

Debeze v. Mann, 2 Br. C. C. 166. S. P. 1 Ball & B. 305.

But

Debeze v. Mann, 2 Br. C. C. 165. Robinson v. Whitley, 9 Ves. 577. But the advancement must be intended to answer *all* the purposes of the legacy; a legacy to maintain and educate, and to apply the principal or part in apprenticing the legatee, or for his advancement in the world, is not answered by the testator merely paying an apprentice fee. Roome v. Roome, 3 Atk. 181.

Duke of St. Alban's v. Beauclerk, 2 Atk. 636. S. C. 2 Russell, 271. note. Coote v. Boyd, 2 Br. C. C. 521. If a second codicil has internal evidence that it was intended to be *substituted* for the first, the legacies given in such second codicil cannot be considered as accumulative, but substitutionary; as, for example, if a testator having made a codicil, containing several legacies, afterwards makes a second precisely to the same effect, with the addition of only one pecuniary legacy. || Attorney General v. Harley, 4 Madd. 263. Gillespie v. Alexander, 2 Sim. & Stu. 145. Hemming v. Gurrey, *ibid.* 311.

(D) Where a Legacy shall be presumed to be a Satisfaction of a Debt or Duty owing from the Testator.

Abr. Eq. 205. Salk. 155. pl. 5. 2 Salk. 508. 2 Vern. 177. 258. 298. || Gaynon v. Wood, 1 Dick. 331. 1 Ves. sen. 125. || THE intention of the testator being the prevailing rule to go by in the construction of wills, it has been from thence established as doctrine, that wherever a person, by his will, gives a legacy as great or greater than the debt he owes to the legatee, that such legacy should be a satisfaction of the debt, on the presumption that a man must be intended just before he is bountiful, and that his intent is to pay a debt, and not to give a legacy.

2 Vern. 111. Bloyes and Bloyes, cited to have been adjudged. As, where a man by marriage settlement provides 400*l.* for daughters, and having two daughters, by will gives them 200*l.* a-piece for their portions, without taking notice of the settlement; it was held, that the 200*l.* a-piece should be a satisfaction of the portion by the settlement.

2 Vern. 498. Prec. Chan. 240. S. C. Brown v. Dawson. So, where a man had prevailed on his wife to join in selling 7*l.* 10*s.* *per ann.* of her jointure, and after 6*l.* 10*s.* *per ann.* more, and having given two several notes, that his executor should pay her the said two several sums during life, he after makes his will, and thereby gives her 14*l.* *per ann.* during life, out of certain lands; this was held to be a satisfaction of the notes.

Prec. Chan. 138. Bromley v. Jeffereys. So, where one settles his estate on trustees, to be sold for payment of his debts, with power of revocation; then he marries a daughter, gives her a portion, and covenants that the husband shall have the estate 1500*l.* cheaper than any other; after he, by will, revokes the settlement, gives the husband 1500*l.*, and dies; this legacy was held to be in satisfaction of the 1500*l.* secured by the settlement.

2 Vern. 555. Herne v. Herne. So if *A.*, by marriage articles, agrees to leave his wife 800*l.* and her jewels, &c., but it is declared that, notwithstanding the articles, she should not be debarred of any thing he should give her

her by will; and *A.* by will makes a disposition of his whole estate among his children, &c., and gives his wife 1000*l.* The wife must waive the articles, or the will, for she cannot have both; for his making a disposition of the whole estate, shews that he intended that every part should be performed.

So, where a child, entitled by his father's marriage articles to a share of his father's personal estate, had a legacy given to him by the will of his father; it was held, that, if he will have the legacy, he must waive the benefit of the articles.

2 Vern. 556.

So, where a freeman of *London* made his will, and devised legacies to his children, more than their orphanage parts would amount to, without taking any notice whatsoever of the custom, it was held by the Master of the Rolls, that these legacies should be a satisfaction of their orphanage shares, to which they were entitled by the custom in the nature of a debt; and that the legacies should not come out of the testamentary or dead man's part; because it is held in this court, that they shall not take both by the will and the custom too: but where such legacies are less than their orphanage shares, whether they shall be *pro tanto* a satisfaction, he was in great doubt, and sent it to the city to certify, though he seemed rather to think they should in that case take both, especially if none of the devises in the will were thereby disappointed.

Trin. 1729.
Nicholls v.
Nicholls.

¶ The doctrine of the courts appears to be, that, as a benefit given by a will is *primâ facie* a bounty, a free gift, it cannot be held to satisfy a debt or obligation, unless there be evidence of a contrary intention; the proof of which intention must lie upon those who would discharge themselves of the obligation. (*a*) And it seems such intention must be collected from the will itself. (*b*)

508. *Peacock v. Falkener*, 1 Br. C. C. 295. (*a*) 2 Br. C. C. 395. 1 Cox, 191. *petitori*. (*b*) 1 Br. C. C. 295. 5 Ves. 79. But, if the words of the will raise a presumption, parol evidence may be received to

Cuthbert v.
Peacock,
Salk. 155.
pl. 5. S. C.
2 Vern. 593.
Cranmer's
case, 2 Salk.
Incumbit onus
rebut it. See

In a case, however, where testator had, on his marriage, covenanted to pay 1000*l.* to his wife within six months after his death; and by his will gave her a legacy, payable three months after his death;—Sir *J. Leach* V. C. held, that the covenant was satisfied by the legacy, and said, “the intention to perform “the covenant is to be presumed.”

Wathen v.
Smith,
4 Madd. 325.

And it is settled, that a legacy to a wife shall *satisfy* a provision made on marriage, if the wife's taking *both* her marriage provision and the gift would disappoint, or frustrate, or be inconsistent with an express provision in the testator's will; at least, the wife would be put to her election.

Reynolds v.
Torin,
1 Russell, 129.
Dickson
v. Robinson,
Jacob, 503.
Tolson v.
Collins, 4 Ves.
483. See

A debt due by a parent to a child, not as a portion, shall be considered, with respect to satisfaction, as a debt to a stranger.

Plume v. Plume, 7 Ves. 258.

A legacy by a creditor to his debtor is *primâ facie* not a satisfaction of the debt; but parol evidence is admissible to shew the intention of testator.¶

Eden v.
Smith, 5 Ves.
345. Wilmot
v. Wood-

house, 4 Br. C. C. 226.

But

(a) That in all these cases the intention of the party ought to be the rule.

Salk. 508.

||(b) Graham v. Graham,

1 Ves. sen. 263.

|| (c) Though the contingency does actually happen, and the legacy thereby becomes due, yet it shall not go in satisfaction of the debt, because a debt which is certain shall not be merged or lost by an uncertain and contingent recompence; for whatever is to be a satisfaction of a debt ought to be so in its creation, and at the very time it is given, which such contingent provision is not. Prec. Chan. 295.

2 Vern. 478.

Atkinson v.

Webb, Prec.

Chan. 236.

S. C. and the reasons there given, because the second

annuity being payable half-yearly, and charged on land, by which it will be liable to taxes, cannot be so advantageous.

2 Vern. 505.

Perry v. Perry.

As, if *A.* give a bond to *B.*, her servant, to pay her 20*l.* *per ann.* quarterly, for her life, free from taxes; and by will, without taking notice of the bond, gives 20*l.* *per ann.* for her life, payable half-yearly, but not said free of taxes; *B.* shall have both the annuities, for that by the will not being so advantageous as the first, cannot be presumed a satisfaction.

So, where *A.* on his marriage covenanted to purchase and settle a jointure of 20*l.* *per ann.* on his intended wife, and if he died before such purchase or settlement made, she should have 300*l.* out of his estate for her own use: the marriage was had, and the husband died before any such settlement was made; but by his will he devised to his wife 330*l.* for her life, with power to dispose of 30*l.*, part thereof, at her death; it was held, first, that she had a right to 300*l.* and interest, and that the executor could not now be at liberty to settle 20*l.* *per ann.* as the testator might have done. Second, that she should have the 330*l.* as an additional bounty and provision for the wife.

2 Vern. 258.

Duffield and Smith.

|| Journ. Ho.

Lords, vol. 15.

p. 158. 20 Dec.

1692. ||

By a marriage settlement, in case of failure of issue male, the remainder of the estate was limited to daughters, until they should raise 3000*l.* for portions: there was issue of the marriage a son and two daughters: the father devised 700*l.* a-piece to the daughters, and died: the son afterwards made his will, and devised to the daughters to the amount of 7000*l.*, without any mention of its being in lieu or satisfaction of any thing due to them, and gave his land to his heirs male, and died without issue. It was held clearly, that the father's legacy could be no satisfaction, not being adequate in value; besides, the father had a son then living, and it was altogether contingent and uncertain whether 3000*l.* would ever arise and become payable or not, and therefore it was but reasonable that the father should make some certain provision for his daughters: but as to the son's legacy of 7000*l.* it was by two lords commissioners, against *Rawlinson*, decreed a satisfaction; but upon an appeal to the lords the decree was reversed, for the daughters being heirs at law, and disinherited, there was no ground for the court to make a strained construction to their prejudice, in favour of a voluntary devisee.

H. owed

H. owed to his niece *A.* 100*l.* by bond, and having two other nieces, *B.* and *C.*, makes his will, and bequeaths 300*l.* to his niece *A.*, and to his other two nieces 200*l.* a-piece: after that he borrowed another 100*l.* of his niece *A.*, and died, being indebted to her in 200*l.* To prove that the 300*l.* should go in satisfaction of the debt, it was insisted on as a rule in equity, that where a testator, being indebted, gives his debtee a legacy greater than his debt, it shall go in satisfaction; for a man shall be intended to be just before he is kind: otherwise, where a legacy is less, for that is neither to be just nor kind, and shall not be taken to go in satisfaction of any part. But *per Cowper* Lord Chancellor, it might be as good equity to construe him to be both just and kind, if he intended to be both; if any part of this 300*l.* be applied to the payment of the debt, as for so much it is not a gift: whereas a legacy must be taken to be a gift or gratuity: and there being assets, and some (a) proofs of the testator's greater kindness to *A.* than his other nieces, his Lordship decreed her the whole 300*l.*, over and above her debt.

If a legacy of 100*l.* is given to *A.* by *J. S.*, and another of 50*l.* by *J. D.*, and of both wills *A.*'s father is made executor, who having by a marriage settlement power to charge his land with 2000*l.* for portions, devises 1000*l.* equally between his daughters; by devising it to them equally, according to the marriage settlement, he shews that he intended them an equal benefit, and therefore the 1000*l.* shall not be in satisfaction of the legacies given *A.*

A. indebted to *B.* in 50*l.* left him a legacy of 500*l.* and made him executor, and *after the making of his will* borrowed 150*l.* more of him; and the Master of the Rolls held, that the legacy should be a satisfaction of both debts: but *Harcourt* Lord Chancellor reversed his decree, and held, that a court of equity ought not to hinder a man from disposing of his own as he pleases; and when he says he gives a legacy, it cannot contradict him, and say he pays a debt: and it was also held in those cases, if a legacy be less, it shall not be a satisfaction. So, if the thing given be of a different nature, as land, it shall not go in satisfaction of money. So, if the legacy be upon condition; for by the breach he may be a loser, whereas the will intended it for his benefit.

A. by will gave six several annuities for lives, three of 10*l.* each, and three of 5*l.* each, to be paid out of his personal estate, and gave all the rest of his real and personal estate to *E.* his wife, whom he made sole executrix: the annuitants were his sisters and their children; and about two years after the wife makes her will, and gives two annuities of 5*l.* each to two of the 5*l.* a year annuitants in her husband's will, but gives them to them and their heirs, in case they happen to overlive such a one, who by her husband's will had 10*l.* *per ann.* for life; she likewise gives another annuity of 10*l.* *per ann.* to one and her heirs, and another of 5*l.* to another and her heirs, who had each of them the like annuities for life by the husband's will; but in the disposition of these annuities she takes no manner of notice of her husband's

Salk. 155. pl. 5.
Cuthbert v.
Peacock.
2 Vern. 595.
S. C.

(a) But whether any parol evidence ought to be admitted in those cases, see tit. *Evidence*.

Prec. Chan.
514.

2 Salk. 508.
pl. 4. Cranmer's case.
|| Thomas v. Bennet,
2 P. Wms.
343.]]

Trin. 1729.
Crompton v. Sale, 2 P. Wms. 552. S. C.
|| See also Mathews v. Mathews, 2 Ves. sen. 635. where it was held a *contingent* legacy could not satisfy a certain debt. See, too, Nicholls v. Judson, 2 Atk. 300.]]

will, or that they had any annuities thereby given them; and the only question was, Whether the four annuities given to the persons in fee, by the wife's will, should be taken to be only in satisfaction of the like annuities for life, given to the same persons by the husband's will?—and it was argued that they should, because the husband's annuities being payable only out of his personal estate, and the wife being his executrix, she was in the nature of a debtor for them; and wherever a person, by his will, gives a legacy as great or greater than the debt he owes to the legatee, it has always been taken to be a satisfaction of the debt. But *per* Lord Chancellor, this doctrine has already been carried too far, and he would never carry it further; for though it is true, a man ought to be just before he is bountiful, and therefore shall be presumed to pay a debt rather than give a legacy to the same person, when it is the same sum, or more, than he owes him, yet why may he not be both just and bountiful when there are assets to answer both, as in the present case; and there can be no pretence to say that the two first annuities of 5*l.* can be a satisfaction of the like annuities given by the husband, because they are given upon the contingency of overliving such a one, which has not yet happened, and possibly never may; and then shall the annuities for life, which are certain, be extinguished by giving the same persons annuities in fee on a contingency which may never happen? And if that were so, as to these annuities, there is no reason to imagine the wife had a different intention as to the others, or that she intended two of them should go in satisfaction of the like annuities given by her husband, and the other two not: and the cases where a legacy has been held a satisfaction of a debt, are where the debt was owing by the same person who gave the legacy; but if such legacy be given on a contingency, or to take place at a future day, it is no satisfaction of the debt; and therefore in the principal case it was decreed, that the annuities given by the wife were distinct additional annuities, and not an enlargement only of the husband's annuities from an interest for life to an interest in fee, and that the annuitants should take both.

¶ A debt is due and payable at the death of testator: if, then, a legacy be given which is not payable then, it is not equally beneficial and shall not be deemed a satisfaction, though larger in amount than the debt.

Thus Lord *Hardwicke* held, that a legacy payable *one month* after death of testator did not satisfy a debt which was payable immediately on his death. So Lord *Thurlow* decided, that a debt payable one month after testator's death was not satisfied by a legacy payable within six months.

Clarke v. Sewell, 3 Atk. 96. See Nicholls v. Judson, 2 Atk. 300. Haynes v. Mico, 1 Br. C. C. 129. See 2 Ves. sen. 656. M'Clel. & You. 54. Adams v. Lavender, *Ibid.* 41.

(a) Eastwood v. Vincke, 2 P. Wms. 613.
(b) *Ibid.* and 15 Ves. 515.
(c) 1 Ves. sen.

For a legacy to satisfy a debt it must be of the *same nature* as the debt. Copyhold land shall not be taken as a satisfaction for freehold (a); nor money for land (b); nor the moiety of the residue of personal estate for an annuity (c); nor a life interest in

in the whole residue for a sum secured by bond (a); nor the absolute interest in a share of the residue for a debt. (b)

521. (a) *Alley v. Alley*, 2 Ves. sen. 37.
 Forsight v. Grant, 1 Ves. jun. 298. See also *Richardson v. Elphinstone*, 2 Ves. jun. 463.
 (b) *Devese v. Pontet*, 1 Cox, 188.

Nor can a contingent debt, or one which is uncertain, as due on a running account, be satisfied by a legacy. Nor a debt due on a negotiable instrument.

Rawlins v. Powel, 1 P. Wms. 296.
Carr v. Eastbrooke, 3 Ves. 561.

A direction by testator that debts and legacies should be paid has been relied upon, by Lord King Chancellor, to shew that a legacy should not be deemed a satisfaction of a debt.

Chancy's case, 1 P. Wms. 408.
Richardson v. Greese, 3 Atk. 64. *Field v. Mostin*, Dick. 543.

A father, who as executor owed one of his two daughters 250*l.*, bequeathed 2000*l.* to be equally divided between his daughters; held that the debt was not satisfied, otherwise the daughters would not have been equally benefited.

Meredith v. Wynn, Prec. Chan. 314.

PORTIONS. — If a father incur a debt to his children by engaging by marriage settlement, or otherwise, to pay them portions, and afterwards by his will makes a provision for them, such provision shall *primâ facie* be deemed a satisfaction, or part satisfaction of the portion. So, if it be provided in the settlement that any sum settled or given by the parent shall be taken in full or part satisfaction of the portion, a legacy shall be so taken. (c)

Hinchcliffe v. Hinchcliffe, 3 Ves. 516.; and cases there cited. *Sparkes v. Cator*, 3 Ves. 530. *Pole v. Lord Somers*, 6 Ves. 309.
Bengough v. Walker, 15 Ves. 507. (c) *Rickman v. Morgan*, 1 Br. C. C. 63. continued 2 Br. C. C. 393. *Leake v. Leake*, 10 Ves. 477. *Onslow v. Michell*, 18 Ves. 490. *Goolding v. Haverfield*, M^c Clel. 345.

It matters not that the legacy and portion are payable at different periods (d); or that the legacy is given in an uncertain shape as a residue. (e)

(d) 18 Ves. 493. 17 Ves. 191.
 (e) *Rickman v. Morgan*, 1 Br. C. C. 63. *Bengough v. Walker*, 15 Ves. 507.

But a contingent legacy cannot be taken as a satisfaction for a certain portion; nor if it (the legacy) be given for a different purpose. ||

Bellasis v. Uthwatt, 1 Atk. 426. *Hanbury v. Hanbury*, 2 Br. C. C. 352. 375.

(E) Of Legacies vested or lapsed: And herein,

1. Where it shall be a lapsed Legacy by the Legatee's dying in the Lifetime of the Testator; and where in such Case it shall vest in another Person, to whom it is limited over.

IT seems by the rule of the civil law, and by the cases on this head, that if a legacy be devised to J. S., and he die in the lifetime of the testator, that the legacy is lapsed, there being no such person to take at the time when the will is to take effect.

Abr. Eq. 296, 297.

So, where A. by will, reciting that B. owed him 400*l.*, gave and bequeathed those 400*l.* to him, provided he, out of the 400*l.*, paid several sums in the will mentioned to his wife and children,

2 Vern. 522. *Elliot and Davenport*. [1 P. Wms. 83. S. C.]

(a) The Lord Keeper declared, "that the last clause in the will (whereby it was directed that the security should be delivered up to the said *William Elliot*, his executors, administrators, or assigns, to be cancelled, and that no use should be made thereof,) was only in aid of the first clause in the will, by which alone the sum is to be taken as a lapsed legacy." Reg. Lib. A. 1705. fol. 521. || *Toplis v. Baker*, 2 Cox, 119. 121. See *Corbyn v. French*, 4 Ves. 435. (b) *Sibthorp v. Moxom*, 3 Atk. 580. ||

Corbyn v. French, 4 Ves. 418. 434. || So where testator bequeathed to *A.* for life, and at her death to *B.*, "or to her proper representative," if she should not be living at *A.*'s decease, and *B.* died in testator's lifetime, the bequest to *B.* was held lapsed.

Bone v. Cook, M'Clel. 168. 15 Price, 332. Again, a legacy bequeathed to *A.* after a life estate, and in case of his death before it became payable to his executors or administrators, was held to lapse by the death of *A.* in testator's lifetime.

Tidwell v. Ariel, 3 Mad. 403. So where a legacy was directed to be paid to the legatee at the end of one year after testator's decease, or to his heirs, the legacy was held to lapse by the death of legatee in testator's lifetime.

Sibley v. Cook, 3 Atk. 572. But where testator gave, among other legacies, a legacy to *Ann*, wife of *R. W.*, and to her executors or administrators, and declared, that if any of the legatees should die before the same became due and payable, they should not be deemed lapsed legacies; and *Ann* died in the lifetime of testator: held, that her husband as administrator was entitled.

Bridge v. Abbot, 3 Br. C. C. 224. S. C. 2 Vern. 378. in note. See *Pirie v. Strange*, 6 Mad. 159. So where a legacy was given, in case of death of legatee before testator, "to her legal representatives," the next of kin of legatee, at the death of testator, were held entitled. ||

Abr. Eq. 296. *Burnet and Holgrave*. [This case of *Burnet v. Holgrave* is much weakened in point of authority by the case of *Oke v. Heath*, 1 Ves. 135. In that case a *feme covert* having *A.* devised an estate to his wife for life, and after to the plaintiff, his niece, and her heirs, upon condition, and to the intent that she pay 400*l.* to such person as his wife by her will in writing, or any other writing, should direct and appoint, and dies; the wife after marries a second husband, and then makes a will in writing, and thereby, reciting the power given her by her former husband's will, appoints the 400*l.* to be paid to her husband, his executors or administrators, and that when he shall have fully received the 400*l.* he shall pay 100*l.* out of it to *B.*, 50*l.* to *C.*, and 50*l.* to *D.*, and makes her husband her executor; and then goes on and says, that she has published this her last will and testament

ment in the presence of three witnesses; and the husband subscribed that he approved of this will: the husband dies before her, and makes her executrix of his will, and residuary legatee; then *B.* and *C.* die both intestate, and afterwards the wife dies, and the defendants take out administration to her, with the will annexed, and also administration to *B.* and *C.*; and the question was, Whether this appointment being made by will, and the appointee dying before the appointer, this should be in the nature of a legacy, and so the appointment void, the testatrix surviving the nominee? And my Lord Keeper held, that if it was a thing purely testamentary, it would be plainly a lapsed legacy, but that in this case the 400*l.* was not in its own nature testamentary, but they take as nominees, and it is but the execution of a trust; and decreed the money to be paid.

C., he in consideration thereof paying an annuity to his mother. *C.* died in the lifetime of the testatrix. Lord *Hardwicke* held, that by the death of the appointee in the lifetime of the testatrix, the appointment was void; for though it arises under a power, it is a testamentary disposition, and subject to all the qualities of a will. The case of *Burnet v. Holgrave*, his Lordship said, is a very particular and extraordinary case, and he doubted if it would be so determined now: it appeared by the register to have been a cause by consent, and not adversary; which takes off greatly from the weight of the opinion there, shewing it to have been probably sudden, and without consideration. But taking it as it is, his Lordship observed, there are several differences: first, the wife there, by marrying a second husband, had disabled herself from making a will; nor is the power given her to be executed during coverture; therefore it could not be a will, but must be considered as a writing under hand and seal only; and then the determination may be right: but that is nothing to this, which is by a will properly proved as such. But, suppose the court took it as a will, or a writing in nature of a will; the appointment there was not personally to the husband only, but the executors or administrators, and on trust to pay thereout. It is true, that in general the words *executors* or *administrators* are understood as representatives only, but not always; as in cases *pur autre vie*, executors or administrators take, not as representatives of the first taker, but as new special occupants newly named in the will or deed: and if they took further so as to be persons taking the trust, in that light it is different. And the court rather did this in support of the trust, one of the *cestuy que trusts*, for whose benefit it clearly was, being then living; nor can the *cestuy que trust* be defeated by the death of the trustee in the testator's life. The words are, that the court took it to be an execution of a *trust*; which is not a misprint instead of *power*; and imports the husband, his executors or administrators, to be barely trustees. Another thing in support of that determination is, that all was come back to the wife herself; the husband, to whom and his executors she had appointed, dying in her life, and making her executrix.] [This case of *Oke v. Heath* has been followed by *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 61. 73.; and see *Vanderzee v. Aclom*, 4 Ves. 771. *Burges v. Mawbey*, 10 Ves. 319. 326.]

So, where *E.* made her will, and devised in these words:—*I give unto my loving kinsman R. H. the sum of 300*l.*, one 100*l.* part whereof he doth owe me, which I intend to give to my cousin S. H., his youngest daughter; but my will and desire is, that he will give the said 300*l.* to his daughter S. H. at the time of his death, or sooner, if there be occasion, for her better advancement and preferment*; the testatrix, at the time of making her will, was in *England*, and it happened that *R. H.* died in *Ireland*, eight days before the death of the testatrix; afterwards *S. H.* died, at the age of sixteen, and unmarried, and the plaintiff was her administrator; and it was decreed at the Rolls, and affirmed by my Lord Chancellor, that the words *I desire*, or *I will*, amount to an express devise, and that the 100*l.* bond to the testatrix should be assigned to the plaintiff, and the 200*l.* paid him, with interest, from the

by marriage articles power by deed or will to appoint 400*l.* for such persons as should be her kin, and for none other; the 400*l.* in default of appointment to go according to the statute of distributions; appointed by will to her nephew

2 Vern. 466-7.
Eales v. England. Prec.
Chan. 200.
S. C. [See
Moggridge v. Thackwell,
1 Ves. jun. 465.]

time of exhibiting the bill; although it was insisted upon, that a benefit was designed *R. H.*, and that he was not a bare trustee; for he was to have the interest of the 300*l.* for his life, unless his daughter had occasion for it before his death, which she had not.

2 Vern. 116.
Birkhead v.
Coward.

But if the testator gives his sister 350*l.*, upon condition that she, at or before her death, give to her children 200*l.* thereof, and the sister dies in the lifetime of the testator, the whole legacy is lapsed; although it was insisted, that if the devise had been only of the interest of the 200*l.* to the testator's sister for life, and the principal to the children, that had been a good devise to the children as to the 200*l.*, and it would not have been lost by the mother's dying in the testator's lifetime, and the intention of the testator in this case amounted to as much; but it was adjudged *ut supra*, the court taking it that, being a devise of money, the absolute property vested in the first legatee: *Quære*.

Prec. Chan.
470, 471.
Northey v.
Burbage; || and
see Barker v.
Giles, 2 P.
Wms. 280.
3 Br. P. C.
104. ||

But however a legacy may become void or lapsed by the legatee's dying in the lifetime of the testator, yet it is plain, that if in such case there be a limitation over to another, that the limitation over is good, though the first legatee die in the lifetime of the testator; as, where *A.* devised 500*l.* a-piece to his two grandchildren by name, and if either of them die, his share to go to the survivor; one of them died in the lifetime of the testator; it was held, that his share should go to the survivor, and was not a lapsed legacy.

Smith v.
Pybus, 9 Ves.
566.

|| So, where testatrix bequeathed a personal annuity, after the death of her father, to be equally divided between her brother and sisters, *Charles*, *Catherine*, and *Martha*, "to them and their heirs, or the survivor of them;" and *Martha* died in the lifetime of testatrix; it was held, that her share went over to her brother and sister, under the limitation to the survivor. ||

2 Vern. 207.
Miller and
Warren, de-
creed. 2 Vern.
611. Ledsome
and Hickman,
S. P. decreed.
Willing v.
Baine, 3 P.
Wms. 113.
S. P.

So, if *A.* devise 1500*l.* a-piece to the four children of *J. S.*, by name, to the sons to be paid at their age of twenty-one years, and to the daughters at eighteen, or days of marriage; and in case one or more of the aforesaid children shall happen to die before his, her, or their respective legacy or legacies shall become due, then such legacy or legacies shall go to the survivors of them; and in case three should die, then the survivor to take the whole; if one of the children dies in the lifetime of the testator, the survivors shall take that share, and it shall not be a lapsed legacy.

Rheede v.
Ower, 3 Br.
C. C. 240.

|| So where testator, having bequeathed a life-interest in a share of the residue to *A.*, directed, in case she died leaving issue, that the share to which *A.* so deceasing should be entitled, *at or before* the time of her decease, to receive the interest on, should go amongst her (*A.*'s) children; *A.* died in lifetime of testator; held, that her children were entitled to the share. ||

2 Vern. 378.
Dorrel and
Molesworth,
Vern. 425.
2 Vern. 653.
744. S. P.
Hornsby v.
Hornsby,
Mosel. 319. S. P.

So, where a legacy of 50*l.* was given to *A.* at twenty-one, or marriage, and 50*l.* to *B.* at twenty-one, or marriage, and in the close of the will the testator added, *If any legatee dies before his legacy is payable, the same shall go to the brothers and sisters of such legatee*; *A.* dying in the lifetime of the testator, it was adjudged no lapsed legacy, but that it should go to his sister.

|| If

¶ If there be a bequest to a person, payable at a certain period, which may happen either before or after the death of testator, with a declaration, if legatee die before legacy is payable that it shall go to the "survivors," if there be a class, or to some person or persons described; then, if the legatee should die before the assigned period, although in the lifetime of the testator, the legacy does not lapse but goes according to the will. If, however, the period should arrive in the lifetime of the testator, and the legatee should survive *it*, and then die *before* testator, the legacy *does* lapse.¶

So, where a man devised 100*l.* to *A.* and *B.*, the two daughters of his brother *G.*, to be paid within a year after the death of his wife; *viz.* 50*l.* to *A.*, and 50*l.* to *B.*, if they shall be both alive at the time of payment; but if either of them should die before, then the said 100*l.* to the survivor of the said two daughters: one of the said two daughters died in the lifetime of the testator; and the only question was, Whether the surviving daughter should have the whole 100*l.*, or only the 50*l.*? — and *Rawlinson* and *Hutchins* Lords Commissioners were clearly of opinion that she should have the whole 100*l.*: they said, that by the first clause of the will it is a joint devise to them of the 100*l.*, in which case, if the will had gone no farther, if one had died, it would have survived to the other; then the *viz.* that comes after is only a severance of it, in case they should both live to the time of payment, which they did not; and then the last clause of the will, in case either died before the time of payment, is a new substantive devise of the whole 100*l.* to the survivor; and decreed accordingly.

So, where one made his will, and, after several legacies, gave and devised all the rest, residue, and remainder of his personal estate to three persons, whom he thereby made his executors; one of them died in the lifetime of the testator; and the only question was, Whether the two surviving executors should have the whole; or whether the third part should be distributed, according to the statute, amongst the next of kin? and the Master of the Rolls, on time taken to consider of the case, and citing most of the authorities, both out of the civil and common law, was of opinion, and decreed accordingly, that the two surviving should take the whole.

¶ **JOINT-TENANCY.**—If there be a bequest to *A.* and *B.* as joint-tenants, and from some cause or other the bequest to *A.* is defeated, — as by his death in testator's lifetime (*a*), or by testator making a codicil, and revoking the bequest to him (*b*), or by reason of an uncertainty in the description of *A.* (*c*), — *B.* takes the whole; for "each was a taker of the whole, but not solely; for "the whole was devised to both, and not a moiety to each."

(*c*) *Dowset v. Sweet*, Amb. 175.

Of course the share of a tenant in common, who dies before testator, lapses.

Willing v. Bain, 5 P. Wms.

115. *Humberstone v. Stanton*, 1 Ves. & B. 388.

Walker v. Maise, 1 Jac. & W. 1. *Williams v. Jones*, 1 Russell, 517.; and see *McClell*. 177.

Abr. Eq. 298. *Scoulding and Green*.

Abr. Eq. 245. *Trin.* 1750,

Hunt and Berkley.

Mosel. 47.

S. C.

¶ *Frewen v. Relfe*, 2 Br. C. C. 220.¶

(*a*) *Buffar v. Bradford*,

2 Atk. 220.

Morley v.

Bird, 5 Ves.

628. 631.

(*b*) *Humphrey*

v. Tayleur,

Amb. 156.

(*c*) *Dowset v. Sweet*, Amb. 175.

Bagwell v.

Dry, 1 P. Wms.

700. *Owen v.*

1 Br. C. C. 503.

Owen, 1 Atk. 494. *Ackroyd v. Smithson*, 1 Br. C. C. 503.

Viner v.
Francis, 2 Cox,
190. S. C.
2 Br. C. C.
658; *sed vide*
Martin v.
Wilson, 3 Bro.

But if there be a bequest to persons as a *class*, as to the children of *M. C.* equally to be divided among them, the children who are living at the death of testator are entitled to the whole, although a child or children may have died between the date of will and death of testator.||

C. C. 325. cont. but the former seems the better authority.

2. *Where a Legacy shall be said to be vested or lapsed, being to be paid at a future Time, to which the Legatee did not arrive.*

This distinction is laid down in Dyer, 59. Leon. 177. Swinb. 311. 313. Off. Ex. 347. Godb. 182. 2 Vent. 342. Cloberie's case, 2 Chan. Cases, 155. 2 Salk. 415. pl. 2. Carth. 32. Vern. 462. 2 Vern. 675. Prec. Chan. 21. Abr. Eq. 294, 295. Bur. Rep. 227. Atk. Rep. 504. ||(a) See the rule, Cod. lib. 6. tit. 55. sec. 5. and Roper, ch. 10. sec. 2.||

The rule and distinction which hath obtained in these cases, and which is agreeable to the rule (a) of the civil law, is, that if a legacy be devised to one generally, to be paid or payable at the age of twenty-one, or any other age, and the legatee die before that age, yet this is such an interest vested in the legatee that it shall go to his executor or administrator; for it is *debitum in presenti*, though *solvendum in futuro*, the time being annexed to the *payment*, and not to the *legacy* itself; but if a legacy be devised to one at twenty-one, or if or when he shall attain the age of twenty-one, and the legatee die before that age, the legacy is lapsed; and though, says my Lord Cowper, this distinction was at first introduced upon very slender reasons, and probably upon no other but from a constant willingness in the civil law to stretch in favour of a particular legatee against the residuary legatee, who went away with the whole surplus of the personal estate, yet, it being the rule of the ecclesiastical courts, it is fit that the same rule should be observed in Chancery, as this court has now a concurrent jurisdiction with the ecclesiastical courts in matters of this nature; and therefore there ought to be a conformity in their resolutions, that the subject may have the same measure of justice, in which court soever he sues.

Pasch. 7 Annæ,
Strick v. Hud-
son, in Canc.

But if legacies are given to children, and if any die, their legacies to survive, yet after twenty-one, or marriage, there shall be no survivorship, though the words are general.

2 Vern. 675.
Stapleton v.
Cheales, Pr.
Ch. 318. S. C.
Gilb. Eq. Rep.
S. C.

So, if a legacy of 50*l.* is devised to *J. S.* when of the age of sixteen years, and interest in the mean time, to be paid quarterly, this is a legacy vested, and shall go to the representative of the legatee, because it carries interest.

2 Salk. 415.
Smell and
Dee, pl. 2.

But if *A.* devise in these words; *viz. — I give 100*l.* a-piece to the two children of J. S. at the end of ten years after my decease,* and the children die within the ten years, this is a lapsed legacy, and is so in all cases where the time is annexed to the *legacy* itself, and not to the *payment* of it; though it was objected, that this differed from the case where a man devises 100*l.* to *J. S.* at his age of twenty-one; because it is a contingency whether he will attain to that age; but the expiration of the ten years is inevitable.

Abr. Eq.
295, 296. On-
slow v. South.

Again, one being possessed of a very considerable estate, part in *Jamaica*, and part in *England*, and being himself resident in *Jamaica*, made his will, and thereof appointed several executors, some for his estate in *Jamaica*, and others residing in *England* for

for his estate here, and, amongst other things, devised in these words; *viz.* — *I give and bequeath to J. S., now under the custody of R. D., the sum of 2000*l.* at the age of twenty-one years, to be paid by my executors in England, and devised all the rest and residue of his estate to the plaintiff, and died. J. S., having attained the age of eighteen, made his will, and thereby devised this legacy, and all his estate, to the defendant. My Lord Chancellor held this a lapsed legacy, and that it was a vain endeavour in the defendant's counsel to construe it a present legacy, and therefore vested by the word *now*, because it was a plain description of the condition of the legatee, *viz.* *now* under the custody of, &c., for otherwise they must stop at *now*, which would be playing with the words; and though the word *paid* was made use of, yet it was plainly intended a designation of the persons by whom the legacy was to be paid, *viz.* by his executors in *England*, which was proper, he having two sets of them.*

¶1. Where there is an immediate Gift, but the Time of Payment is postponed.

RULE 1. When there is a gift of a legacy, or of a share of a residue, *to be paid* at or when legatee shall attain twenty-one, or any specified age (a); or at the death of a particular person (b); or when legatee shall have served out his apprenticeship (c), the gift vests in legatee at the death of testator — the time only applies to the payment.

(a) Bolger v. Mackell, 5 Ves. 509.

(b) Jackson v. Jackson, 1 Ves. sen. 217.

(c) Sidney v. Vaughan, 2 Br. P. C. 254.

Exception.—But in a case in which there was a gift of the residue in shares, *to be paid* at twenty-one; it was held that the shares did not vest till that age, on the ground that the contents of the will sufficiently indicated the testator's intention, though it was not expressed, that the legatees or legatee who attained twenty-one should take the whole residue.

Mackell v. Winter, 3 Ves. 236. 536.

RULE 2. So when there is a gift to be paid when testator's debts are paid, or when his assets are realized (d), or when an estate is sold (e), the legacy vests.

(d) Gaskell v. Harman, 6 Ves. 159. 11 Ves.

489. (e) Stuart

see 8 Ves. 558.

Exceptions.—1. Where the testator sufficiently manifests his intention that the legacy is not to vest till the debts are paid.

Bernard v. Montague, 1 Mer. 422.

2.—Where the produce of real estate was bequeathed among persons “at such time as the sale should be completed, in case “they were then living,” the interests were held contingent until sale.

Elwin v. Elwin, 8 Ves. 547.

RULE 3. When there is a gift, and the time of payment is not merely a postponed and definite period, but is uncertain, and implies the motive of the gift, the gift does not vest till the specified period arrives. Thus, where there was a bequest of 200*l.* to *Elizabeth*, to be paid at the time of her marriage, provided she married with consent, it did not vest till married.

Atkins v. Hiccocks, 1 Atk. 500.

So, where the bequest was of 1000*l.* to *Frances*, to be paid to her as soon as she attained twenty-one, and in case she should live

to

to attain that age and not otherwise, or upon her marriage, which should first happen; — Sir *W. Grant* M. R. thought the age or marriage was a condition precedent.

Booth v.
Booth, 4 Ves.
399.
See Sir *W. Grant's* observations on this case, 2 Mer. 386.

Exception.—A bequest of a *residue* to trustees to pay annual produce to *Phæbe* and *Anne* until their marriages, and then to assign to them their several shares, was held to give a vested and disposable interest to the legatees before marriage.—It was held equivalent to a trust of the residue for *P.* and *A.*, to pay interest till married, and then the principal.

2.—When the Gift and Time of Payment are united.

(a) *Smell v. Dee*, 2 Salk. 415. *Onslow v. South*, 1 Eq. Ca. Abr. 295.

RULE 1. If there be a *simple* gift of a legacy to *A.* at (a), if, (b), provided (c), in case of (d), when (e), as soon as (g), from and after (h), he attains twenty-one or marries, the gift does not vest till the age or marriage.

pl. 6. *Cruse v. Barley*, 5 P. Wms. 20. (b) See *Brownwood v. Edwards*, 2 Ves. sen. 245. (c) *Atkinson v. Turner*, 2 Atk. 41. (d) *Elton v. Elton*, 3 Atk. 504. (e) *Hanson v. Graham*, 6 Ves. 239. (g) *Knight v. Knight*, 2 Sim. & Stu. 490. (h) *Leake v. Robinson*, 2 Mer. 387.

Knight v. Knight, 2 Sim. & Stu. 490.
See *Gordon v. Rutherford*, Turn. & Russ. 373.

The principal and interest of a legacy may be included in one gift, and may be contingent; as a bequest of 2000*l.* with legal interest to *C.* as soon as he attains twenty-one, is contingent.

in which the gift was it seems a specific legacy.

RULE 2. But if the gift is not simply one upon condition, but is accompanied with circumstances shewing that the terms, apparently requiring as a condition precedent the happening of an event, were only intended to mark the time when the gift should vest in possession, it is not contingent.

(i) *Fonner-eau v. Fonner-eau*, 3 Atk. 645. *Hoath v. Hoath*, 2 Br. C. C. 4. *Walcott v. Hall*, *ibid.* 505. and see 2 Meriv. 586. *Lane v. Goodge*, 9 Ves. 225. *Jones v. Mackilwain*, 1 Russell, 220. (k) *Hanson v. Graham*, 6 Ves. 239. 249. (l) *Branstrom v. Wilkinson*, 7 Ves. 421. See *Love v. L'Estrange*, 3 Br. P. C. 337.

1. Thus, where in the mean time, till the period when possession is to be taken, the whole annual produce of the fund is to be employed for the maintenance (i), or for the benefit (k), or upon trust (l) for the legatee, the fund vests at once in the legatee.

Dodson v. Hay, 3 Br. C. C. 404.; but see *Barker v. Lea*, Turn. & Russ. 413.
a case of a residue given entire.

And this rule, that the giving of the whole annual interest vests a legacy, is not to be overturned by words of vague import; as by a direction, after giving the interest, that the legacy is not to be otherwise claimed or inherited, directly or indirectly, until the age of twenty-one.

But where the gifts of the interest and of the capital, though to the same person, are perfectly distinct, and that without there being any reason, as the minority of the legatee, for the distinction, the giving of the interest will not vest the capital sooner than the words bequeathing such capital import.

Batsford v. Kebbell, 5 Ves. 363. referred to 3 Ves. 367. 5 Ves. 514. 3 Mer. 342. 1 Russell, 224.

Thus where testatrix gave to *Robert* the dividends upon 500*l.* 3*l.* per cent. consols, until he should arrive at the age of thirty-two years, at which time she directed her executors to transfer to him the principal sum for his own use; it was held that the capital did not vest till *Robert* attained thirty-two.

2.—Words though apparently constituting a condition precedent are understood to mark only the time when the legacy is to vest in possession, if the intermediate interest, though not given for the benefit of the legatee, is only an *exception* out of the whole property of a certain interest, to endure till legatee attains twenty-one, or till debts are paid, &c.

Ca. Abr. 195. pl. 4. Boraston's case, 3 Rep. 19.

But where testator bequeathed furniture, pictures, &c. to the use of his wife, desiring that they should be distributed amongst his children on the youngest attaining twenty-one, at her and his executors' discretion, it was held that children who died before the youngest who lived to twenty-one attained that age, took nothing; as it was evident that the discretion of executors could only be applicable to those who were then living.

RULE 3. When there is a bequest to *A.* for life, and *after* his decease, or "from and after" or "at" his decease, then to *B.*, *B.* takes a vested interest.

general v. Crispin, ibid. 386. Benyon v. Maddison, 2 Br. C. C. 75. Taylor v. Langford, 3 Ves. 119. Wadley v. North, ibid. 364.

So, where testator gave to *Pringle* 200*l.* at his wife's decease, *P.'s* interest was vested.

But if there be a bequest to *A.*, and after his decease to his children, and it be inferred from the words of the will that only children living at the death of *A.* are intended to take, their shares will not vest till that time.

Thus, where there was a bequest of the interest of 1500*l.* to *Capel* for life, and after his decease testator gave the said sum to his (*Capel's*) children equally; it was held that the shares of children were not vested; because, 1. the capital was not given till the death of *Capel*; 2. it was inferred from a provision in the will that children living at *Capel's* decease were only intended to take.

and see 1 Jac. & W. 146.

So, if there be a bequest to *A.* and after her decease to her children, with a bequest over if she die *without any child* (*a*); or, if she should leave but one child then the whole to go to that one, the shares of the children are contingent. (*b*)

and see *Schenck v. Legh, 9 Ves. 300. and Randall v. Metcalfe, cited ibid. 314. (b) Smith v. Vaughan, Vin. Abr. tit. Devise, pl. 32. Spencer v. Bullock, 2 Ves. jun. 687.; and see 2 Wils. C. C. 64.*

3. Legacies with Executory Bequests over.

RULE 1. A legacy which is given immediately to *A.*, and is in its terms vested, is not rendered contingent by being given over upon the happening of a specified event.

As a bequest to children in equal shares, and if either die before twenty-one, his share to the survivor, the children take vested interests, subject to be divested by dying under twenty-one.

RULE 2. The right or interest which an executory legatee takes is not lost by his death before the event happens on which the bequest is to vest in possession.

Thus,

See *Lane v. Goodge, 9 Ves. 226. 231. Taylor v. Biddall, 2 Mod. 289. Manfield v. Dugard, 1 Eq. 1 New R. 317.*

Ford v. Rawlins, 1 Sim. & Stu. 328.

Monkhouse v. Holme, 1 Br. C. C. 298. Attorney General v. Langford, 3 Ves.

Blamire v. Geldart, 16 Ves. 314.

Billingsley v. Wills, 3 Atk. 219. See Bennett v. Seymour, Amb. 521. Reeves v. Brymer, 4 Ves. 692.

(*a*) *Thickness v. Liege, 3 Br. P. C. 365. 373. See and consider this case;*

(*b*) *Smith v. Vaughan, Vin. Abr. tit. Devise, pl. 32. Spencer v. Bullock, 2 Ves. jun. 687.; and see 2 Wils. C. C. 64.*

Davidson v. Dallas, 14 Ves. 576.

Pinbury v. Elkin, 1 P. Wms. 563. Barnes v. Allen, 1 Br. C. C. 181. S. C. 3 Ves. 208. Stanley v. Wise, 1 Cox, 432.; and see Fearne, Ex. Dev. 555. 7th edit. Wilmot v. Wilmot, 8 Ves. 10.

CONSTRUCTION OF WORDS LIMITING AN EXECUTORY BEQUEST OVER.

Hutchin v. Mannington, 1 Ves. jun. 366. See Lord Eldon's comments, 11 Ves. 547.

1. If these be not sufficiently precise and clear the bequest over cannot take place, and the whole interest vests absolutely in the first taker; as where testator gave a legacy over in case the first taker died before he might have received it.

Turner v. Moor, 6 Ves. 557. Cambridge v. Rous, 8 Ves. 13. Montagu v. Nucella, 1 Russell, 165.

2. When the words of limitation over are "in case of the death of legatee;" these are confined to the legatee's dying *before the testator*, if it appear from the will that the bequests were alternative, and that the second or executory bequest was only intended as a substitute in case the first taker did not survive the testator.

Webster v. Hale, 8 Ves. 410.

Thus a bequest to *Clementina* of 8000*l.*, "but should she happen to die," to her children. So a bequest to *Helen*, "and, in case of her death," over.

Ommaney v. Bevan, 18 Ves. 291. S. P. Slade v. Milner, 4 Madd. 144.

So a bequest of a residue to *P.*, and in case of her death to the children of *W.*, *P.* surviving testator was held absolutely entitled.

Billings v. Sandom, 1 Br. C. C. 593. Lord Douglas v. Chalmer, 2 Ves. jun. 501.

But the words "in case of legatee's death" will not be confined to a dying before the testator, if it appear from the will that the testator only intended to give the legatee a life interest.

Galland v. Leonard, 1 Swanst. 161. Harvey v. McLaughlin, 1 Price, 264.

So if there be an absolute bequest to *A.* in remainder, and not immediate, "and in case of *A.*'s death," to *B.*; *B.* will be entitled if *A.* die before the first taker.

Maberly v. Strode, 3 Ves. 450.

3. A bequest to *A.* and his children, "but in case *A.* die unmarried and without issue." "Unmarried" is to be understood to mean "never having been married;" but "and" is to be read "or," so as to make a double contingency.

Bell v. Phyn, 7 Ves. 454.

Thus, on a bequest of a residue to three children, but if any of them died "without being married and having children;" Sir *W. Grant* M. R. construed these words, "without ever having been married, or without having had a child or children."

4. Words limiting an executory bequest, by which a previous vested interest may be divested, are construed strictly; and, unless the event on which the bequest is limited over literally happen, the primary gift will not be divested.

Browne v. Lord Kenyon, 5 Madd. 410.

Thus a bequest to *Abigail* for life, with remainder to *Chetwode* absolutely, but if then dead to *Charles* and *Philip*, or the whole to the survivor. *Philip* survived *Charles*, and *Chetwode* died

died in lifetime of *Abigail*, but *Philip* also died in her lifetime, and therefore was held not entitled to the whole but to a moiety only.

So a bequest to *A.* for life, remainder to her children absolutely, *or such of them as should be living at her decease*; all the children died in *A.*'s lifetime, therefore the bequest to them was not disturbed by the bequest to those who survived wife, for none survived, and the representatives of the children were entitled.

Sturges v. Pearson,
4 Madd. 411.
See Wall v. Tomlinson,
16 Ves. 413.
3 Mer. 335.

Harrison v. Foreman, 5 Ves. 207. and see Skey v. Barnes,

4. An absolute bequest is not affected by a discretionary power vested in a stranger to give the fund over, when such power fails by the death of the donee.

Keates v. Burton, 14 Ves. 434. See Robinson v.

Smith, 6 Madd. 194.

5. When an executory bequest is limited on the death of the first taker before the legacy is "*payable*." This word, though accompanied by "*assignable or transferable*," is if possible referred to the period when the legacy *vests*, if the legacy is in the nature of a *portion* or provision for a child. In other cases its construction must depend upon the words of the will.

Jefferies v. Reynous, stated 9 Ves. 311. 6 Bro. P. C. 398. See Perfect v. Lord Curzon, 5 Madd. 442.

Maitland v. Chalie, 6 Madd. 243.

Thus, where there was a bequest to *Rebecca* for life, with remainder to nephews and nieces equally, the shares to be paid at twenty-one; but if any of the legatees died before their shares became *payable*, then over to the survivors. The share of a nephew who attained twenty-one, but died in the lifetime of *Rebecca*, was held to go to his representatives.

Hallifax v. Wilson, 16 Ves. 168.

4. A Bequest subject to a Power of Appointment.

RULE. If there be a bequest to *A.* for life, remainder to children, subject to a power given to *A.* to appoint the fund, in such shares as she shall think proper, among them, the children take vested interests; but if any of them die before *A.*, *A.* may appoint the whole to the survivors; if, however, *A.* does not effectually appoint the whole fund, the representatives of a child dying in *A.*'s lifetime are entitled to a share.

Boyle v. Bishop of Peterborough, 1 Ves. jun. 299.
McGhie v. McGhie, 2 Madd. 378.
Wilson v. Pigott, 2 Ves. jun. 351. Butcher v. Butcher, 1 Ves. & B. 79. 92.

CONSTRUCTION OF "SURVIVORS."

If a fund is given to three persons equally to be divided, shares to be paid at twenty-one, and it is directed, if any die under twenty-one, the share or shares to go to the survivors or survivor; the survivorship is referred to twenty-one, so that if one attain twenty-one, and afterwards die, and then a share survives, his representatives are entitled to a part of such share.

Wilmot v. Wilmot, 8 Ves. 10. And when "survivors" is construed as "others," see 14 Ves. 578.

5. Legacies payable out of Land.

If a legacy be charged upon both real and personal estate, or upon real estate only, and be given to *A.* (whether a child or stranger) at twenty-one, or marriage, or *to be paid* at that age or marriage, or in other terms shewing that the time of payment had regard to the legatee, and not to the estate or the convenience of the

Pawlett v. Pawlett, 1 Vern. 321.
Duke of Chandos v. Talbot, 2 P. Wms. 602.

Prowse v. the owner, the legacy, so far as the land charged is concerned, Abingdon, lapses or sinks into the land on the death of the legatee before 1 Atk. 482. the time of payment.
Harrison v. Naylor, 3 Br. C. C. 108.

(a) King v. Wi- But this rule is not adopted when the payment of the legacy is thers, Forrest. postponed, not on account of the legatee, but of the estate or its 117. S. C. 3 Br. owner (a); or, when the testator manifests an intention that the P. C. 155. legacy should not lapse by the death of the legatee before the Walker v. time of payment. (b)
Main, 1 Jac. & W. 1. 7.

(b) Lowther v. Condon, 2 Atk. 127. Watkins v. Cheek, 2 Sim. & Stu. 199.

Hutchins v. So, when there is a devise in remainder to A., "paying out of Foy, Com. Rep. "the estate when it falls 500*l.*;" and a bequest of the 500*l.* to 716. 723. Martha. Though Martha should die before A. comes into possession, her legacy passes to her representatives.

Emes v. Han- So, where testator devised to Thomas in fee on attaining twenty- cock, 2 Atk. five, on condition that he, his heirs or assigns, paid to Elizabeth 507. Sherman 60*l.* within two years after his attaining twenty-five, and a right of v. Collins, entry was given to Elizabeth on non-payment. Elizabeth's personal 3 Atk. 319. representative was held entitled though she died before the expiration of the two years. Great stress was laid on the fact that Elizabeth and her executors or administrators had a legal title to recover the money; the devise operating as a conditional limitation.

Hodgson v. It may be stated generally, that if there be a devise to A. of an Rawson, 1 Ves. estate in remainder, charged with legacies when it vests in possession, the legacies do not lapse by the deaths of legatees before sen. 44. Em- the period of payment.||
brey v. Martin, Amb. 250.

Manning v. Herbert, Amb. 575. Jeal v. Tichener, 1 Br. C. C. 120. note. Clarke v. Ross, 2 Dick. 529. Pawsey v. Edgar, 1 Br. C. C. 192. note. Dawson v. Killet, 1 Br. C. C. 119. S. P. *ibid.* 191.

(F) Of Conditional Legacies, and how far the Condition must be complied with, otherwise the Legacy will be forfeited.

|| A CONDITION must be expressed in language sufficiently precise, to enable a court to say whether it has been performed or not.

Tattersall v. Howel, 2 Mer. 26.

A testator bequeathed, "provided my son changes the course of life he has too long followed, and will give up all his low company, and frequenting public-houses entirely, I then leave him, but not otherwise, the interest of 5500*l.* for life." Sir W. Grant M. R. held the condition not too vague to be enforced, and directed the master to enquire, whether the condition had been satisfied.

Whether a condition be precedent or subsequent, that is, whether it must be performed before the legatee can be entitled to an absolute interest in the bequest, or not till after, of course depends upon the words and intention of the testator. But a testator in making a bequest may use words of condition, which, however, shall not be construed as such, if it clearly appear

pear that they do not involve the motive and reason of the bequest.

Thus a bequest to *A.* for life, remainder to *C.* for life, "and after *C.*'s death, *in case* he should become entitled to such interest," to divide the principal between *D.* and *E.* *C.* died in *A.*'s lifetime, yet it was held the limitation to *D.* and *E.* took effect.

So, where there was a bequest upon trust for such children as testator should leave at his death; but if all of them died under twenty-one, the fund was to go to the wife; there were no children, yet the wife was held entitled.

sen. 420. Parry v. Boodle, 1 Cox, 183.

If a testator by his own act render the performance of a condition he has imposed *impossible*, the bequest takes place, discharged of the condition.

So, if the condition becomes impossible by the act of *God*.

Lowther v. Cavendish, Amb. 356. 1 Eden, 99. S. C. Keates v. Burton, 14 Ves. 434. Aislabe v. Rice, 3 Madd. 256.

So, if a condition be illegal, or contrary to the policy of the law,—as if a legacy be given to a *feme covert*, if she is living separate from her husband,—the condition is void, and the legatee is entitled absolutely; so, if the legacy be upon an illegal condition to assign to a charitable purpose.||

If a legacy be given on condition not to dispute the will, and the legatee commence a suit, whereby he disputes the validity of the will, yet this is no (a) forfeiture of the legacy, if there was *probabilis causa litigandi*.

holder, and require him to do his services, and the copyholder answer, if they are due he will do them, but it shall be tried at law first, whether they are due or not; this is no forfeiture, being no wilful refusal. Roll. Abr. 506. Roll. Rep. 429. 3 Buls. 80. 268. 4 Co. 21. b.

|| But it seems otherwise, if in case of the legatee disputing the will the legacy is given over; or if the testator direct the legacy to fall into the residue upon a breach of the condition, and dispose of that fund. (b)||

v. Branton, 5 Mer. 118.

But what we are here chiefly to consider is, how far conditions, annexed to legacies which restrain marriage, are to be performed, and how, and in what case, the neglect or non-performance of them will forfeit the legacy.

And here we must observe as a general rule, that all conditions in restraint of marriage are to be considered strictly, being prejudicial to society, as they hinder the propagation of the species.

Therefore by our law, as also by the civil law, a devise upon condition not to marry, or not to marry a person of such a profession or calling, is void, whether there be a limitation over or not; for (c) every person ought to be at liberty to marry when he pleases; and therefore conditions restrictive of that power are against law, and void.

man to his wife for so many years, if she shall remain a widow so long, this is a good conditional bequest, because of the particular interest every husband has in his wife's remaining a widow; for thereby she will the better take care of the concerns of his family, in respect of which

Pearsall v. Simpson, 15 Ves. 29. See 1 Roper on Leg. 650.

Meadows v. Parry, 1 Ves. & B. 124. See Avelyn v. Ward, 1 Ves.

Darley v. Longworthy, 3 Br. P. C. 359.

Sir James Aislabe

Brown v. Peck, 1 Eden, 140. Poor v. Mial, 6 Mad. 32.

2 Vern. 91. (a) If the lord of a copyhold manor come to a copy-

holder, and require him to do his services, and the copyholder answer, if they are due he will do them, but it shall be tried at law first, whether they are due or not; this is no forfeiture, being no wilful refusal. Roll. Abr. 506. Roll. Rep. 429. 3 Buls. 80. 268. 4 Co. 21. b.

Cleaver v. Spurling, 2 P. Wms. 526. (b) See Lloyd

Swinb. 266.

Godolph. Orph. Leg. 45. Swinb. 266. Vern. 20. Mod. 86.

(c) If an annuity be bequeathed by a

which he may well allow her a maintenance for that time, to cease when she removes herself into the interest of another family. Godolph. Orph. Leg. 45. — But if a stranger gives a legacy upon such condition, it is not good; for there is no more reason for restraining a widow from marrying, than a maid. Godolph. 46. — Where a man devised, after debts and legacies paid, the surplus of his estate to his wife and his son *John*, equally betwixt them, and adds, *whom I make my executors*, and farther wills, that she should continue his true widow; but if she marry again, *my will is, she shall render the right of being my executrix to my son Roger, to be partner with his brother John in the executorship*; it was held, that by the wife's marrying again, she had as well lost her share of the surplus, as her right to the executorship. 2 Vern. 308. *Barton v. Barton*.

Swinb. 267. Also, by the civil law, a gift or devise upon condition not to
(a) If one be marry without (a) consent is void, though there be a limitation
appointed executor or over; for the maxim there is, *matrimonium debet esse liberum*.
legatee, upon condition he marry with the consent and approbation of another, and if he marry against their consent, that the executorship or legacy shall go to another; yet he shall have the executorship or legacy: But in this case it is said, that he is bound to ask consent, and to marry; for both these parts of the condition are lawful, though the part is not that restrains him from marrying against the consent of another. Godolph. 46.

Swinb. 267. But though conditions which restrain marriage generally are
8 Vern. 20. void, yet, both by our law and the civil law, a condition that
2 Br. Ch. restrains marriage as to time, place, or person, is good; as not to
Rep. 488. marry before twenty-one, not to marry at *York*, not to marry a
(b) ||Perrin v. papist, &c. ||Or not to marry a *Scotchman*. (b)||
Lyon, 9 East,
170. 1 Shep.
Touch. by Preston, 132.||

2 Chan. Ca. But the prevailing distinction in the courts of equity as to this
22. 138. Vent. matter is, between such conditions as are good, and bind the
199. Vern. 20. legatee, and such as are only *in terrorem*; as to which it is clearly
2 Vern. 293. agreed, that if a legacy be given to a person upon condition that
5 Vin. Abr. he or she marry with the consent of *J. S.*, that in such case the
343. pl. 41. condition is only *in terrorem*, and the legatee does not forfeit,
Atk. Rep. 502. though the marriage was without such consent: but if in this case
Prec. Chan. the legacy had been limited over to another, the marriage without
565. the same consent had been a forfeiture. And the reason thereof is, not
distinction; only from the intention of the testator appearing more strongly in
and there said, the latter than in the first case, but also because the courts can-
that though a not in this case relieve against the forfeiture without doing an
lawyer may injury to the person to whom it is limited over. (c)
know it to be
no forfeiture,
not being
limited over,
yet the parties themselves might not be so learned, and therefore it would be some terror to them to venture to break it; and without this distinction, strangers, executors, might run away with a great part of a man's estate from his children. [(c) Hence, if in the event of a marriage without consent the legacy or portion be given over, a demurrer will lie to a bill for a discovery of the fact of the marriage. *Chauncey v. Tahourdin*, 2 Atk. 392. *Chancey v. Fenhoulet*, 2 Ves. 265.]

1 Chan. Ca. If by lease 9000*l.* are secured for a *feme sole*, in case she mar-
58. Fleming ries not contrary to the liking of *A.*, and if she doth, then for such
and Wald- person as *A.* shall nominate; and for want of such nomination,
grave, 2 Vern. for *A.*; and she marries without the consent of *A.*, yet he cannot
575. S. C. dispose of the lease otherwise than for her benefit; for it would
cited; and be the most unreasonable thing imaginable, that his giving or
there said, that refusing his consent should have any influence in an affair that
there may be was to turn so much to his own advantage.
a difference
between a con-
dition that a person cannot marry without consent, and where it is that the party shall not marry

marry against consent. [S^o, by Lord *Hardwicke* in 5 Atk. 535. As to this case of *Fleming v. Waldgrave*, it was said by the Attorney General, and agreed by the Master of the Rolls in *Reeves v. Herne*, 5 Vin. Ab. 545, pl. 41., that the legacy *here* vested immediately, it being given upon her not marrying without consent, &c.; and his Honour remembered a like case in the time of *Wright S. C.*, where the condition being, if she did not marry with consent, &c. the legacy was decreed her immediately, she entering into a recognizance to refund, in case she married without consent, &c. A testator gave his granddaughter 200*l.* on condition she continued with his executors till she was twenty-one; but if she was taken from them by her father (who was a papist), or married against the consent of his executors, then he gave her but 10*l.* The granddaughter was placed by his executors with a clergyman, who, before she was twenty-one, with consent of one of the executors, permitted her to make a visit to her father, who took that opportunity to marry her to a papist. She was decreed the legacy at the Rolls; but upon a re-hearing Lord Keeper held, that she should have only the 10*l.*; and he said, that in this case there was no difference between a condition that she should not marry without consent, and that she should not marry against consent. *Creagh v. Wilson*, 2 Vern. 572. *Qu.* Whether there was any limitation over?]

If *A.* devise a messuage, &c. to *B.* his wife for life, remainder Vent. 199.
to *C.* his granddaughter in tail, upon condition that she marry Mod. 300.
with the consent of his wife and *D.* and *E.*, or the major part of 1 Chan. Ca.
them, and if she marry without their consent, or die without 158. Fry and
issue, the same to remain to *F.* and her heirs; and *C.* marries Porter. See
without the consent of any of them, who, as soon as they hear of also *Bertie v.*
it, declare their dislike to the marriage, but afterwards consent Lord Falk-
to it; yet *C.* shall not be relieved in equity, for the subsequent land, *supra*,
assent cannot divest the estate which was before vested in *F.*, Vol. I.
neither can there be any collateral averment that the condition was intended only *in terrorem*.

A. devised 300*l.* to *B.* her daughter, and that if she married Vern. 580.
under twenty-one, without consent of the executors, or the major Mesgret v.
part of them, the legacy to go to the children of her sister, the wife Mesgret.
of *C.*, and made *C.* and two others executors; *B.* being at the house
of *C.*, there marries his son, by a former wife, with his privity,
being under twenty-one; *B.* and her husband bring a bill for the
legacy, *C.*, in favour of his other children, insists that the legacy
is forfeited; the other executors confessed they had notice of the
courtship, and did not contradict or disapprove of it, and the 300*l.*
were decreed the plaintiffs, there being at least a tacit consent.

A., having issue three daughters, *B.*, *C.*, and *D.*, devised 1000*l.* Prec. Chan.
to be paid *B.*, at the age of twenty-one, or marriage, upon con- 562. Semphil
dition that she married with the consent of his executors; and v. Bayley, de-
likewise devised to her several messuages, &c. upon the like con- creed in the
dition; and, after several other legacies and bequests, he devised Duchy Court
the residue of his estate to his executors, for the benefit of his by *Lechmere*
children. *B.* married, against the consent of the executors, a Chancellor
person who made his addresses to her in her father's lifetime, which and *King C. J.*
the father knew, and was dissatisfied at; she had likewise notice against the
given her by the executors of her father's will, and that by mar- opinion of
rying without their consent she would be in danger of forfeiting Justice *Dor-*
her legacy; and that they could not approve of that match, be- mer.
cause they knew that her father disliked it in his lifetime; yet it
was held, that there being no express limitation over, the devise
of the residue being after debts and legacies paid, that the con-
dition was only *in terrorem*, and that the marriage, without con-
sent, did not amount to a forfeiture of the legacy, &c.

Abr. Eq. 112.
Amos v. Hor-
ner.

A. devised to his daughter *M.* 100*l.*, to be paid by his executors upon her day of marriage, or age of twenty-five years, which should first happen, upon condition that she should marry with the consent of such and such persons; and if she married without their consent, then to have 50*l.* only, and no more, and gave the residue of his personal estate to the defendants; *M.* married the plaintiff, without such consent, before she was twenty. And it was held by the Master of the Rolls, that this was more than a clause *in terrorem*, and that the devise of the surplus of the personal estate was a devise over of the 50*l.*, on *M.*'s disobedience.

Mich. 1688.
Paulett and
Dogget, in
Can.

One by will devised 1300*l.* to his daughter *A.*, to be paid at her age of twenty-one years, and if she died without issue before twenty-one, then to go over to *B.*, provided that if she married before twenty-one, without consent of certain persons, then to go over to *C.* She did marry before twenty-one, without such consent: and upon a bill brought by *B.*, it was decreed that *A.* should give security, &c. for the money, if she died before twenty-one without issue; and the Master of the Rolls, who heard the cause, said, the law was now settled accordingly; but the decree was so ordered as to serve both contingencies; *viz.* that upon her marriage before twenty-one, without consent, the money should go to *C.*, yet so that if she died before twenty-one without issue, it should go to *B.* according to the devise.

2 Vern. 452.
Aston and
Aston.

A. by will gave portions to his daughters, without mentioning any time of payment, upon condition that they married with the consent of his wife; and if any married without such consent, her portion to go over. On a bill brought by the daughters for their portions, it was decreed accordingly, but on security to refund in case the condition should be broken; for it was held, that though the marriage without consent was but a condition subsequent, yet the court could not relieve against the forfeiture, by reason of the devise over, although it was admitted to be a hard condition, no time being limited, but going to a marriage at any time, even after the age of twenty-one years.

Abr. Eq. 112,
113. King v.
Withers.

The defendant's father devised to him, who was his heir at law, all his lands, &c. (except such and such parts), charged with the sum of 2500*l.* to his daughter (since married to the plaintiff) at her age of twenty-one years, or marriage, which should first happen; and devised the excepted lands, in trust, to be sold for the payment of his debts; provided that if his said daughter should marry in the lifetime of her mother, without her consent first had in writing, then 500*l.*, part of the said 2500*l.*, should cease, and should be applied towards payment of his debts charged on the said excepted lands, and appoints his wife to be guardian of his said daughter, and makes her executrix, and dies; the daughter attains her age of twenty-one years, and, without the consent or privity of her mother, intermarries with the plaintiff, who was a gentleman of some estate, and called to the bar, but had made no settlement or provision for his wife; and therefore the defendant, the heir at law, refused to raise or pay any part of his sister's portion; and insisted likewise, that by her marriage

marriage without her mother's consent, 500*l.*, part of her fortune, was become forfeited. Whereupon the plaintiffs brought their bill to have the whole portion raised by sale of the land charged therewith. *Per* Lord Keeper, this is a portion to be raised out of lands, and therefore to be considered as land: and though it be to go towards payment of debts on breach of the condition, and there appear one hundred and twenty creditors concerned, yet none that are in danger of losing their debts; and it is then to be considered as it stands upon the condition itself, and therefore the plaintiff must have her whole portion; for the testator has appointed two periods of time to entitle her to it; *viz.* marriage, or the age of twenty-one; and as she has attained that age, it becomes a vested and settled interest in her, not to be divested by the marriage without the consent of the mother, for that consent cannot, in any reason, be carried farther than during her minority.

¶ It seems now settled, that marriage with consent, whether before or after twenty-one, may be made a condition precedent, whether there be a devise over or not.

2 Vern. 572. *Gillet v. Wray*, 1 P. Wms. 284. *Elton v. Elton*, 1 Wils. 159. 3 Atk. 504. *Henmings v. Munckley*, 1 Br. C. C. 503. *Scott v. Tyler*, 2 Br. C. C. 451. S. C. 2 Dick. 712. *Stackpole v. Beaumont*, 3 Ves. 89. But see *dictum* in *Malcolm v. O'Callaghan*, 2 Madd. 549. 553. *per* Sir T. Plumer V. C.

Aston v. Aston, 2 Vern. 452. *Creagh v. Wilson*,

Testator declared, if either *Jane* or *Mary* married into the families of *Prudence* or *Resignation*, and had a son, then he gave all his estate to such son; but if they did not so marry, then the estate was to go to *A.* *Jane* and *Mary* married, but not into the aforesaid families, and *A.* claimed the estate; but it was held, that during the lives of *Jane* and *Mary* the claim was premature, for one of them might afterwards satisfy the condition.

Randal v. Payne, 1 Br. C. C. 55.

CONDITION OF MARRIAGE WITH CONSENT.

If this be required as a condition precedent, the consent of the persons authorized to give it *after* the marriage is of no avail.

Malcolm v. O'Callaghan, 2 Madd. 549.

Reynish v. Martin, 3 Atk. 351. See Lord *Eldon's* observations in *Clarke v. Parker*, 19 Ves. 15., and *Long v. Ricketts*, 2 Sim. & Stu. 179.

The consent to satisfy such a condition precedent must, if vested in trustees, be given by all the acting trustees, unless the testator expressly declare that the consent of the majority shall be sufficient.

Clarke v. Parker, 19 Ves. 1. *Worthington v. Evans*, 1 Sim. & Stu. 165.

If a consent in writing be required, it may be given by letter; and, indeed, it seems that a court of equity will be satisfied, though the consent is not formally expressed in writing.

Worthington v. Evans, 1 Sim. & Stu. 165.

If a legacy vest in *A.*, subject to be divested by marriage without consent of certain persons, and such consent becomes impossible to obtain by the death of the described persons, the legacy is absolute and discharged of the condition.

Peyton v. Bury, 2 P. Wms. 626. *Gadon v. Hicks*, Dow. P. C. 73.

2 Atk. 16. 18. *Aislabie v. Rice*, 3 Madd. 256. *Grant v. Dyer*, 2

- Pollock v. Croft, 1 Mer. 181. Mercer v. Hall, 4 Br. C. C. 327. A *general* consent to the legatee, to marry whomsoever she pleases, is sufficient.
- Strange v. Smith, Amb. 263. 10 Ves. 242. Merry v. Ryves, 1 Eden, 1. D'Aguilar v. Drinkwater, 2 Ves. & B. 254. An absolute and unconditional consent once given cannot be retracted, unless some objection occur which ought to have prevented the consent being given at all.
- Dashwood v. Lord Bulkeley, 10 Ves. 250. 244. D'Aguilar v. Drinkwater, 2 Ves. & B. 225. But consent may be given conditionally, and will then of course require the fulfilment of the condition before it is effectual. It seems, however, that a settlement after marriage will satisfy a conditional consent.
- Campbell v. Lord Netterville, cited 2 Ves. sen. 534. 10 Ves. 243. Mesgrett v. Mesgrett, 2 Vern. 580. If a person whose consent is requisite knows of and tacitly acquiesces in a courtship, his consent is implied.
- Clarke v. Berkeley, 2 Vern. 720. Parnell v. Lyon, 1 Ves. & B. 479. Wheeler v. Warner, 1 Sim. & Stu. 304. A marriage in the lifetime of testator, with his consent or subsequent approbation, is equivalent to a marriage after his death with the requisite consent.
- Smith v. Cawdery, 2 Sim. & Stu. 558. Thus, a bequest was made to *Mary Young* on the day of her marriage, with any other person than *Henry Twynam*; and if she married him, then over. She married *H. Twynam* in the lifetime and with the consent of the testator, and she was held entitled to the bequest.
- Hutcheson v. Hammond, 5 Br. C. C. 128. 146. Crommelin v. Crommelin, 3 Ves. 227. A condition requiring consent is satisfied by the *first* marriage of the legatee, though she become a widow in testator's lifetime, having married with his approbation.
- Desbody v. Boyville, 2 P. Wms. 547. Knapp v. Noyes, Amb. 662. Osborn v. Brown, 5 Ves. 527. If a legacy be given to *A.*, to be paid at twenty-one, or upon marriage with consent, with a bequest over if *A.* marries without consent, this bequest over is confined to the period of *A.*'s minority; and if *A.* attains twenty-one, she is entitled to the legacy absolutely.
- Chauncy v. Graydon, 2 Atk. 616. So, if a legacy be given to be paid at the expiration of one year after testator's death, with a limitation over if legatee marry *B.*; yet should legatee survive the time of payment, and then marry *B.*, she will be entitled to the legacy.
- Austen v. Halsey, 13 Ves. 126. Knight v. Cameron, 14 Ves. 389. But if a legacy be given to be paid at twenty-one, or marriage with consent, with a limitation over in case legatee die under twenty-one, or marry without consent, and legatee does marry during minority without consent, the legacy goes over though legatee afterwards attains twenty-one.
- When, however, a contingent legacy was given; as "when *A.* attained twenty-one, or married before that age with consent, but if he should not attain twenty-one, or marry before that age with consent," then over; and *A.* did marry before twenty-

twenty-one, but *without* consent, yet upon attaining that age he was held entitled to the legacy.

If a vested legacy be given, subject to be divested upon the marriage of legatee without consent, but the legacy is not given over or directed to fall into the residue, the condition is inoperative, and *in terrorem* only.

So, an express revocation of a legacy, in the event of not complying with a condition, subsequent of marrying with consent, though accompanied by a declaration that the legatee was in such event to have no further benefit under the will than his father should direct, is not equivalent to a limitation over.

But if there be a limitation over, or the legacy is directed to sink into the residue which is bequeathed, the condition must be fulfilled.

Stratton v. Grymes, 2 Vern. 357.
Lloyd v. Branton, 3 Mer. 108. 118.

As to a condition of marrying one of the testator's name, see cases in margin.

Barlow v. Bateman, 3 P. Wms. 65.
Barn. & A. 544.

2 Br. P. C. 272. Leigh v. Leigh, 15 Ves. 107. Doe v. Yates, 5 Barn. & A. 544.

As to NOTICE to be given to legatees of conditions, Lord *Hardwicke* observed, "where a condition is annexed to a devise of real or personal estate, and no notice required by the will to be given, nor any person obliged to give it, the legatees must perform the condition or cannot be entitled; and if they omit to do so, a forfeiture incurs when there is a limitation over."

Chauncy v. Graydon, 2 Atk. 619.,
and see 3 Meriv. 7.

CONDITIONS AGAINST CHARGING, OR DISPOSING OF, OR ALIENING A BEQUEST.

If there be a bequest to *A.* of the whole interest in a fund, but with a bequest over if he should attempt to dispose of it (*a*); or if he should not receive it, or dispose of it by will or otherwise (*b*), the bequest is absolute, and the bequest over void.

(*a*) Bradley v. Peixoto, 3 Ves. 324.
(*b*) Ross v. Ross, 1 Jac. & W. 154.

If there be a bequest to *A.* of an annuity for life, "upon this express condition," that in case he should assign or dispose of or otherwise charge it, so as not to be entitled to the profit, receipt, use, and enjoyment thereof, then the annuity should cease, determine, and be void; the bankruptcy of the annuitant will not determine the annuity, it being a proceeding *in invitum*.

Wilkinson v. Wilkinson, Coop. 259.
S. C. 3 Swanst. 515.
528.; and see Cooper v. Wyatt, 5 Madd. 482.

And if there be a bequest to *A.* of a life interest, with a proviso, that it should not be grantable, transferable, or otherwise assignable by way of anticipation; but there is no limitation over in case of default, it seems that the proviso is inoperative and void.

Brandon v. Robinson, 18 Ves. 429.
See Barton v. Briscoe, Jacob, 603.

So where testator bequeathed to his wife for life, should she survive and continue unmarried, with a bequest over after her decease, and wife survived testator, and afterwards married; it was held, nevertheless, that wife was entitled for her life.

Marples v. Bainbridge, 1 Mad. 590.
See Richards v. Baker, 2 Atk. 321.

Barton v.
Briscoe,
Jacob, 603.

But if the bequest be to a female, a condition against anticipation is good against her during coverture.

Doe v.
Hawke,
2 East, 481.
Shee v. Hale,
13 Ves. 405.

A bequest to *A.* till bankruptcy, or insolvency, or any other event, is good, if upon the happening of the event the bequest is given over.

Wilkinson v. Wilkinson, 3 Swanst. 515. Cooper v. Wyatt, 5 Madd. 412.; and see Brandon v. Robinson, 18 Ves. 429.

Simpson v.
Vickers,
14 Ves. 341.
348. Taylor
v. Popham,
1 Br. C. C. 168.

A CONDITION OF EXECUTING A RELEASE of all demands within a certain time is sometimes annexed to a legacy; if there be no gift over, the legatee may be entitled to his legacy upon executing the release, though not within the given time.

Tulk v. Houl-
ditch, 1 Ves.
& B. 248.
Burgess v.
Robinson,
3 Mer. 7.
1 Madd. 172.

If a legacy be given to *A.*, provided he claim it within a certain period, and in default it is given over, or directed to sink into the residue, *A.* is not entitled to the legacy if he does not claim it within the prescribed period, though he claims it as soon as he is informed of the testator's bequest.

Lester v. Gar-
land, 15 Ves.
248.

The time within which a condition must be performed may be computed inclusive or exclusive of the day of testator's death, as will best answer his intention; but *primâ facie*, it seems, the time begins to run on the day following the testator's death.

Harrison v.
Rowley,
4 Ves. 216.
Humberston
v. Humber-
ston, 1 P. Wms. 333.

If testator give a legacy to *A.*, and *A.* is afterwards named an executor, the legacy is *primâ facie* to be considered as given to him as executor; and an executor cannot claim his legacy without proving the will, and *bonâ fide* acting in the trusts.

Harford v. Browning, 1 Cox, 302. Read v. Devaynes, 3 Br. C. C. 95. Abbot v. Massie, 3 Ves. 148. Stackpoole v. Howell, 15 Ves. 417.

Dix v. Reid,
1 Sim & Stu.
237.

Testator gave 50*l.* to his cousin *Thomas King*, and appointed him executor. *Leach* V. C. held, though not without doubt, that the legacy was in respect of the relationship and not of the office.]

(G) Of Specific and Pecuniary Legacies, and the Difference between them.

Per Lord
Hardwicke in
Purse v. Snap-
lin, 1 Atk. 417.

[THERE are two kinds of gifts included under the description of specific legacies. First, when a particular chattel is specifically described, and distinguished from all others of the same kind. Secondly, something of a particular species, which the executor may satisfy by delivering something of the same kind, as a horse, &c. The first kind may be more properly called an individual legacy, and if such, so bequeathed, is not found among the testator's effects, it fails; or, if given first to *A.* and then to *B.*, they must divide it; or, if it is disposed of in the life of the testator, it is an ademption of such legacy. (a)

[(a) Barker v.
Rayner,
5 Madd. 208.
Evans v. Fripp,
6 *ibid.* 91.]

(b) Lawson v.
Stitch, 1 Atk.
508.

Although it may be difficult to make pecuniary legacies specific, yet money may be so distinguished as to be the subject of a specific bequest, as money in a certain chest (*b*), &c.; or a particular

ticular sum of money in the hands of *B.* (*a*); or a particular debt. (*b*) So, a bequest of stock in a particular fund is specific (*c*); or a legacy to be paid out of the profits of a farm which the testator directs to be carried on. (*d*) So, a bequest of part of a specific chattel may be equally a specific legacy; as where the testator gives part of the debt due to him from *A.* (*e*), or part of his stock in a particular fund. (*g*)

108. (*c*) *Ashton v. Ashton*, Ca. temp. Talb. 152. *Avelyn v. Ward*, 1 Ves. 424. *Drinkwater v. Falconer*, 2 Ves. 623. (*d*) *Mayott v. Mayott*, 2 Br. Ch. Rep. 125. (*e*) *Heath v. Perry*, 5 Atk. 103. (*g*) *Sleech v. Thorington*, 2 Ves. 565.

(*a*) *Hinton v. Pinke*, 1 P. Wms. 540. (*b*) *Ellis v. Walker*, Amb. 510. *Ashburner v. Macguire*, 2 Br. Ch. Rep.

But a mere bequest of *quantity*, whether of money or of any other chattel, is a general legacy, as of a quantity of stock (*h*); and where the testator has not such stock at his death, it is a direction to the executor to procure so much stock for the legatee. (*i*) Personal annuities given by will (*k*) are general legacies, though this seems to have been doubted in one case. (*l*)

Purse v. Snaplin, 1 Atk. 414. *Sleech v. Thorington*, 2 Ves. 562. *Bronsdon v. Winter*, Amb. 57. *Bishop of Peterborough v. Mortlock*, 1 Br. Ch. Rep. 565. (*i*) *Partridge v. Partridge*, Ca. temp. Talb. 227. *Bronsdon v. Winter*, *ubi supra*. (*k*) *Hume v. Edwards*, 5 Atk. 693. *Lewin v. Lewin*, Ves. 417. (*l*) *Peacock v. Monk*, 1 Ves. 133.

(*h*) *Purse v. Snaplin*, 1 Atk. 414. *Sleech v. Thorington*, 2 Ves. 562. *Bronsdon v. Winter*, Amb. 57. *Bishop of*

A specific legacy differs from a pecuniary legacy, or a sum of money, in that the legatee is not, in case of deficiency of assets, to (*m*) abate in proportion, as pecuniary legatees must do.

2 Chan. Ca. 25. 171. Vern. 31. 2 Salk. 416. pl. 3.

|| 1 P. Wms. 422. 540. 679. 3 P. Wms. 385. 5 Br. C. C. 160. || (*m*) But though a specific legatee has a preference, and is not to abate in proportion with other legatees, where the estate falls short, as to the payment of debts, yet he cannot in any case have more than the testator could or did devise to him; and therefore where a freeman of London devised a lease for years to *J. S.*, who was evicted of a moiety thereof by the widow claiming it by the custom; it was held, that the specific legatee should have no satisfaction for this eviction out of the surplus, the testator having power to dispose only of a moiety. 2 Vern. 111. [But where the reversion of a leasehold estate for three lives was devised to *A.* for life, afterwards to *B.*, and then to *B.*'s son, and a creditor of the testator filed a bill to charge the estate with his debts, Lord King said, that as this was a specific devise, all the rest of the testator's personal estate not specifically devised must be first applied to pay the debts; and if there were any other specific devise, the same ought to come in average with this, and pay its proportion; but if that would not serve, all must be sold to pay the testator's debts. *Duke of Devonshire v. Atkins*, 2 P. Wms. 381.]

So, if a man devise his personal estate at *W.*, this is as much a specific legacy as if he had enumerated the several particulars of it; and though the other legacies fall short, yet the legatee must have this specific legacy entire.

2 Vern. 688. *Sayer & Sayer*. Prec. Chan. 592. S. C.

But if the testator devise his personal estate at *A.*, and his personal estate at *B.*, and then devise a legacy out of his personal estate, and have no personal estate but what lies in those two places, the pecuniary legacy must be paid out of these specific legacies thus particularly devised.

Prec. Chan. 593.

So, if after several specific legacies the testator devise a pecuniary legacy, or sum of money, out of all his personal estate whatsoever; in this case the pecuniary legacy shall come out of the estate at large.

Prec. Chan. 593, 594.

If a horse, or term for years, which is specifically devised to another, be taken in execution by creditors on a judgment obtained (as they may be), the specific legatee shall have recompense in equity against the executors or residuary legatees for

the value, who are to have nothing till after the debts and legacies are paid.

Abr. Eq. 298.
Lord Castle-
ton v. Lord
Fanshaw.

J. S. having 4000*l.* secured to him by bond in the names of *A.* and *B.*, in trust for himself, devised it to his daughter (now married to the plaintiff), and made her residuary legatee, and by the same will devised a lease he had in farm to *R. D.*, and there not appearing assets at his death to pay his debts, this farm devised to *R. D.* was sold for payment of debts; afterwards, by decree of this court, the 4000*l.* was adjudged to be assets to pay debts, and was brought into court, there to remain for that purpose. The plaintiff proposed to have what remained of the 4000*l.* paid out of court to him, all debts being (as it was said) paid, and the defendant *R. D.* opposed it till he had first had a satisfaction out of it for the value of the farm devised to him, and sold for the payment of debts. The court held, that the devise of this sum of money was a specific legacy, and therefore *R. D.* can have but a proportionable part of the value of his specific legacy out of it.

Richards v.
Richards,
9 Price, 219.
226. (a) *Ibid.*
and see 4 Ves.
177. (b) *Fon-*
taine v. Tyler,
9 Price, 98.
(c) 8 Vin. Abr.
441. pl. 3.
(d) *Heseltine v.*
Heseltine,
3 Madd. 276.
(e) *Barton v.*
Cooke, 5 Ves.
461. See

¶ The following are instances of *specific bequests* of individual chattels. So many of the testator's horses as should amount to 800*l.* The remainder of the stock of horses. (a) All the horses which I may have in my stable at the time of my decease. (b) Jewels. (c) All my household furniture at *C.* (d) All my household goods, household furniture, jewels, plate, pictures, horses, linen, woollen, and all other moveables in my said house. (e) The brooch which I received as a present from *A.* (g) Every specific bequest is limited in its nature, and excludes whatever it does not contain; and there is no material difference between limiting an extensive description by an exception, and giving at once a more limited description; *e. g.* all my furniture at *L.*, plate only excepted. (h)

9 Pr. 221. and 226. 6 Ves. 545. (g) *Touchst.* 433. (h) *Langham v. Sanford,* 17 Ves. 449. S. C. on appeal, 2 Mer. 18.

Nisbett v. So, a bequest of all my personal estate in *Jamaica.*
Murray, 5 Ves. 150.

(i) *Abney v.* So, a devise of a college lease is specific. (i) So, all my tithes
Miller, 2 Atk. payable out of *C.* (k)
593. (k) 2 Ves.
sen. 419. 1 Br. C. C. 263.

(l) 2 Atk. 599. A devise of corn in a barn is a legacy of quantity. (l) So, a
S. P. 3 Atk. legacy of all testator's cattle, or of sheep generally, is not spe-
121. (m) 3 Atk. cific. (m)
121. 1 Jac. &
W. 602.

Howe v. the A bequest of personal estate is not specific, merely because it
Earl of Dart-
mouth, 7 Ves. is coupled with a devise of real estate, which is necessarily
137. specific.

Long v. Short, ANNUITIES.—These may be charged specifically, on a certain
1 P.Wms. 403. fund, so as to depend entirely upon it; as where testator be-
and see 2 Ves. queathed 40*l.* a year out of his chattel estate at *Ken.*
sen. 623.

But

But if an annuity is merely directed to be paid out of personal estate, or is charged upon a certain *corpus*, it is not deemed specific, and so may stand though the fund fail.

cited 2 Ves. 417. *Mann v. Copland*, 2 Madd. 223.

So, the bequest of an annuity of 50*l.*; and, "I will that so much capital sum be kept in the 3*l.* per cent. consols to pay the same," is not specific.

Hume v. Edwards, 3 Atk 693. *Alton v. Medlicot*,

see Lord

Sibley v.

Perry, 7 Ves.

523. 550., and

see Lord

Eldon's observations, 9 Ves. 152.

MONEY LEGACIES.—So, if testator give a sum of money, and charges it upon a certain fund, or the produce of real estate, it is not specific, and shall not fail though the fund fails.

Savile v.

Blacket, 1 P.

Wms. 778.

Fowler v. Wil-

loughby, 2 Sim. & Stu. 354.

But if testator, after directing an estate to be sold, and stating that the produce would amount to 10,000*l.*, gives that sum as follows: 7000*l.* to *A.*, 1000*l.* to *B.*, 500*l.* to *C.*, and the overplus to *D.*, and the estate only sold for 7000*l.*; it was held that the legacies were specific, and that the legatees should abate among themselves, *D.* being entitled in the proportion of 1500*l.*, the assumed overplus.

Page v. Leap-

ingwell,

18 Ves. 463.

Upon a settlement of partnership accounts, 2000*l.* was found due to *A.* This sum *A.* bequeathed upon trust for certain persons, "if he did not draw it out of trade before he died." Held specific.

Ellis v. Wal-

ker, Amb. 309.

Legacies not specific.—400*l.* cash (*a*); 50*l.* for a ring (*b*); 60*l.* a-piece to executors (*c*); a sum to be purchased in bank annuities, out of personal estate (*d*); the 500*l.* we have now out upon mortgage, and then a gift of the said 500*l.* (*e*)

(*a*) *Richards v.*

Richards,

9 Pri. 219.

(*b*) *Apreece v.*

Apreece, 1 Ves.

Richards, 1 Dick. 324.

& B. 364. (*c*) *Attorney General v. Robins*, 2 P. Wms. 23. (*d*) *Gibbons v. Hills*, 1 Dick. 324. and see 1 P. Wms. 539. (*e*) *Le Grice v. Finch*, 3 Mer. 50. See 15 Ves. 384.

STOCK LEGACIES.—There is no case deciding a legacy to be specific, without something marking the specific thing, the very *corpus*; without describing it as standing in testator's name, or by the expression "my stock."

Verba Lord

Eldon, 7 Ves.

529. in *Sibley*

v. Cook. See

Parrott v.

Worsfold, 1 Jac. & W. 601.

Specific bequests.—My capital stock of 1000*l.* in the India Company's stock.

Ashburner v.

McGuire, 2 Br.

C. C. 108.

3000*l.* stock in the 3*l.* per cent. consols, being part of my stock now standing in my name.

Barton v.

Cooke, 5 Ves.

461.

A bequest of 6000*l.* South Sea annuities, upon trust to sell, and lay out in the purchase of land.

Ashton v.

Ashton, 3 P.

Wms. 384.

See 2 Ves. sen. 564.

Testatrix gave 2500*l.* in different sums, by the name of South Sea annuity stock, and then bequeathed to her coachman the remaining 13*l.* 13*s.* South Sea stock standing in her name.

Sleech v.

Thorington,

2 Ves. sen. 561.

564. See *Staf-*

ford v. Horton, 1 Br. C. C. 482.; and *Richardson v. Brown*, 4 Ves. 177. *Attorney General v. Grote*, 3 Mer. 316.

Fontaine v.

cent.

If I have not so much as 10,000*l.* capital stock in the 3*l.* per cent.

- Tyler, 9 Price, cent. reduced or consols, or one or both of them, I will that my
94. This is an instance of a specific bequest, with a general legacy in case of its failure.
executors make up the capital sum of 10,000*l.* in the reduced or consols, or one or both of them, and hold the same upon trust.
- Drinkwater v. 10*l.* *per annum* for life, to be paid out of my dividends of
Falconer, 400*l.* in the South Sea annuities now standing in my name; and
2 Ves. sen. 623. I give to C. my 400*l.* in the South Sea annuities, subject to the annuity.
- Morley v. 400*l.* out of 700*l.* now lying in the 3*l.* per cent. consols.
Bird, 3 Ves. 628. 631.
- Humphreys v. All the stock I have in the three per cents. being about 5000*l.*,
Humphreys, except 500*l.*
2 Cox, 184.
- Partridge v. *Stock legacies not specific.*—1000*l.* capital South Sea stock.
Partridge, Forrest. 226. See Wilson v. Brownsmith, 9 Ves. 180. S. P.
- Simmons v. The interest of 100*l.* new South Sea annuities to A. for life,
Vallance, 4 Br. and after his death to be divided among his children.
C. C. 345.
- Purse v. Snap- A bequest of a sum *in* a certain stock, without more particu-
lin, 1 Atk. 415. larly referring to or marking the *corpus*, is not specific, though
Bronsdon v. the testator has the identical stock at his decease.
Winter, Amb., 57. Bishop of Peterborough v. Mortlock, 1 Br. C. C. 565. Webster v. Hale, 8 Ves. 410.
- Sibley v. Per- So, where testator directed his executor to transfer 1000*l.*
ry, 7 Ves. 523. stock in the public funds, called the 3*l.* per cents. consol.
and see Lord Eldon's observations in Deane v. Test, 9 Ves. 152.
- Kirby v. Pot- A bequest of 1000*l.* out of my reduced bank annuities *primá*
ter, 4 Ves. 748. *facie* is taken to be a bequest of 1000*l.* sterling, with a direction
Deane v. Test, out of what fund it is to be paid, and is not a specific legacy.
9 Ves. 146.
- Lambert v. So, a bequest of the sum of 12,000*l.* out of my funded pro-
Lambert, perty to be transferred, was held to be a general legacy of ster-
11 Ves. 607. ling money.
- Raymond v. A bequest by A., of *Jamaica*, of 10,000*l.*, current money of
Brodelt, *Jamaica*, invested or to be invested in the funds of *Great Bri-*
5 Ves. 199. *tain*, not specific.
- Parrott v. So the bequest, after a specific legacy, of all other stocks or
Worsfold, funds which the testator might be possessed of at the time of his
1 Jac. & W. decease.
594.
- Sadler v. Turn- So, a bequest of 1000*l.*, to be paid so soon as my property in
ner, 8 Ves. 617. *India* shall be realized in *England*.
- Richardson v. Testatrix having a power to appoint 14,000*l.* stock, gave nine
Brown, 4 Ves. legacies of 1000*l.* each, part thereof; and gave the residue of the
177. See 2 Ves. said stock, and all other her personal estate, to A. Held, that
sen. 561. 564. the residue of the stock was not a specific legacy.||
1 Eq. Cas. Abr. 271. Page v. Leapingwell, 18 Ves. 463.

BEQUEST OF DEBTS AND SUMS OF MONEY SECURED.

- Ashburner v. *Specific bequests.*—The interest arising from C.'s bond for life;
McGuire, 2 Br. and then a gift of the principal of the said bond.
C. C. 108.
- Iunes v. Johnson, 4 Ves. 568.

8000*l.* vested in the bank of, &c.; for which sum, payable with interest, I have the promissory note of the bankers. Before the bequest was made, testator had indorsed the note,—“ I give this “ note to *B.*” (the legatee).

7000*l.* navy bills, the testator reciting that he was possessed of about that sum.

The interest of a certain sum due on a bond.

5000*l.* sterling, in two bills, which bills are now lying for acceptance at the India House, *London.*

The sum of money which my executors may receive on the note of 400*l.* given to me by Messrs. *C.* and *Co.*, bankrupts.

40*l.*, being part of a debt due from *C.*; and the rest of what is due, being about 40*l.* more, to *D.* and *E.*

S. C. 2 *P. W.* 469. See *Richardson v. Brown*, 4 *Ves.* 177. *Page v. Leapingwell*, 18 *Ves.* 465.

1000*l.* to *B.*, payable at twenty-one; to be retained in the hands of *A.*, who was testator's banker, and had money of testator's in his hands.

Heath v. Perry. But see 2

Bequests not specific.—400*l.* *East India* bonds.

5000*l.* sterling, or 50,000 current rupees, which testator expressed to be now vested in the Company's bonds.

389.; and see *Le Grice v. Finch*, 3 *Mer.* 50.

GENERAL LEGACIES CHARGED ON PARTICULAR FUNDS.

A will is to be read, with an inclination to hold it a general legacy, with reference only to the particular fund, as that out of which it is in the first place to be paid.

Such a legacy does not abate; and a fund so charged cannot be applied to the prejudice of the legatee, except for the payment of debts.

It is a legacy of this kind, and not specific, when testator merely directs that it shall be paid out of certain monies, or a certain debt to be received.

748. *Deane v. Test.* 9 *Ves.* 146. *Smith v. Fitzgerald*, 3 *Ves.* & *B.* 2. *Acton v. Acton*, 1 *Mer.* 178. *Booth v. Blundell*, 1 *Mer.* 193. *Fowler v. Willoughby*, 2 *Sim.* & *Stu.* 354.

But, if testator give several sums, and directs them to be paid out of a certain debt, and then gives the remainder of the said debt, it seems that the legacies are specific.||

(H) *Of abating, refunding, and giving Security for that Purpose.*

PECUNIARY legatees shall abate in proportion to the deficiency of assets; and therefore, if the ecclesiastical court go about

Chaworth v. Beech, 4 *Ves.* 555.

Pitt v. Camelford, 3 *Br. C. C.* 160.

Stanley v. Potter, 2 *Cox*, 180. 4 *Ves.* 559.

Gillaume v. Adderley, 15 *Ves.* 384.

Fryer v. Morris, 9 *Ves.* 360.

Ford v. Fleming, 1 *Eq. Ca. Abr.* 302. pl. 3.

Philips v. Carey, cited 1 *Atk.* 507.

See 3 *Atk.* 105. *Br. C. C.* 113.

Sleech v.

Thorington, 2 *Ves. sen.* 560. 563.

Gillaume v. Adderley, 15 *Ves.* 385.

15 *Ves.* 385.

Verba Sir R. P. Arden M.R. 4 *Ves.* 555.

4 *Ves.* 159.

9 *Ves.* 152.

1 *Mer.* 179.

Roberts v. Pockock, 4 *Ves.* 150.

Kirby v. Potter, 4 *Ves.* 150.

Acton v. Acton, 1 *Mer.* 178.

Badrick v. Stevens, 3 *Br. C. C.* 431.

and see 1 *Roper*, 214.

Cro. Eliz. 467. *Moor*, 413.

Owen, 72.
Allen, 40.

about to compel an executor to pay a legacy without security to refund, a prohibition will be granted; for, though an executor may pay a legacy without such caution or security, yet he is not obliged to do it.

Vern. 51.
Brown and
Allen. ||S. P.
Beeston v.
Booth,
4 Madd. 161.||
2 Vern. 434.
Fretwel and
Stacey.
||S. P. Heron
v. Heron, 2 Atk. 171.||

So, if a man devise several legacies, as 100*l.* to one, and 50*l.* to another, &c.; there, although he directs the legacy of 100*l.* to be paid in the first place, yet if the other legacies fall short, then the legatee of the 100*l.* must make a proportionable abatement of his legacy.

So, if a legacy be given to executors for care and pains, yet this shall give such legacy no preference, but the executors must abate in proportion.

Attorney

||So, legacies to *servants* are entitled to no preference.

General v. Robins, 2 P. Wms. 23. Alton v. Medlicot, cited 2 Ves. sen. 417.

Coppin v.

So, legacies to creditors, who had accepted a composition for and had released their debts, must abate.

Coppin,
2 P. Wms. 292.

(a) Apreece
v. Apreece,
1 Ves. & B.

So, legacies for *rings* (a), or for a monument (b), are not favoured.

364.
1 P. Wms. 423.

(b) Blackshaw v. Rogers, cited 4 Br. C. C. 349.; but see Masters v. Masters,

Hume v.

Annuities must abate together with other general legacies.

Edwards, 3 Atk. 693. Hinton v. Pinke, 1 P. Wms. 559.

Blower v.

Morret, 2 Ves.
sen. 420.

General legacies to a wife and children are not protected from abatement, unless there be sufficient evidence of the testator's intention for that purpose.

Marsh v.

Evans, 1 P.
Wms. 668.

Testator bequeathed 2000*l.* a-piece to his two sons, and 2000*l.* to his daughter; and directed, if the assets should fall short, his daughter's legacy should nevertheless be paid in full, and that his sons' legacies should abate. Testator left sufficient assets to pay the legacies in full, but they were wasted by his executor;—held, on the presumed intention of the testator, that the daughter was entitled to her legacy in full.

Blower v.

Morret,
2 Ves. sen.

420. 4 Madd. 168.

But the testator appointing different times for payment of legacies is not sufficient to protect any from abatement.

Beeston v.

Booth,

4 Madd. 162.
172. Lewin v.

Lewin, 2 Ves. sen. 415. 421.

If certain legacies are directed to be paid out of the residue, they will, of course, fail, if there be not sufficient to pay the others in full.

Attorney

General v.

Robins,

2 P. Wms. 23.

Testator, after bequeathing several legacies, and among others one of 200*l.* to a charity, declared there would still be a surplus, and then gave further legacies. By a codicil, he gave another legacy, and directed, in case his assets should not be sufficient to pay all his legacies in full, the legacy in the codicil should be substituted for the charitable legacy. Held, that the direction in the codicil placed *all* the legacies on the same footing, and that all should abate *pari passu*, as the assets were deficient.

But

But a legacy given to a wife in lieu of dower shall not abate; for it is not a mere gift, but is on a consideration.||

Blower v. Morret, 2 Ves. sen. 420. Davenhill v. Fletcher, Amb. 244. Heath v. Dendy, 1 Russell, 545.

As to refunding and abating, it seems clear, that creditors may compel legatees in equity to refund when assets become deficient, although there was no provision made for refunding at the time the legacies were paid.

So where *A.*, being indebted to *B.*, made *C.* his executor, and *C.* wasted the estate, and died, having devised several legacies, and made *D.* executor, which legacies *D.* paid; and *B.* having exhibited a bill against *D.*, the executor of *C.*, for his debt due from the first testator, and against the legatees in the will of *C.*, to compel them to refund their legacies; there not being sufficient assets of the first testator, it was decreed accordingly (*a*); for a creditor may follow the assets in equity, into whose hands soever they come.

Also, one legatee may compel a pecuniary legatee to refund where the assets become deficient, though there was no provision made for refunding, and although he hath still remedy against the executor, and may compel him to pay it out of his own purse, if he voluntarily paid away the assets to the other legatees.

|| But if on the death of testator there be sufficient to pay all the legacies, but some only are paid, and then the executor wastes the assets, and causes a deficiency, the legatees unpaid cannot compel those who are paid to refund; their only remedy is against the executor, and if he become bankrupt, their claim is barred by his certificate.||

See 2 Ves. sen. 194.

But it seems to be agreed, that an executor who voluntarily pays a legacy, or assents to the devise thereof, cannot, either in favour of other legatees or creditors, compel the legatee to refund, but that in such case he must bear the loss himself.

|| The rule is, whenever an executor pays a legacy, it is presumed he has sufficient to pay *all* legacies; and the court will oblige him, if solvent, to pay the rest, and not permit him to maintain a suit to compel the legatee, whom he *voluntarily* paid, to refund.||

Coppin v. Coppin, 2 P. Wms. 292. 296. Keylinge's 1 Eq. Cas. Abr. 239. pl. 25.

But it is said, that if an executor pays out the assets in legacies, and afterwards debts appear, of which he had no notice at the time of payment of the legacies; or, if he had been compelled by a decree in equity to pay legacies; that in these cases he may, by bill in equity, compel the legatees to refund, although he took no caution or security for that purpose.

|| It is a rule of equity, that whensoever a legacy is paid by an executor, and afterwards an *unknown* debt appears when the assets are gone, the executor may make a legatee refund, though he have no equity at all against the creditor. And this is the reason

Burridge v. Brady, 1 P. Wms. 127.

Vern. 94.
2 Vent. 358.
360. 2 Vern. 205.

Vern. 162.
1 P. Wms. 495.

(a) 2 Vern. 205. laid down as a rule.

Chan. Ca. 156.
248. 2 Chan. Ca. 152.
Vent. 360.

Anonymous, 1 P. Wms. 495.
Walcot v. Hall, 2 Br. C. C. 305.
S. C. in Mr. Cox's note, 1 P. Wms. 495.
2 Meriv. 386.

2 Chan. Ca. 9.
145. Vern. 90.
453. 460.
2 Vern. 205.

Verba Sir John Strange M. R. in Orr v. Kaimes, 2 Ves. sen. 194. See

Chan. Ca. 156.
2 Vern. 205.
1 P. Wms. 495.

Per Lord Nottingham in Jewon v. Grant, 3 Swanst. 659.

and see cases
cited in the
editor's note.

reason why the Court of Chancery, when it decrees a legacy, never requires security from the legatee to refund if debts appear, for the law of the court is security enough; and otherwise, few legacies could ever be paid: for if men must find security against all dormant debts or contingent covenants before they receive their legacies, this security must lie out for ever, and very few will be able to find such security. It is true, the Spiritual Court requires security before they give sentence for a legacy, and cannot be prohibited if they do so; but this court never does it but in very extraordinary circumstances.||

Davis v. Davis,
Vin. Abr.
tit. Devise,
(Q. d.) 423.
pl. 55.

[So, on a bill by an executor against a legatee to refund a legacy voluntarily paid him by the executor, the assets falling short to satisfy the testator's debts, it was decreed by Sir J. Jekyll Master of the Rolls, that the defendant should refund to the plaintiff; and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid him, as well as a creditor; for the executor, paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against the legatee to compel him to refund.

Verba Lord
Eldon in
Gittins v.
Steele,
1 Swanst. 24.

|| *Interest upon legacy refunded.* — “If a legacy have been erroneously paid to a legatee who has no further property in the estate; in recalling that payment, I apprehend that the rule of the court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the court, justice “must be done out of his share.”||

(I) Of Residuary Legacies and Legatees.

Vide tit.
Executors and
Administrators.
|| And 2 Roper,
ch. xxiv.
sect. ii.
p. 590.||

THE testator's making his will, and appointing an executor, is a disposition of all his personal estate, after debts and legacies paid, to such executor, without more words; but if the testator appoints, that after his debts and legacies paid, *J. S.* shall have the surplus, or what remains; then is *J. S.* residuary legatee, and may sue for and recover such surplus or residue, and is also, upon the executor's refusal to prove the will, entitled, from his interest therein, to administration, with the will annexed.

Carth. 52. *per*
Curiam.

If a residuary legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such legatee shall have the whole residue of the personal estate which remains over, &c. and not the executor of the first testator.

Palm. 409.

Also, if there be a residuary legatee, and the executor omit part of the testator's effects out of the inventory, or undervalue those which he puts in, the residuary legatee may file a bill of discovery against him before he has paid the testator's debts.

Abr. Eq. 305.
Lord Castle-
ton v. Lord
Fanshaw.

If a man devise all the rest and residue of his personal estate, after debts and legacies paid, to *J. S.*, and several of the creditors are barred by the statute of limitations, who notwithstanding bring actions against the executor, and he refuses to plead the statute of limitations, yet equity will not, in favour of *J. S.* to whom the surplus is devised, compel the executor to plead the statute.

|| A gene-

¶ A general residuary bequest carries all the personal estate of the testator which is undisposed of at his decease by a valid bequest. "Residue means all of which no effectual disposition is made by the will."

v. Cooke, 16 Ves. 451. *Smith v. Fitzgerald*, 3 Ves. & B. 3. *Leake v. Robinson*, 2 Mer. 392. *Skrymsher v. Northcote*, 1 Swanst. 570. *Bland v. Lamb*, 5 Madd. 412.

Cambridge v. Rous, 8 Ves. 25. *Bird v. Le Fevre*, 15 Ves. 589. *Roberts*.

Hence legacies which lapse, whether by death of legatee in testator's lifetime, invalid disposition, or other casualty, fall into the residue.

Thus, a legacy payable out of an aggregate fund composed of the produce of real and personal estate, which was void by the statute 9 Geo. 2. c. 36., fell into the residue.

Durour v. Motteux, 1 Ves. sen. 320. 1 Sim. & Stu. 292.

So, a legacy given by a *feme covert* under a power to a person whom she supposed to be her husband, but who was previously married and had deceived her, was held void on account of the fraud, and fell into the residue.

Kennell v. Abbott, 4 Ves. 803.

So, where there is an interval of time in which the interest upon a legacy is not disposed of, as before the persons come into existence who are to take it, the interest forms part of the residue.

Harris v. Lloyd, Turn. & Russ. 310. See *Leake v. Robinson*, 2 Mer. 384.

After-acquired personal estate passes by a residuary clause, though it be a million.

Bland v. Lamb, 5 Madd. 412. S. C. on appeal, 2 Jac. & W. 399. See *Legge v. Asgill, Turn. & Russ.* 265. note.

But the gift of a residue may be circumscribed and confined.

Dewes, 3 P. W. 40. *Attorney-General v. Johnstone*, Amb. 377. S. C. cited. 268. note.

Davers v. Turn. & Russ.

No particular form of words is required to pass a residue; it is sufficient if the testator's intention, to include every thing not otherwise disposed of, is shewn.

Thus testatrix, after giving several specific legacies of stock, concluded:—"I believe there will be sufficient money left to pay my funeral expenses." In a codicil she said, "If there is money left unemployed I desire it may be given in charity;" and she then gave several specific chattels. Held that the general residue was well given to charity.

Legge v. Asgill, Turn. & Russ. 265. note.

So, a bequest of "my furniture and live stock; or what else I may then be possessed of at my decease," passed the residuary estate, though followed by specific bequests and devises to the same person, and by gifts of pecuniary legacies to other persons.

Fleming v. Burrows, 1 Russell, 276. *Bennet v. Bachelor*, 1 Ves. jun. 63. S. C. 3 Br. C. C. 29.

But where testator, after giving several general stock legacies (most of them to charities), desired that his books and furniture should be sold, and that mourning should be given to his servants, and rings to several friends, concluded, "In case there is any money remaining I should wish it to be given in private charity." Held that the general residue, consisting of leaseholds, stock in the funds, &c. did not pass by these words.

Ommaney v. Butcher, Turn. & Russ. 260.

If

Skrymsher v.
Northcote,
1 Swanst. 566.

If the residue be given in shares, some of which lapse by the death of legatees in testator's lifetime, the lapsed shares go to the next of kin, and not to the residuary legatees who survive testator.

With respect to lapsed legacies a presumption arises in favour of the residuary legatee. The testator is supposed to give them away from the residuary legatee only for the sake of the particular legatees. But when the disposition of the residue itself fails, to the extent to which it fails the will is inoperative.

Nannock v.
Horton, 7 Ves.
391.

Testator gave residue to the legatees in proportion to their legacies; *all* legatees, pecuniary and specific, even of rings, were held entitled.

Henwood v.
Overend, 1
Mer. 23.

But in another case a similar bequest was, upon the words, restricted to general pecuniary legatees.

Coope v. Ban-
ning, 1 Sim. &
Stu. 535.

Testator, after giving certain legacies, directed his trustees "to pay unto my devisees as under," and enumerated several; and then gave the residue "unto all my devisees above named;"—held that *all* the legatees were entitled.

Sherer v.
Bishop, 4 Br.
C. C. 55.

Testator by his will gave the residue to certain relations; he afterwards by a codicil gave legacies to two of them;—held, nevertheless, that they were entitled to share in the residue.

Grassick v.
Drummond,
1 Sim. & Stu.
517.

Testator directed the interest of a certain fund to be paid in equal proportions between his mother and sisters, and the principal afterwards to the children of the sisters; and, after several legacies, desired that "in the proportions already noticed" his mother and sisters should be the residuary legatees;—held that the sisters were entitled to the residue absolutely.

Verba Lord
Eldon in
McLeod v.
Drummond,
17 Ves. 169.

"It is said that the residuary legatee is to take the money "when made up; but I say he has in a sense a lien upon the "fund as it is, and may come here for the specific fund."||

(K) Of the Payment of Legacies: And herein,

1. *What shall be a good Payment, and to whom to be made.*

Prec. Chan.
228. [(a) The
receipt by
36 G. 3. c. 52.
must be on a
stamp for every
species of legacy. See tit. *Stamps*.]

AN executor, in the payment of a legacy, ought to be careful that he takes a proper receipt (a), or has sufficient vouchers of the payment; and the rather, because it is held to be such an equitable demand as is not (b) barred by the statute of limitations.

See tit. *Stamps*.] (b) Vern. 256.; but where after length of time a legacy was presumed to have been paid, vide 2 Vern. 21. 484.

Jones v. Tur-
berville, 2 Ves.
jun. 11. 4 Br.
C. C. 115.
S. C. See 2 Ves. jun. 280.

|| *Presumptive payment*.—If a legatee neglect for twenty years to demand his legacy, such delay is *prima facie* evidence of payment.

Montresor v.
Williams, May
A. D. 1823.
Roper on

Sir John Leach V. C. declared he should hold, that where an executor and residuary legatee twenty years after the death of the testator sold a leasehold charged by the will with legacies, and

no

no demand has during all that time been made upon it, there was evidence that the charges had been paid.

Retainer.—If the legatee be indebted to testator, the legacy, or a sufficient part, may be retained to answer such debt.

Barnard, 5 Madd. 32. See *Richards v. Richards*, 9 Price, 219.

If a legacy be given generally, without any direction as to the currency in which it is to be paid, it must be paid in the currency of the country in which the testator resided.

2 Br. C. C. 39. 47. *Malcolm v. Martin*, 3 Br. C. C. 50. 2 Bli. P. C. 91.

The rule is the same though the legacy be charged on lands in a country in which the testator does not reside.

Legatees are entitled to be paid their legacies in the country in which they reside, according to their value in the country in which the testator resided, at the end of one year next after his death.||

Cokerell v. Barber, 16 Ves. 461; but with respect to a rent charge, see *Lansdowne v. Lansdowne*, 2 Bli. P. C. 60.

Also, an executor ought to be careful that he pay it to the proper hand that has authority to receive it, and that without a decree or order of a court of equity he cannot pay it to the (a) father, or any other relation of an infant.

children's legacies, being infants, might be paid to him, and a prohibition granted. Godb. 243.

As where a legacy of 100*l.* was devised to an infant of about ten years of age, the executor paid this legacy to the father, and took his receipt for it; when the infant came of age, the father told him he had such a legacy of his in his hands, but could not pay it immediately, but however would not have him trouble the executor about it, for that he would give it him; upon this the son rested satisfied for about fourteen or fifteen years, and he and his father carried on a joint trade together, and then became bankrupts; and upon a commission taken out against the son, this legacy, among other things, was assigned for the benefit of his creditors; and the plaintiff, the assignee of the commission, brought his bill against the executor, to have an account and payment of the legacy; and for the defendant it was insisted, that this would be an extreme hardship on him, if he should be obliged to pay it over again; that he had already fairly and honestly paid it to the father whilst he was in good circumstances, and if application had been made sooner, he might have had his recompense over against the father; that the father was by nature guardian to his children, and such payments to him have formerly been allowed good, though now, indeed, this court has thought fit to extend its care farther for such children, and disallowed such payments; but the circumstances of this case were such, that the defendant, it was hoped, would not be answerable again for it. Lord Chancellor *Cowper* said, that if the father had

Legacies, c. 14. sect. 3. p. 792. 3d edit.

Jeffs v. Wood, 2 P. Wms. 129. *Ranking v.*

9 Price, 219.

Saunders v. Drake, 2 Atk. 465. *Pierson v. Garnet*,

2 Bli. P. C. 91.

Wallis v. Brightwell, 2 P. Wms. 88. 2 Bli. P. C. 91.

Phipps v. The Earl of Anglesea, 1 P. Wms. 696.

2 Bli. P. C. 89.

Chan. Ca. 245.

(a) Where a father libelled in the spiritual court that his

Abr. Eq. 300.

Dagley v. Tolferry. 1 P.

Wms. 285.

S. C. *Gilb.*

Rep. 103. S. C.

4 Burn's E. L. 321. S. C.

||See *Philips v.*

Paget, 2 Atk.

80. 3 Atk. 629. ||

not made his son such promise of recompense, and the son had acquiesced all that time, the case might have been more doubtful; but this promise of his father drew him to forbear applying to the executor sooner, and since his father had not, nor could now make good his promise, being a bankrupt likewise, the reason of the son's forbearance was at an end; and he thought the rule of this court, in not suffering parents to receive their children's legacies, was founded on very good reason; and therefore, lest this case might hereafter be cited as a precedent, when the circumstances attending it were forgotten, and to discountenance and deter others from paying such legacies to the parents (though he did not deny the hardships of this particular case), he decreed against the executor, which was affirmed on a rehearing.

Cooper v.
Thornton,
3 Br. C. C. 98.

|| With reference to the above case, *Lord Alvanley M. R.* said, "Although the money was directed to be and was paid to the father, and the son acquiesced a great length of time, still it was competent to him or his representatives to demand it; because a contrary determination would encourage such payments, and a son must acquiesce, or *pursue* his father; or, which is the same thing, by commencing a suit against the executor, occasion *him* to pursue the father. If the legatee had not stood in such relation to the person to whom the legacy was paid, I take it the bill would have been dismissed."

Cooper v.
Thornton,
3 Br. C. C. 96.
186. Robin-
son v. Tickell, 8

But if a legacy be given to *A.* to be equally divided between himself and his family, or to *A.* for his and his children's use, the legacy may be paid to *A.*

Davies v.
Austen, 5 Br.
C. C. 178. Lee
v. Brown, 4 Ves. 362.

Executors may not pay any part of the capital of a legacy for the *advancement* of an infant.

Executors may by 36 Geo. 3. c. 52. pay legacies given to infants or persons abroad into the Court of Chancery.||

1 Vern. 261.
Palmer v.
Trevor.

If a legacy be given to a *feme covert*, it must be paid to the husband; also, where a legacy was given to a *feme covert* who lived separate from her husband, and the executor paid it to the wife, and took her receipt for it, yet, on a bill brought by the husband, he was decreed to pay it over with interest.

Roll. Abr.
343. 2 Roll.
Abr. 301.
Moor, 665.

Also it hath been adjudged, that if husband and wife are divorced *à mensâ et thoro*, and a legacy is left to her, the husband alone may release it.

Cro. Eliz. 908. Noy, 45. Roll. Rep. 426. 3 Buls. 264. Moor, 683. Salk. 115. pl. 4. Ld. Raym. 73. 12 Mod. 891. 5 Mod. 69. But a person may by deed or will give any thing in trust for the separate use of a *feme covert*, and this shall be out of the power of her husband. 2 Vern. 659.

|| But if a legacy be given for the separate use of a married woman, she must give a receipt for it.

Brown v.
Elton, 3 P.
Wins. 202.

And if a legacy be given generally to a *feme covert*, executors may refuse to pay it, unless the husband will make a reasonable settlement

settlement out of it upon the legatee; and this though the wife be living apart from her husband. (a) But if she be an adultress, it seems the court would, if applied to, order the legacy to be paid into court. (b)

(a) *March v. Head*, 3 Atk. 720.

(b) See *Ball v. Montgomery*, 4 Ves. 1469.

4 Br. C. C. 339. 2 Ves. jun. 191. S. C. Carr v. Eastabrooke,

“Where an *absolute* equitable interest is given to the wife, the court will not permit the husband to possess it without making a provision for the wife, or her express consent; and all who claim under the husband must take his interest subject to the same equity. But where an equitable interest is given to the wife, *for her life only*, this court does permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true, that if the husband desert his wife and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife; and if the husband becomes bankrupt, or takes the benefit of an Insolvent Debtors’ Act, this court will fasten the same obligation of maintaining the wife out of the property of this description, which devolves, by act of law, upon the general assignee; for when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife; but the same principle does not necessarily apply to a particular assignee for a valuable consideration, who purchased this interest when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife, whatever may be the force of general reasoning upon it.”

Verba Sir John Leach V. C. in *Elliott v. Cordell*, 5 Madd. 156. See *Ball v. Montgomery*, 2 Ves. jun. 196. 4 Br. C. C. 339. S. C.

Legacy to a LUNATIC must be paid to the committee. But if an executor without notice and *bonâ fide* pay a legacy to a person who is afterwards found to have been a lunatic at or before the time of such payment, the Court of Chancery will not interfere to set aside such payment.||

Niell v. Morley, 9 Ves. 478. *Hall v. Warren*, 9 Ves. 605.

A legacy of 1000*l.* was given to one, after the death of her mother, when she should attain the age of twenty-one years; and the defendant was appointed trustee for the raising and payment thereof out of certain lands; the legatee was drawn into an improvident match with one who soon after became a bankrupt, and the commissioners assigned all his effects, and gave him a certificate of his conformity; and the assignees brought a bill against the trustee for this 1000*l.*, who insisted that the assignees could be in no better condition than the husband, and that if he were plaintiff he could not prevail without making a suitable provision on his wife; and that this legacy being liable to a double contingency, *viz.* the death of the mother, and the legatee’s arriving at the age of twenty-one years, at the time of the bankruptcy, was not such an interest as could be assigned. The court held, that though both contingencies have since happened, yet those being since the assignment of the bankrupt’s estate, and since a certificate

Abr. Eq. 34. *Jacobson v. Peter Williams*.

rate of his having conformed himself in every thing to the acts, he was now discharged as a bankrupt; and this legacy could not pass without a new assignment, which the commissioners could not make, their commission being determined.

Tudway v. Bourn, 2 Burr. 717. || Legacy to a BANKRUPT, before his certificate is allowed and confirmed by the Chancellor, must be paid to his assignees.

Norris v. Norris, Finch, R. 419. Dixon v. Dixon, 5 Br. C. C. 510. A person abroad, and not heard of for a long time, will be presumed to be dead, and a legacy given to him may be paid to those entitled in that event; they giving security to refund, in case the legatee return.

Mainwaring v. Baxter, 5 Ves. 458. Bailey v. Hammond, 7 Ves. 590.

Rasleigh v. Master, 5 Br. C. C. 101. and cases cited Swanst. 349. n note. REQUESTS OF ANNUITIES. — Annuities and dividends on stock are not apportionable. But interest, whether the principal is secured by mortgage or bond, may be apportioned, notwithstanding it is expressly made payable half-yearly; for it becomes due *de die in diem*, for forbearance of the principal. So, a bequest for the maintenance of an infant, or of married women living separate from their husbands, is apportionable.||

2. At what Time a Legacy is to be paid.

Godolph. Orph. Leg. 272. 2 Salk. 415. pl. 2. By the civil law, executors have a year's time, from the death of the testator, to pay legacies: and in conformity to the civil law, the same rule hath been taken up, and is now followed, in the Court of Chancery.

|| And the executor is not obliged to pay them sooner, although the testator may have directed them to be discharged within six months after his death. (a) But if the state of the testator's circumstances be such as to enable the executors to discharge the legacies at an earlier period, they have authority to do so; for the legacies are due at the death of the testator, and the year allowed the executors, previous to compulsory payment, is merely for their convenience and safety. (b)||

(a) See Benson v. Maude, 6 Madd. 15. If a legacy is given to a child, payable at twenty-one years, and the child dies before, though his administrator shall have the legacy, yet he must wait for it till such time as the child, if he had lived, would have come to the age of twenty-one.

(b) 10 Ves. 13. Smith, Amb. 588.||

2 Vern. 31. 199. 283. || Chester v. Painter, 2 P. Wms. 336. Roden v. Smith, Amb. 588.|| || But if interest be given during the minority, the representative of the deceased infant may claim the legacy immediately. If it bear a *less* interest than the *utmost use*, the representative has a right to the money, paying the modified interest.||

Green v. Pigot, 1 Br. C. C. 105. Crickett v. Dolby, 3 Ves. 13. But where *A.* by will gave a legacy to *B.* at twenty-one, and if he died before twenty-one, then to the plaintiff; *B.* died before twenty-one; and the only question was, Whether the plaintiff was entitled to the legacy presently, or must wait till *B.*, if he had lived, would have been twenty-one? And on time taken to consider of it, my Lord Chancellor was of opinion, the plaintiff was entitled to the legacy presently (c); but that where a legacy

Abr. Eq. 299, 300. Laundry and Williams. 2 P. Wms. 478. S. C. So, 1 Atk. 556. (c) For this vide Leon.

is given to one to be paid at twenty-one, so as to be an interest vested in him presently, though not payable till twenty-one; if the party dies before that age, his executors or administrators shall not have it till the legatee, if he had lived, would be twenty-one years of age.

277, 278. And.
33. 2 Roll.
Rep. 154.

[But where one, having several daughters, *charged his lands* with 1000*l.* to each of them, payable at their respective ages of twenty-two or marriage, which should first happen; and if any of his said daughters should die before her portion became payable, the share of her so dying should go to the survivors. One of the daughters died before twenty-two, or marriage, and another of the daughters attains twenty-two years of age. By the court,—This portion arises out of lands, and it would be a hardship on the heir (whom equity favours) to make it payable before the time it was intended. Now there can be no reason to make the additional portion payable before the original one; wherefore, as the heir is to suffer by the raising of these portions, it may reasonably be presumed in favour of him, that the testator might compute within what time they might be paid, so that this additional portion shall not be paid before such time as the daughter to whom it was given should have come to the age of twenty-two years, if she had lived.]

Feltham v.
Feltham,
2 P. Wms.
271.

¶ A legacy of 3000*l.* was given upon trust to pay interest for the maintenance of *A.* till twenty-eight, and after that time to pay him the whole interest for life; with an authority to the trustees to apply 600*l.* for the advancement of *A.*, at any time before he attained twenty-six; and when he attained that age testator gave him 600*l.* *A.* attained twenty-one, and claimed the 600*l.*, but it was refused. The court, however, referred it to a master to enquire whether the situation of *A.* required any, and what part, of the money to be advanced before he attained twenty-six.¶

Lewis v. Lewis,
1 Cox, 162.;
and see Robin-
son v. Cleator,
15 Ves. 526.

A legacy of 500*l.* was given to the eldest son of *A.* to be begotten, to place him out apprentice; *A.* had a son born after the death of the testator; and on a bill brought by him for the legacy, it was decreed to be paid, though before such time as he was fit to be placed out apprentice.

2 Vern. 431.
Nevil and
Nevil.
¶ Barton v.
Cooke, 5 Ves.
462.; and see
1 Swanst. 35.¶

Hammond v. Neame,

If legacies are given to *A.*, *B.*, and *C.*, being the testator's three coheireses, to be paid at their respective marriages, and if any of them die, her legacy to go to the survivors, and one of them dies unmarried, the survivors shall not receive her legacy before their respective marriages, for the condition, though not again repeated, shall go to the whole, as well to what accrued by survivorship as to their original devise.

2 Vern. 620.
Moor and
Godfrey.

¶ A contingent legacy, payable two years after the event, out of real and personal estate, was given to *A.* By a codicil testator declared his estate could not pay it during the life of *A.*, and therefore he directed it to be paid twelve months after *A.*'s death. *A.* died *before* the event. Held, that it should not be paid till two years after the event.

Wordsworth
v. Younger,
5 Ves. 73.

If a legacy be given to *A.*, with a bequest over if he succeed to a certain estate, or upon condition that it shall be void in that

Griffiths v.
Smith, 1 Ves.
jun. 97.

Fawkes v. Gray, 18 Ves. 131.

Simmons v. Bolland, 3 Mer. 547.

Leacroft v. Maynard, 1 Ves. jun. 279. Cooper v. Day, 3 Mer. 154.

Chatteris v. Young, 2 Russell, 183. 6 Madd. 31.

See Gibson v. Bott, 7 Ves. 96. Houghton v. Franklin, 1 Sim. & Stu. 390. Where an annuity is directed to be paid out of a residue, see Storer v. Prestage, 3 Mad. 167. Angerstein v. Martin, Turn. & Russ. 232.

Pearce v. Baron, 12 Ves. 459.

event, the legacy must be paid to *A.* notwithstanding, and without security.

If, however, the estate of the testator be subject to outstanding liabilities, as a bond or covenant which may be broken, the executor may require indemnity before paying legatees.

If a legacy be given in substitution for or in addition to another, it depends upon the construction of the will whether it shall be paid at the same time and in the same manner as the legacy, in lieu of or in addition to which it is given.

If an annuity is given to *B.* for life, the first payment is due at the end of the first year after testator's death. But if a sum of money be given, with a direction to pay the interest to *B.* for life, the first payment will not accrue till the end of the second year after testator's death. The tenant for life of a *residue* is, however, entitled from the testator's death.

If testator's assets are in the hands of the Court of Chancery, legacies will not be paid before the master reports that the debts are discharged, unless there be a clear surplus, and all parties consent. ||

3. *Where the Legatee shall have Interest, and Maintenance till the Legacy is paid.*

If a legacy be devised generally, it is regularly to carry interest from the expiration of the first year after the death of the testator; but if the legatee, being of full age, neglects to (*a*) demand it at that time, he cannot have interest but from the time of the demand.

2 Salk. 415. pl. 2. and *vide* Vern. 251. 262. (*a*) That a legacy differs from a debt, and must be demanded, otherwise the legatee not entitled to interest. Poph. 104. — So, though a bond was given for the performance of the will. 1 Leon. 17.

2 Salk. 415. pl. 2.

But it is said, that if a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death, though no demand be made, because no *laches* shall be imputed to him.

Salk. 415. pl. 2. per Lord Cowper. (*b*) But in

Also, it is said in *Salk.* that a legacy left payable at a (*b*) certain day must (as it seems without demand) be paid with interest from that day, and that the interest allowed is 5*l.* per cent.

Prec. Chan. 161. it is held, that though a legacy be devised to be paid at a certain time, yet it shall not carry interest but from a demand made; otherwise, of a debt.

Prec. Chan. 11. Knapp and Powell.

The plaintiff had a legacy devised to him, payable within a year after the death of the testator, who was his half-brother: the plaintiff knew nothing of the legacy, nor of the testator's death, till the executor published it in the *Gazette*, and then he demanded his legacy of the defendant the executor; and the only

only contest was, whether the plaintiff should have interest from the time the legacy should have been paid. And the court would not give any interest, not so much as from the time of the bill exhibited, nor would they give costs even out of the assets, but the bare legacy.

||*INTEREST.* — *On specific legacies* interest is due from the death of testator, when the legacy given yields interest.

Barrington v. Tristram, 6 Ves. 345. *Apreece v. Apreece*, 1

Sleech v. Thorington, 2 Ves. sen. 563. *Ves. & B.* 564.

And where testator made a specific bequest of a mortgage for 1000*l.* to his wife, and desired her to give the sum of 500*l.* to *M. C.*, his grandchild, “but for the time and manner of doing it, I leave it freely to herself, and as she shall see it best for her;” and the wife lived twenty years after testator and never paid the 500*l.*, the court decreed payment of it to *M. C.*, with interest from the testator’s death.

Churchill v. Speake, 1 Vern. 251.; see *Raithby’s* note.

So, where a specific legacy of stock was given upon a contingency, the dividends were ordered to await the event, and go to the person who should become absolutely entitled to the principal.

Gordon v. Rutherford, Turn. & Russ. 373. It is

assumed, that the legacy in this case was a specific bequest, but the report is not clear.

On general legacies : —

1. A gross sum vested, and no time of payment named by testator.

Interest is computed from the year’s end after the testator’s death; and the legatee is entitled to this whether the assets of testator yield interest or not, and though the fund charged with the payment be only a dry reversion.

Pearson v. Pearson, 1 Sch. & Lef. 10. *Wood v. Penoyre*, 13 Ves. 333.

This rule is, of course, subject to any inference which may be fairly drawn from the words of testator. Thus, *A.* bequeathed 4000*l.* upon trust for the use of a boy named *Michael*, aged five years, and directed the trustees to pay the expenses of his maintenance and education out of the interest. Held, that the interest began to run from the death of testator.

Beckford v. Tobin, 1 Ves. sen. 308.; see also *Hill v. Hill*, 3 Ves. & B. 183. *Pett v. Fellows*, 1 Swanst. 561. note.

2. Where a time of payment is named by the testator.

In this case the legatee, unless he be an infant having a right to demand maintenance from the testator, can only claim interest from the time named for payment; and to this he is entitled, whatever be the fund out of which it is to be paid, whether productive or not.

Heath v. Perry, 3 Atk. 101. *Crickett v. Dolby*, 5 Ves. 10. *Tyrrell v. Tyrrell*, 4 Ves. 1.

When the interest upon a contingent legacy, or a residuary fund given upon a contingency, is not disposed of, it belongs to the residuary legatee or next of kin of the testator.

Cunliffe, 4 Br. C. C. 144. *Haughton v. Harrison*, 2 Atk. 329. *Harris v. Lloyd*, Turn. and Russ. 310.

Wyndham v. Wyndham, 5 Br. C. C. 57. *Shawe v. Lloyd*, Turn.

Thus, where testator bequeathed the residue of his estate upon a contingency, Lord *Hardwicke* declared, that the interest

Bullock v. Stones, 2 Ves.

sen. 521. from the death of the testator till the contingency happened
 Studholme v. should fall into the residue and accumulate, and be paid to resi-
 Hodgson, duary legatee when he was entitled to receive the capital.
 3 P. Wms.
 299. Trevanion v. Vivian, 2 Ves. sen. 450.

Gordon v. But where a sum of stock was given to trustees upon trust for
 Rutherford, *D. G.* until he attained twenty-five, with a direction that they
 Turn. & Russ. should transfer the said sum unto *D. G.* for his own use and be-
 373. The nefit when and so soon as they should in their discretion think
 gift of the proper, and upon *D. G.*'s death without lawful issue before re-
 stock was spe- ceiving the bequest, it was given over, Lord Gifford *M. R.*
 cific, *semble*; held, that the vesting of the legacy was suspended until the
 see the Report. transfer; and that in the mean time the dividends should accu-
 mulate for the benefit of the person who should become abso-
 lutely entitled to the principal.

Tissen v. If a legacy or a residue be given which vests and is payable,
 Tissen, 1 P. but which is subject to be divested by a condition subsequent,
 Wms. 500. the first legatee is entitled to the whole interest till the con-
 Taylor v. dition is performed.
 Johnson, 2 P.

Wms. 504. Mills v. Norris, 5 Ves. 335. Montgomerie v. Woodley, 5 Ves. 522.

Shepherd v. Thus, if a residue be given to the children of *A.*, who has no
 Ingram, Amb. children, the first child born is entitled to the whole interest till
 448. the birth of the second; and the first and second to the whole
 till the birth of the third, &c.

Skey v. So, also, where a residue is given which vests, but is not pay-
 Barnes, 3 Mer. able till the legatee attains twenty-one, or upon some other event,
 335. and cases and is given over upon the death of the legatee before the hap-
 there cited. pening of such event, the legatee is entitled to the interest which
 accrues from the death of testator.

Verba Sir W. "The directing payment to be made at twenty-one does not
Grant M. R. "postpone vesting, even in the case of a common legacy, still
 in Skey v. "less in the case of a *residue*. There is, indeed, a clause author-
 Barnes, izing the executors to apply the interest and dividends of the
 3 Mer. 335. "children's portions for their education, maintenance, or other
 "benefit or advantage; but there is nothing that can exclude
 "their right to the surplus of income that might not be so
 "employed; nor is there anything that could entitle those who
 "are to take in the event of all the children's dying without
 "issue under twenty-one, to claim the surplus interest and pro-
 "duce of the residue during the lives of those children."

Angerstein v. Where the residue of personal estate is given *generally* to
 Martin, and one for life, with remainders over, and no direction is given in
 Hewitt v. the will respecting the interest, the tenant for life is entitled to
 Morris, Turn. the *interest* from the death of testator.
 & Russ. 232.

Gibson v. Testator bequeathed the residue of his property to *A.* for life,
 Bott, 7 Ves. with remainders over, and directed it should be converted as
 89. soon as conveniently might be. The effects of testator were
 converted into money within a year after his death; among these
 effects were cattle, which had improved much between the death
 of testator and the sale. Some leasehold estates could not be
 sold

sold on account of defects in the title. "The best decree in this cause will be to declare that the property to be converted has been converted in a reasonable time; that the persons entitled for life should have interest *from that conversion*; and as to the leasehold premises, that it being for the interest of all parties that they should not be sold, a value shall be set upon them, and the persons entitled for life shall have interest at 4*l.* per cent. upon that value from the death of testator."

Verba Lord Eldon in Gibson v. Bott, 7 Ves. 39.

But when a residue is directed to be invested in land, or other security, as soon as conveniently may be, and the interest is to accumulate till that period, the tenant for life of residue is entitled to the interest from the end of one year after testator's death.

Sitwell v. Bernard, 6 Ves. 543. Kilvington v. Gray, 2 Sim. & Stu. 396. 6 Madd. 155.

Generally speaking, interest is not given upon the *arrears of an annuity*; yet, if the person charged with the payment of it has at law incurred a forfeiture by non-payment, against which he seeks relief in equity, the court will not assist him unless he consents to pay interest upon the arrears.

Ferrers v. Ferrers, Forr. 2. Batten v. Earnley, 2 P. Wms. 163. Tew v.

Winterton, 1 Ves. jun. 451. Mellish v. Mellish, 14 Ves. 516.

The rate of interest given by the Court of Chancery is, unless under special circumstances, 4*l.* per cent.

Guillam v. Holland, 2 Atk. 343.

Beckford v. Tobin, 1 Ves. sen. 311. Sitwell v. Bernard, 6 Ves. 543.

The same rate only is given, though the testator be resident in the Colonies.

Malcolm v. Martin, 3 Br. C. C. 50.

Bourke v. Ricketts, 10 Ves. 330.

If an executor neglects to accumulate interest, according to the directions in the will, he may be compelled to account for compound interest.

Raphael v. Boehm, 11 Ves. 92.

MAINTENANCE. — If a legacy be given to an infant, a child of the testator, or one towards whom he has placed himself *in loco parentis*, and this legacy be payable at a future time though vested; or if it be contingent, and maintenance is not given, it is allowed from the death of testator; and the court determines the *quantum* of the allowance, either the whole of the usual interest allowed by the court, or less, according to circumstances.

Harvey v. Harvey, 2 P. Wms. 21. Conway v. Longville, 1 Eq. Ca. Abr. 301. pl. 3. Inledon v. Northcote (a case of a *contingent* legacy), 3 Atk. 432.

Thus, where there was a bequest of a residue to a child upon his attaining twenty-one, with a bequest over if he died under that age, with a direction that the interest should accumulate, yet maintenance was decreed.

Mole v. Mole, 1 Dick. 310.

Testator provided for the maintenance of his daughter till twenty-one or marriage, and gave her a legacy upon her attaining twenty-one; the daughter married under twenty-one, and she was held entitled to maintenance during the interval for which the testator had not provided.

Chambers v. Goldwin, 11 Ves. 1.

If testator bequeaths legacies to his children living at his decease, and at his decease there is a child *en ventre sa mère*, such child is entitled to maintenance from its birth.

Rawlins v. Rawlins, 2 Cox, 425.

Hearle v. Greenbank, 3 Atk. 697.
Aynsworth v. Pratchett, 15 Ves. 321.;
but see Ellis v. Ellis, 1 Sch. & Lef. 5.

If a testator makes a certain allowance for maintenance out of his general estate, it will not be increased by giving interest upon a legacy by way of maintenance, unless the amount named by the testator be insufficient for the purpose, and then it will be given though the legacy is contingent.

Wynch v. Wynch,¹ Cox, 433. See 3 Ves. 17.

If the allowance for maintenance be not a certain sum, but given generally, then the court will increase it if not sufficient, having regard to the amount of the interest of the legacy provided for the infant.

Long v. Long, 3 Ves. 286.
note. Stretch v. Watkins, 1 Madd. 253.
Freemantle v. Taylor, 15 Ves. 363.

If testator gives part of the interest of the legacy by way of maintenance, and it is not sufficient, the court will give more if the legacy be vested, though not payable till a future day.

Testator gave 2000*l.* to be divided between his two girls; and gave the interest to his wife till Mrs. *M.*'s death, and then for the education of his children. There was a daughter born after the date of the will, and Mrs. *M.* died, and the wife married again; held that the *three* daughters were entitled to an allowance for maintenance.

Billingsley v. Crichton, 1 Br. C. C. 267. Haley v. Banister, 4 Madd. 275.

Testator gave legacies to his children payable at a future day, and directed his trustees to give maintenance if they thought fit. Trustees refused to give maintenance, but the court directed them to do so, though the widow had a provision from the testator, and an estate of her own, but had married again, and maintenance was only given from the time of such second marriage.

Acherley v. Vernon, 1 P. Wms. 783.

Whether a testator shall be deemed to be *in loco parentis* to an infant must be decided from the circumstances of the case.

Beckford v. Tobin, 1 Ves. sen. 308. Hill v. Hill, 3 Ves. & B. 183. Ellis v. Ellis, 1 Sch. & Lef. 5, 6.

Lowndes v. Lowndes, 15 Ves. 301.

A provision for maintenance is only made for *infants*, and not for *adults*.

Raven v. Waite, 1 Swanst. 553.

Stent v. Robinson, 12 Ves. 461.

Thus a wife is not entitled to an allowance of interest by way of maintenance.

Lowndes v. Lowndes, 15 Ves. 301.
Haughton v. Harrison, 2 Atk. 329.

Nor are *natural* children, for they are considered as strangers to the testator; nor grandchildren, merely on the ground of their relationship.

Greenwell v. Greenwell, 5 Ves. 194.
Collis v. Blackburn, 9 Ves. 470. Errat v. Barlow, 14 Ves. 202.
Haley v. Banister, 4 Madd. 275.

But if legacies, or a fund directed to carry interest, be given to infants, either individually or as a class, then, though they are strangers to the testator, if their father be not of ability to maintain them, and there is no limitation in the will giving an ulterior, contingent, or executory interest to other persons in such legacies or fund, such infants will be entitled to an allowance for maintenance out of the interest, though expressly directed to accumulate.

But

But infant stranger-legatees cannot have maintenance if the will give other persons a contingent interest in the fund bequeathed; for that might in effect be to give for the maintenance of one person the property of another.

Ex parte Whitehead, 2 You. & Jer. 243.

If, however, the persons to whom the fund is given over, in the event of the infant's not attaining an absolute interest, are competent and will consent, the court will grant maintenance.

v. Barlow, 14 Ves. 202. See 2 *Swanst.* 436.

Where, however, a legacy given to an infant stranger-legatee is not directed to carry interest, and is contingent or payable *in futuro*, maintenance cannot be given, unless there is sufficient on the face of the will to shew that such was the testator's intention.

Thus, testator gave his daughter an annuity of 200*l.* during her life for the maintenance of herself and children, and gave the children 5000*l.*, to be paid on attaining twenty-one; held, that the children after the death of their mother were entitled to maintenance during their minorities. "The strong argument in support of maintenance is, that the testator has expressly given it during the mother's life; and it is extremely improbable, therefore, that he intended the children should be without any provision in case she died leaving them under age."

Notwithstanding testator expressly provide maintenance for an infant-legatee, yet if the father be of ability to maintain his children, it is a rule of the Court of Chancery not to allow such maintenance to be paid, but it is accumulated for the infant's benefit.

But this rule is not allowed to operate, —

1. Where the interest is given to the father himself.

Brown v. Casamajor, 4 Ves. 498.

2. Where it would indirectly work injustice to children of the father of the legatees who do not take any benefit under the will.

Neither does the rule apply where the maintenance is provided by a marriage settlement.

When the court grants an allowance for maintenance there is no fixed period at which it shall commence, the circumstances of each case must determine the time; it is, however, settled that it may be made for time past. ||

387. *Belt's ed. note. Maberly v. Turton*, 14 Ves. 499.

Marshall v. Holloway, 2 *Swanst.* 436. and cases cited in note; and

Cavendish v. Mercer, 5 Ves. 195. S. C. cited in *Errat* 2 *Swanst.* 436.

Pett v. Fellows, 1 *Swanst.* 561. note.

Lambert v. Parker, Coop. 143. But see *Hume v. Rundell*, on a deed, 2 Sim. & Stu. 174.

Hughes v. Hughes, 1 Br. C. C. 386. *Andrews v. Partington*, 3 Br. C. C. 60.

Hoste v. Pratt, 3 Ves. 730.

Mundy v. Earl Howe, 4 Br. C. C. 223.

Sisson v. Shaw, 9 Ves. 285. *Ex parte Penleaze*, 1 Br. C. C.

(L) Of the Executor's Assent to a Legacy.

||See Com. Dig. tit. Administration, (C. 5.)||

Godolph.
Orph. Leg.
148. Off.
Ex. 27.

||1 Saund. 279.
d. note 5.||

(a) And therefore, if a legatee takes possession of the thing devised, without the assent of the executor, he may have an action of trespass against him. Dyer, 254. Keilw. 128.

ALTHOUGH the testator disposes of goods and chattels, and sums of money, to legatees, yet they all pass to the executor, and he has them in nature of a trustee, and he alone has a (a) title in law to them, and nothing passes to the legatee, nor can any legatee take any thing to him devised without the executor's assent; for were it otherwise, it might be in the power of a legatee to subject an executor to a *devastavit*, which would discourage all persons from taking upon them the office of an executor.

Off. Ex. 29.
Godolph. 148.
Plow. 525.
(b) And is like an attornment of a tenant to the grant of a reversion. March, 137.

But this matter of assent is only (b) a perfecting act for the security of the executor, for it is the will of the testator which gives the interest to the legatee (c), and therefore the law does not require any exact form in which it is to be made. Hence any expression or act done by the executor, which shews his concurrence or agreement to the thing devised, will amount to an assent.

And therefore a small matter will amount to an assent. Vern. 90. 460. 2 Vent. 358. And which the legatee may compel the executor to do in the spiritual court. March, 127. ||(c) If termor devise his term to another, appoint executors, and die; and the executors commit waste, and afterwards assent to the bequest, although between the executors and the devisee it has relation, and the latter is in by the devisor, yet an action of waste shall be maintained against the executors in the *tenuit*. Foster v. Spencer, cited in Saunder's case, 5 Rep. 126.||

Plow. 53.
5 Co. 29.
4 Co. 18.
March, 158.
||Touchst. 456.
Cowp. 293.||

As, if the executor says to the legatee, *I wish you joy of the thing devised to you*, or *I am content that you have it according to the will*; or, if one offers the executor money, or seems willing to purchase a horse, &c. devised to J. S., and the executor directs him to the legatee; or, if the executor himself offers the legatee money for the horse, &c., these and the like acts amount to an assent.

Lampet's case,
10 Rep. 47. a.
52. b. Off. Ex.
322.

||So, if an executor request the legatee to dispose of his legacy, his assent is implied.

Leon. 129.
Paramour v.
Yardley,
Plow. 559.

Or, if the rents or interest of a bequest be directed for the maintenance of the legatee during minority, and the executor commence so to apply them, his consent to the principal is presumed.

1 Strange, 70.
Young v.
Holmes.

So, if a legacy be subject to a charge which is paid by the executor.

Bank of
England v.
Lunn, 15 Ves.
569.

The assent of the executor is required to a *specific* as well as to a general legacy.||

Hil. 5 Ann.
Beckett and
Ball.

Hence it hath been held, that if a specific legacy be devised, as three gowns, &c., and the legatee take money in satisfaction of them, that this amounts, first, to a consent of the executor to the

the legacy, or devise of them, and that it is a sale of them by the legatee or devisee to the executor for the money *eo instanti*.

¶ It seems that an assent will be presumed in the absence of evidence, when executors die after debts are paid, but before the legacies are satisfied. || See 2 P.Wms. 532.

And as an assent is but a perfecting act, the executor cannot, after he has once given it, revoke the same; neither can it be given on (a) condition, or on any limitation or restriction whatsoever. March, 136. Cro. Jac. 614, 615. 2 Vent. 360.

(a) If the executor deliver to the legatee the goods bequeathed to him, to re-deliver them to him again at such a day, this is a good assent, and the words of re-delivery are void. Leon. 130, 131. || Where assent has been followed by payment or delivery, it cannot be retracted. But if assent be not so perfected, and its recall is not attended with injury to a third person, as to a *bonâ fide* purchaser from the legatee on the faith of such assent, it seems only reasonable, that the executor should have an opportunity to retract it under particular circumstances. 1 Roper on Legacies, 743. ||

If A. devise a term to B. for life, remainder to C., and the executor assent to the devise to B., this will amount to an assent to the devise over to C., and vest the interest in him accordingly. March, 136. 8 Co. 96.

If one is himself both executor and devisee, and he enters generally, without claim or demonstration of election, he shall have the thing devised as executor, which is the first and general authority, unless he elects to take it as devisee. 10 Co. 47. Plow. 520. Dyer, 367. Cro. Eliz. 223. 2 Co. 37.

As, where a man, possessed of a long term for years, devised it to his wife for life, remainder to trustees for his son's life, &c. and made his wife executrix; it was held, that the wife took the term wholly as executrix, in the first place, till she agreed to the devise; but it being proved that she said, *she would take the term according to the will*, it was held by the court to be a sufficient assent. Lev. 25. Garret and Lister.

So in a like case, where the wife said, *that the son was to have the estate after her*, and this was resolved to be a sufficient assent. Lev. 25.

¶ But where one, who was a co-executor and a devisee for life of a term of years, entered and was wholly possessed of the premises, and demised them for forty years, reserving the rent to himself, his executors, administrators, and assigns; held, that neither his entry, nor his sole lease, which was alike inconsistent with his life interest and his duty as executor, should be deemed an assent. Doe on the demise of Hayes v. Sturges, 7 Taunt. 217. and cases cited.

“ It is clearly settled, that where an executor takes an interest in a leasehold estate *for his life*, he must do something more than enter, in order to assent to his legacy; but where his interest is *absolute*, his entry does assent to the legacy.” Verba Gibbs C. J. in Doe v. Sturges, *suprà*.

Testator bequeathed to *Elizabeth Baker* a share of the residue, and appointed *George Hall* an executor. *George Hall* proved the will, and entered into possession of the estate of the testator, and disposed of part, and married *Elizabeth Baker*. Held, that the possession of *George Hall* should be referred to his character of executor, and that it was not such a reduction into possession of the share of his wife so as to prevent it surviving to her, she having survived her husband. || Baker v. Hall, 12 Ves. 497.

5 Co. 29. An executor may assent before probate of the will, and if there be two or more executors, the assent of any one of them will be sufficient; also, it is said, that an infant executor may assent, especially if he be above the age of seventeen years.
Cro. Eliz. 602.
March, 136.
&c. and
vide tit. *Executors and Administrators*.

|| But now by 38 Geo. 3. c. 89., where an infant is sole executor, administration shall be granted to the guardian, or such other person as the spiritual court shall think fit, during the minority of the infant, at which period, and not before, probate of the will shall be granted to him. Such administrator has the same power as an executor. The husband of an executrix may assent to a legacy (a); but a *feme covert*, an executrix, cannot alone assent. (b)||

(a) 1 Leon.
216. Off. Ex.
321.
(b) Cooks v.
Bellamy,
Sid. 188.
Comb. 437,
438. Estward
v. Warry, ad-
judged on a
special verdict.

If a man devise a term to a child *en ventre sa mère*, provided it be a son, and if not a son, to *J.S.*, and the child happen to be a daughter, though the executor assents, yet the daughter cannot take, because here is a condition precedent that never happened, and the executor's assent is not material where there is no devise.

(M) Legacies, in what Court, and how properly recoverable.

Vide tit. *Jurisdiction of the Courts Ecclesiastical*, and tit. *Executors and Administrators*.

IT is clearly agreed, that the ecclesiastical court having jurisdiction over all testamentary matters, they have, as incident thereto, consueance of legacies, and that it is the only proper court where legacies are to be sued for and recovered, except in those cases where the courts of equity claim a concurrent jurisdiction with them.

Dyer, 151.
Palm. 120.
Cro. Jac. 279.
364. Cro. Car.
16. 2 Roll.
Abr. 285.
2 Show. 50.
pl. 36.

But this jurisdiction is confined to gifts of goods and chattels; and therefore if a man, by will, gives lands to be sold for payment of debts or legacies, these legacies cannot be sued for in the ecclesiastical courts, but only in a court of equity; because it is not a legacy merely of goods and chattels, but arises originally out of lands and tenements.

Cro. Jac. 279.
Brown, 34.
Bulst. 153.
Sid. 279.
Lev. 179.
2 Keb. 8.

But if a rent be devised out of a term for years, the ecclesiastical courts may hold plea thereof; for the term for years being only a chattel, is testamentary, and consequently the rent devised thereout.

5 Madd. 357.
Recent in-
stances, how-
ever, may be

|| Suits for legacies, however, are now rarely instituted in the ecclesiastical courts, on account of their not possessing adequate jurisdiction to afford complete relief in many cases.

found in *Clarke v. Douce*, 2 Phill. Rep. 335., and *Grignion v. Grignion*, 1 Hag. E. R. 535.

2 Roper on
Legacies, 693.
Grignion v.
Grignion,
1 Hag. E. R. 535.

Cases of bequests to married women and infants, and which involve the execution of any trust, are subject to the exclusive cognizance of the Court of Chancery.||

If the legatee takes a bond from the executor for payment of the legacy, and afterwards sues him in the spiritual court for the legacy, a prohibition will be granted; for, by taking the obligation, the nature of the demand is changed, and it becomes a debt or (a) duty recoverable in the temporal courts.

giving a bond for payment of a legacy at a certain day, it thereby becomes a duty, and is not to be considered as a legacy. 2 Vern. 31. — But by Justice *Dodderidge*, an obligation given for payment of a legacy does not totally destroy the nature thereof, but the legatee has it still in his election either to sue for it in the temporal or ecclesiastical court. 2 Roll. Rep. 160.; ||but see *Cuband v. Dewsbury*, 8 Mod. 327., where this is denied to be law.||

Also, though the temporal courts do not directly take cognisance of legacies, so as to allow of an action for the recovery of them, yet may the executor make himself liable to an action at common law, as by his promise of payment; in which case an *assumpsit* will lie.

executor in consideration of assets, was determined in *Atkins v. Hill*, Cowp. 284. *Hawkes v. Saunders*, *id.* 289. But these cases seem to be quite overturned by a subsequent case of *Deeks v. Strutt*, 5 Term Rep. 690. It is true, that in this last case, it was stated that the executor made no express promise to pay, whereas in the two former cases an *actual* promise was admitted; yet the arguments of two of the three judges who decided the last case proceeded upon general grounds, and deny the jurisdiction of the common law courts over the subject of legacy, as well where there has been an express as where only an implied promise. ||*Deeks v. Strutt* has always been considered an unqualified decision, that an action at law cannot be maintained for a legacy. *Verba Littledale J.* 7 Barn. & C. 544. and see 2 Saund. 137. b. note.||

As where in *assumpsit* the plaintiff declared that *J. S.* devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him; the defendant pleaded divers bonds and judgments, and *nul assets ultra*; upon which the plaintiff demurred, and had judgment without argument; for it is not material whether he had assets or no, for he is charged upon his own promise, in consideration of forbearance, and a forbearance of suit for a legacy is a sufficient consideration.

||But by a bequest of a specific chattel, whether personal or real, upon the assent of the executor, the interest in it vests in the legatee, so as to enable him to recover it by an action at law.||

And although the spiritual court, having jurisdiction of wills and testaments, have, as incident thereto, jurisdiction of legacies, yet, if a temporal matter be pleaded in bar of an ecclesiastical demand, they must proceed in the ecclesiastical court according to the common law, otherwise they will be prohibited.

Therefore, if payment be pleaded in bar of a legacy, and there be but one witness, which the ecclesiastical court will not admit, because their law requires two witnesses; there the temporal courts will prohibit them, because it is a matter temporal that bars the ecclesiastical demand.

row, adjudged. 3 Mod. 283. Ld. Raym. 220. 546. 2 Ld. Raym. 1161. 1172. 1211. 2 Salk. 547. pl. 1. *Shotton and Friend*, adjudged. Carth. 142. S. C. adjudged. — But it is not sufficient ground for a prohibition to suggest that the spiritual court objected to the credibility of

Yelv. 38.
Goodwyn
and Goodwyn;
and a prohibition
granted
accordingly.

(a) That by
a duty, and is
an obligation
2 Roll.
Sid. 45
Raym. 25.
[That *assump-*
sit will lie
for a legacy
upon a pro-
mise by an

Hawkes v.
284.
Saunders, *id.*
690. It is true,
that in this last
case, it was stated
that the executor
made no express
promise to pay,
whereas in the two
former cases an
actual promise
was admitted;
yet the arguments
of two of the three
judges who decided
the last case pro-
ceeded upon gen-
eral grounds, and
deny the jurisdic-
tion of the com-
mon law courts
over the subject
of legacy, as well
where there has
been an express
as where only an
implied promise.
||*Deeks v. Strutt*
has always been
considered an un-
qualified decision,
that an action at
law cannot be
maintained for a
legacy. *Verba*
Littledale J. 7
Barn. & C. 544.
and see 2 Saund.
137. b. note.||

2 Lev. 3.
Vent. 120.
S. C. *Davie*
and *Reyner*.
Sel. Cas.
Ev. 59.
11 Mod. 91.
pl. 15. See
2 Burn's
Eccles. Law,
690.

Doe v. Guy,
3 East, 120.
and cases
cited.

Williams v.
Lee, 3 Atk. 223.

Roll. Abr.
298, 299.
Hob. 12.
12 Co. 65.
Hetley, 87.
2 Inst. 608.
Sid. 161.

Cro. Eliz. 88.
666. Show.
158. 173.
Vent. 291.
Richardson
and *Desbor-*

2 Salk.
1211. 2 Salk.
547. pl. 1. *Shotton*
and *Friend*, ad-
judged. Carth.
142. S. C. ad-
judged. — But
it is not suffi-
cient ground for
a prohibition to
suggest that the
spiritual court
objected to the
credibility of
a wit-

a witness, nor to suggest that the plaintiff had only one witness to prove the fact, unless the party allege that he offered such proof, and it was refused for insufficiency. Carth. 143, 144.

2 Salk. 415. It is holden by my Lord Chief Justice *Holt*, that a devisee
pl. 1. may maintain an action at common law against a tertenant for a
6 Mod. 26. legacy devised out of land; for where a statute, as the statute of
S. P. *per Holt*, wills, gives a right, the party, by consequence, shall have an
and 279. S. P. action at law to recover it.
per Twissden J.
2 Ld. Raym. 937. || 2 Saund. 137. b. note [a], 5th ed.||

3 Salk. 223. [But the usual remedy in such like cases is in equity.

Toth. 114. It is said, that where the ecclesiastical court and a court of
Prec. Chan. equity have a concurrent jurisdiction, whichever is first possessed
548. 2 Atk. of the cause has a right to proceed; and the same of all other
420. courts. However, where the husband hath sued in the spiritual
court for a legacy given to the wife, the Court of Chancery hath
granted an injunction to stay proceedings; because the spiritual
court cannot compel him to make a settlement upon her.

1 Vern. 26. So, where a personal legacy was given to an infant, it was
|| *Horrel v.* holden, that the same is more properly cognizable in Chancery
Waldron, than in the ecclesiastical court; and if the matter had proceeded
Prec. Chan. to sentence in the ecclesiastical court, yet it was proper to come
546. Nicholas into Chancery for the executor's indemnity; for, in the Chan-
v. Nicholas.|| cery, legatees are to give security for the money, but not in the
spiritual court; and the Chancery will see the money put out
for the children.

1 Atk. 491. So, where there is a trust, or any thing in the nature of a
516. trust, notwithstanding the ecclesiastical court hath an original
jurisdiction in legacies, yet the Chancery will grant an injunction
to stay the proceedings in the ecclesiastical court, trusts being
properly cognizable only in equity. And an executor being in
equity considered as a trustee for the legatee, with respect to his
1 P. Wms. legacy, and as trustee, in certain cases for the next of kin, as to
575. 544. the undisposed surplus; hence the true ground of equitable juris-
diction in these cases.

3 Atk. 561. So, where a will is suppressed or destroyed, the suit for a
personal legacy may be in equity in the first instance, without
resorting to the spiritual court; otherwise it would put the plain-
tiff upon great difficulties: for, in the spiritual court, the plaintiff
must prove it a will in writing, and must likewise prove the con-
tents in the very words; and must also prove the whole will,
though the remainder of it doth not at all belong to or regard
his legacy; which the temporal courts do not put a person upon
doing. Much more, when the legacy is charged both upon per-
sonal and real estate; for, as to the real estate, there is no occa-
sion to resort to the ecclesiastical court at all.

1 Roll. Abr. Legacies may be recovered in the spiritual court against an
919. *administrator with the will annexed*, or against an *executor of his
own wrong*.

1 Ch. Ca. 121. An executor may, in some cases, be compelled to give secu-
rity to pay a legacy; as, where 1000*l.* was devised to a person,
to be paid at the age of twenty-one years; upon a bill exhibited
against

against the executors, suggesting a *devastavit*, and praying that he might give security to pay the legacy when due, it was decreed accordingly.

A testator devised 800*l.* to an infant, to be paid by the executor when the infant should attain the age of twenty-one years. The infant, by his guardian, exhibited a bill, that the executor might give security for the payment of the money. It was decreed accordingly.

Swinb. a. 40.
Law of Ex.
187.

A testator bequeaths his personal estate to his wife for life, and what she should leave at her death to be equally distributed between her kindred and his own. If the estate be so small that she cannot live upon it without spending the stock, it seems, she shall not be obliged to give security; otherwise, she shall.

Prec. Chan.
71.

If a person, possessed of a lease for years, devise that his executor out of the profits thereof shall pay to every one of his daughters 20*l.* at their full age, the executor may be sued in the spiritual court to put in surety to pay the legacies, and no prohibition shall be granted; for this is to issue out of a chattel.

2 Roll. Abr.
285.

But where 500*l.* were given to the granddaughter to be paid at twenty-one, or marriage; and if she died before either of those contingencies happened, then to go over to another; it was said by Lord *Hardwicke*, as the legacy was devised over, nothing vested in the granddaughter till one of the contingencies should happen; and, therefore, she was not entitled to have the legacy secured.

1 Atk. 505.

The Court of Chancery will now, immediately upon the coming in of the executor's answer, order so much as he admits to have in his hands of the testator's property to be paid into the Bank. It was formerly thought necessary for the plaintiff to shew that the executor had abused his trust, or that the fund was in danger from the insolvent circumstances of the executor.]

Strange v.
Harris,
3 Br. Ch.
Rep. 365.
||Freeman v.
Fairlie,
3 Mer. 59. ||

LIBEL.

A LIBEL is (a) defined a malicious defamation, expressed either in printing or writing, or by signs, pictures, &c., tending either to blacken the memory of one who is dead (b), or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule.

Hawk. P. C.
c. 73. § 1.
5 Mod. 165.
12 Mod. 221.
Ld. Raym.
418. 4 Read.

Stat. 149. 155. (a) It is termed *Libellus famosus seu infamatoria scriptura*, and from its pernicious tendency has been held a public offence at the common law; for men not being able to bear the having their errors exposed to public view, were found by experience to revenge themselves on those who made sport with their reputations; from whence arose duels and breaches of the peace; and hence written scandal has been held in the greatest detestation, and has received the utmost discouragement in the courts of justice. Lamb. Sax. Law, 64. Bract. lib. 3. c. 36. 3 Inst. 174. 5 Co. 125. [2 Stra. 791. (b) But an indictment for a libel reflecting on the memory of a deceased person cannot be supported, unless it state that it was

done with a design to bring contempt on his family, or to stir up the hatred of the king's subjects against his relations, and to induce them to break the peace in vindicating the honour of the family. *Rex v. Topham*, 4 Term Rep. 126.] ||See the *Queen v. Taylor*, 5 Salk. 198.; and see *Rex v. Critchley*, and *Rex v. Horne*, cited 2d ed. Holt on Libel, 230. in note.]

But, for the better understanding the nature of this offence, I shall consider,

(A) What shall be said a Libel: And herein,

1. *How far it is necessary that it should be in Writing.*
2. *What Degree of Defamation will amount to a Libel, ||and herein of privileged Communications,||*
3. *What Certainty in the Matter and Application will make it a Libel.*
4. *Whether any Proceedings in a Court of Justice will amount to a Libel.*
5. *Whether any Thing of this Kind can be justified, ||and herein of pleading the Truth of the Libel. ||*

(B) Who shall be said a Libeller: And herein,

1. *Who shall be said the Author or Composer of a Libel.*
2. *Who the Publisher, ||and herein of Proof of Publication in case of Libels in Newspapers.||*

(C) The Offenders how punished.

||(D) Of the Pleadings, and Evidence.||

(A) What shall be said a Libel: And herein,

1. *How far it is necessary that it should be in Writing.*

5 Co. 125.
Ld. Raym.
416.
12 Mod. 2193.

THIS species of defamation is usually termed *written scandal*, and hereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer, and propagate wider and farther, than any other scandal.

5 Co. 125.
Skin. 123.
pl. 2.
Raym. 431.
3 Keb. 378.
||As to libel by a picture, see *Du Bost v. Beresford*,

But it is clearly agreed, that not only written or printed scandal comes within the notion of a libel, but it may be also applied to any defamation whatsoever, expressed either by signs or pictures; as, by fixing up a gallows at a man's door, or elsewhere; or by painting him in a shameful and ignominious manner; as, by exposing a man and his wife by a skimmington or riding, though a special custom is alleged for such practice.

2 Camp. 511. Where the proprietor of a periodical work, describing the failure of a bound bailiff, of the name of Levi, in making an arrest, headed his doggerel lines by a woodcut descriptive of the scene, and styled the bailiff throughout "Levy the Bum;" the publication was held a libel. *Levi v. Milne*, 4 Bing. 195. So, it is a libel to place a lamp before a man's house and keep it burning there all day, thereby intending to mark it as a bawdy-house. *Jefferies v. Duncombe*, 11 East, 226.||

And

And since the chief cause for which the law so severely punishes all offences of this nature is the direct tendency of them to a breach of the public peace; by provoking the parties injured, and their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which, of all others, are most sensibly felt; and since the plain meaning of such scandal, as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking as that which is expressed by writing or printing, why should it not be equally criminal?

Hawk. P. C.
See 73. sect. 3.

2. *What Degree of Defamation will amount to a Libel, || and herein of privileged Communications.||*

As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which, to some men, is more dear than life itself: hence, it hath been held, that not only charges of a flagrant nature, and which reflect a moral turpitude on the party (a), are libellous, but also such as set him in a scurrilous, ignominious light (b); for these equally create ill blood, and provoke the parties to acts of revenge, and breaches of the peace.

that he is a *swindler* is a libel. *J'Anson v. Stewart*, 1 T. R. 748. So, a letter written to a third person, calling plaintiff a "villain," has been held actionable, without proof of special damage. *Bell v. Stone*, 1 Bos. & Pul. 331.; and see *Craft v. Boite*, 1 Saund. Rep. 248, note. But words expressing that certain parties, not being such persons as the proprietors and subscribers thought it proper to associate with were excluded from a subscription room, published by posting a paper, purporting to be the regulation of a particular society, have been held not libellous. *Robinson v. Jermyn*, 1 Price, 11.; and see *Rex v. Hart*, 1 W. Bl. 386. || (b) As, that he hath the itch, and stinks of brimstone. *Villers v. Mansley*, 2 Wils. 403. So, where the mayor of Northampton sent the Lord Halifax a licence for keeping a public-house, 1 Str. 422.]

5 Co. 125.
Keb. 293.
Moor, 627.
Roll. Abr. 37.
||(a) See
Churchill v.
Hunt, 2 Barn.
& A. 685.
1 Chit. 480.
To print of
any person

|| It is not, however, libellous to ridicule a literary composition, or the author of it, so far as he has embodied himself with his work. (c) And a fair criticism on an artist's paintings, or the works of an architect, is not libellous, however mistaken or severe may be the censure. (d) And the editor of a newspaper may fairly comment on any place of theatrical entertainment (e): if, however, his comment be unjust, malevolent, and exceeding the bounds of fair opinion, it will be a libel. (f) So, a paragraph in one newspaper, charging another with vulgarity or scurrility, is not actionable (g); but if, as addressed to persons who are disposed to advertise in it, it asserts that the other newspaper is low in circulation, it will be libellous. (h) And the editor of a newspaper is not justified in calumnious attacks on the private character of the writer of another. (i) ||

(c) *Carr v.*
Hood,
1 Camp. 355.
note. *Tab-*
bart v. Tipper,
1 Camp. 352.
In Dunne v.
Anderson,
3 Bing. 88.
S. C. 1 Ry. &
Moo. 287., it
was discussed
whether a
petition to
parliament on
matters of
general im-
portance

is such a publication as renders the petitioner an object of fair criticism, as in case of a literary work. If the petition be *published*, it seems it is so. (d) *Thomson v. Shackell*, 1 Moo. & Malk. 187. *Soane v. Knight*, *ibid*. 74. (e) *Dibdin v. Swan*, 1 Esp. 28. (f) *ibid*. (g) *Heriot v. Stuart*, 1 Esp. 437. (h) S. C. (i) *Stuart v. Lovell*, 2 Stark. 93.

Hard. 470.
 Skin. 123 .pl.2.
 [2 Wils. 403.]
 || Lord
 Leicester v.
 Walter,
 3 Camp. 214.n.
 S. C. 2 Camp.
 251. Thorley
 v. Lord Kerry,
 4 Taunt. 355.||
 5 Co. 125.
 2 Roll. Rep.
 86. Hawk.
 P. C. c. 73.
 § 7.

(a) Rex v. Lambert, 2 Camp. 398.; and see Rex v. Woodfall, Loft, 776.

Sid. 219.
 pl. 4. Keb.
 773. pl. 8.
 The King
 v. Py.

Pasch.
 4 Geo. 2. in
 B. R. Harman
 v. Delaney,
 Barnard. K. B.
 289. Fitzgib.
 121. 2 Stra.
 898. S. C.

Rex v. Wat-
 son, 2 Terin
 Rep. 199.
 ||And see Rex

Words, though not slanderous in themselves, yet if published in writing, and tending in any degree to the discredit of a man, are libellous, whether such words defame private persons only, or persons employed in a public capacity; in which latter case they are said to receive an aggravation, as they tend to scandalise the government, by reflecting on those who are entrusted with the administration of public affairs, which doth not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also hath a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. || But it is not libellous for a writer to express regret that the king has taken an erroneous view of any question of foreign or domestic policy. (a)||

Where a person delivered a ticket up to the minister after sermon, wherein he desired him to take notice, that offences passed now, without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c.; this was held to be a libel, though no magistrates in particular were mentioned, and though it was not averred that the magistrates suffered those vices knowingly.

A., a gunsmith, published an advertisement in a common newspaper, that he had invented a short kind of gun, that shot as far as others of a longer size, and that he was made gunsmith to the Prince of Wales; and B., another gunsmith, counter-advertised, *That whereas, &c. reciting the former paragraph, he desired all gentlemen to be cautious, for that the said A. durst not engage with any artist in town, nor ever did make such an experiment, except out of a leather gun, as any gentleman might be satisfied at the Cross Guns in Long Acre, the said B.'s house.* And the court held, that though B. or any other of the trade might counter-advertise what was published of A., yet that that should have been done without any general reflections on him in the way of his business; that the advice to *all gentlemen to be cautious*, was a reflection on his honesty, as if he would deceive the world by a fictitious advertisement, and the allegation that he would not engage with an artist, was setting him below the rest of his trade, and calling him a bungler in general terms, and not relative to the precedent matter; and that the words, *except out of a leather gun*, was charging him with a lie, the word *gun* being vulgarly used for a lie, and *gunner* for a liar; and that therefore these words were libellous, and gave judgment accordingly; and herein the court held, that words, though not scandalous in themselves, yet being published in writing, and tending any way to the party's discredit, were actionable; and that all words were to be construed *secundum subjectam materiam*, and to be understood by the court in the same sense that others do.

[An order was made by a corporation, and entered in their books, stating that A. B. (against whom a jury had found a verdict with large damages, in an action for a malicious prosecution for

for perjury, which verdict had been confirmed in *C. B.*;) was actuated by motives of public justice, &c. in preferring the indictment. This was adjudged to be a libel reflecting on the administration of justice, for which an information was granted against the members who made the order.]

v. White,
1 Camp. 359.
n. Rex v.
Evans, 3 Stark.
Ca. 35.¶

But though every species and degree of calumny and detraction of this kind are deemed odious in the eye of the law, and punishable either by civil action or criminal prosecution, in most cases, at the election of the party injured; yet the Court of King's Bench, whose jurisdiction herein is founded upon the necessity of preventing quarrels and ill blood, and which deals with this offence as of dangerous consequence to, and destructive of, the peace of the nation, always exercises a discretionary power in granting an information for an offence of this nature, and will, in many cases, leave the party to his ordinary remedy; as, where the application is made (a) after a great length of time; so (b), where the matter complained of as a libel happens to be true; so (c), where the granting the information would be a discouragement to learned enquiries; or (d) where the matter complained of was intended for reformation, not defamation.

(a) As, in the case of the King v. Knight, Trin. 9 G. 2. in *B.R.* where the party, after two terms, three sessions, and one assizes, applied to the court, it refused to grant an information; though it was agreed, had the application been recent, an information would have

been granted. (b) As, in the case of an apothecary who personated Dr. Crow, wrote in his name, and took a fee, which being published in a public advertisement, a motion was made for an information against the publisher; but the truth of what was advertised being made out, the court left the prosecutor to his ordinary remedy. Hil. 1 G. 1. *The King v. Bickerston*, Str. 498. Andr. 290. Barnard. K. B. 15. [Where the libel contains pointed charges, which, if false, may be denied by the party complaining, an information will not be granted, unless the party complaining denies such pointed charges on oath. *Rex v. Miles*, Dougl. 284. *Rex v. Haswell*, *Id.* 387. But an exculpatory affidavit is not necessary, where the party libelled is abroad at a great distance, or the subject-matter of the charge is general imputation, or an accusation of criminal language holden in parliament. See the last case.] (c) As, for the publishing in a newspaper that Ward's pill and drop had done great mischief in twelve different cases, and that they were a compound of poison and antimony, &c. 8 G. 2. *The King v. Roberts*. (d) As, where a person in a private letter to the party expostulates with him about some vices, of which he apprehends him guilty, and desires him to refrain from them; or where a person sends such a letter to a father, in relation to some faults of his children; which are said to be not at all libellous, being acts of friendship, not designed for defamation, but reformation. 2 Brownl. 151, 152. 2 Burn's Eccles. Law, 779. But such matters published in a newspaper, though the pretence be reformation, are, it seems, libellous, as was agreed, 9 G. 2. *The King v. Knight*.

So, where a man advertised in a public newspaper, that his wife had eloped from him, and cautioned all persons from trusting her; an information for a libel being moved for, it was denied, because it was the only way the husband could take to secure himself.

The King v. Enes, 5 Geo. 2. in *B. R.* Andr. 229. [*Rex v. Masters*, Say. Rep. 122. S.P.

So, where it was advertised in one of the daily papers, that Lady *Mordington* kept an assembly in *Moorfields*, and it being counter-advertised by my lord's order, that the person calling herself Lady *Mordington* was an impostrix, and that there was no such person, except his wife, who always lived with him, the court refused to grant an information; for though she be called an impostrix, yet that relates to her as assuming the title of Lady *Mordington*, which she is alleged not to have any right to; and therefore, in this respect, she may well be called an impostrix.

The King v. Jenneaur, Pasch. 8 Geo. 2. in *B. R.*

A writing was directed to General *Wills*, and the four principal officers of the guards, to be presented to his majesty for redress:

The King v. Bayley, Hil.

8 Geo. 2. in
B. R. Andr.
229.

redress: the paper contained the defendant's case, that he furnished the guard at *Whitehall* with fire and candle, for which the government owed him 350*l.*; that he obtained a warrant for his money, and Captain *Carr* (the prosecutor) told him, that if he would assign the warrant, he would procure him the money: the warrant was assigned, and the money paid to *Carr*, who refused paying it to the defendant: and the question was, If an information should be granted? And the court held it no libel, but a representation of an injury, drawn up in a proper way for redress, without any intention to asperse the prosecutor; and though there be a suggestion of a fraud, yet that is no more than what is in every bill in Chancery, which was never held libellous, if relative to the subject-matter.

Cro. Jac. 91.

Here it may be proper to insert the remarkable case of parson *Prick*, who in a sermon recited a story out of *Fox's Martyrology*, that one *Greenwood*, being a perjured person, and a great persecutor, had great plagues inflicted on him, and was killed by the hand of *God*; whereas in truth he was never so plagued, and was himself present at that sermon; and he thereupon brought his action upon the case, for calling him a perjured person; and the defendant pleaded not guilty. And this matter being disclosed upon the evidence, *Wray* Chief Justice delivered the law to the jury, that it being delivered but as a story, and not with any malice or intention to slander any person, he was not guilty of the words maliciously, and so was found not guilty. (a)

(a) *Qu.* If the story was not in the book?

Archbishop of
Tuam v.
Robeson,
5 Bing. 17.

|| It is a libel to publish of a Protestant archbishop, that he attempts to convert Catholic priests by offers of money and preferment.

Clement v.
Chivis, 9 Barn.
& C. 172.

So, to publish of a man that he has been guilty of gross misconduct, and insulted females in a barefaced manner.

Yrisarrie v.
Clement,
5 Bing. 452.;
see also Hunt
v. Bell,

An action of libel does not lie for any thing written against a party, touching his conduct in an illegal transaction; but for misconduct imputed to him in any matter, independent of the illegal transaction, though arising out of it, an action lies.

7 Moore, 212. S. C. 1 Bing 1.

PRIVILEGED COMMUNICATIONS. — There are also some communications which, though they would be libels, if heedlessly or maliciously published, are held not to be libellous, on account of their being communicated confidentially, and under circumstances which negative a malicious motive.

McDougall v.
Claridge,
1 Camp. 267.
And see Dun-
man v. Bigg, in
note to same
case.

As where *B.* wrote confidentially to persons who employed *A.* as their solicitor, conveying charges injurious to his professional character, in the management of certain concerns which they had intrusted to him, and in which *B.*, the writer of the letter, was likewise interested, his letter was held not to be libellous.

But see *Godson v. Howe*, 1 Brod. & Bing. 7. S. C. 3 Moore, 223. where the communication was held to exceed the line of confidential advice.

Edmonson v.
Stephenson,
Bull. N. P. 8.
Weatherston
v. Hawkins,

And an action will not lie by a servant against his former master, for a letter written by him in giving a character of the servant, unless the latter prove the malice as well as falsehood of the charge, even though the master make specific charges of fraud.

fraud. The question whether the communication is made by the master *bonâ fide*, or with intent to injure the servant, is a question of fact for the jury.

1 T.R. 110.
Rogers v.
Clifton, 3 Bos.
& Pul. 587.
Barn. & C. 578.

Pattison v. Jones, 8

And a petition addressed by the creditor of an officer in the army to the secretary at war *bonâ fide*, and with a view of obtaining through his interference the payment of a debt due to him, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel, for which an action is maintainable.

Fairman v.
Ives, 5 Barn. &
A. 642. S. C.
1 Dow. & Ry.
252.

So, where a court-martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused was highly injurious to the service; the president of the court-martial was held not to be liable to an action for a libel, for having delivered such sentence and declaration to the judge-advocate.

Jekyll v. Sir
John Moore,
2 New R. 341.
S. C. 6 Esp. 63.
and see Warden
v. Bailey,
4 Taunt. 67.
Home v. Lord
F. C. Bentinck,
2 Brod. & Bing.
2 New R. 341.

130. Oliver v. Lord W. Bentinck,

But if a person officiously interfere to inform any of the constituted authorities of alleged abuses, the communication is not privileged, and if untrue, may be considered malicious.

Robinson
v. May,
2 Smith, 3.

And, if a member of parliament publish in the newspaper, his speech as delivered in parliament, and it contains charges of a slanderous nature against an individual, an information will lie for a libel; though had the words been merely delivered in parliament, they would be dispunishable in the courts at *Westminster*; and the circumstance of the speech having been published for the purpose of correcting a misrepresentation, will not render the author less amenable to the law in respect of the publication.

The King v.
Ld. Abingdon,
2 Esp. N. P. C
226. and see
Rex v. Salis-
bury, 1 Ld.
Raym. 341.
Rex v. Cree-
vey, 1 Maul. &
S. 273. S. P.

And though no action will lie against a counsel for slander spoken by him in the course of a judicial proceeding, if the words be pertinent to the matter in issue (a), yet a subsequent publication of them may be libellous. (b) ||

(a) Hodgson
v. Scarlett
1 Barn. & A.
232.

(b) Flint v.
Ry. 528. S. C.

Pike, 4 Barn. & C. 473. Dow. &

3. *What Certainty in the Matter and Application will make it a Libel.*

It seems to be now agreed, that not only scandal expressed in an open and direct manner, but also such as is expressed in allegory and (a) irony amounts to a libel; and that the judges are to understand it in the same manner as others do, without any strained endeavours to find out loop-holes, or to palliate the offence, which in some measure would be to encourage scandal; as where a writing in a taunting manner, reckoning up several acts of public charity done by one, says, *You will not play the Jew, nor the hypocrite*, and so goes on, in a strain of ridicule, to insinuate that what he did was owing to his vain-glory; or where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are

(a) 11 Mod.
86. pl. 5.
See 4 Read.
Stat. Law, 151.
Barnard. K. B.
305. 2 Ses.
Cas. 30. 5 Co.
125. That a
libel may be
as well by des-
criptions and
circumlocu-
tions as in ex-
press terms.
Poph. 252.

Hob. 215.

Hawk. P. C.

c. 73. § 4.

[(a) The rule which at one time prevailed, that words are to be understood in *mitiori sensu*, has been

generally esteemed famous for, pitched on such qualities as their enemies charge them with the want of; as by proposing such a one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &c. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so. (a)

long ago superseded, and words are now construed by courts as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them. *Per* Lord *Ellenborough* C. J. in 9 East, 95. *Roberts v. Camden*. And upon the point of intention it was unanimously agreed by the judges, in the case of *The King v. Sir Francis Burdett, Bart.*, 4 Barn. & A. 95., that where a libel is charged to be written with a particular intent, the defendant must be presumed to have intended that which his act was likely to produce.]]

Hawk. P. C.

c. 73. § 5.

Hurst's case.

[[And see

Bourke v.

Warren, 2 Carr.

& P. 307.]

(b) And on application for an information, some friend to the party complaining should,

by affidavit, state the having read the libel, and understanding and believing it to mean the party.

And from the same foundation it hath also been resolved, that a defamatory writing expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to (b) signify such a person in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say, that a writing which is understood by every the meanest capacity, cannot possibly be understood by a judge and jury.

Hawk. P. C.

c. 73. § 9.

[(c) But this is not law: obscene books are punishable as libels. *Rex v. Curl*, 2 Str.

But it is said, that no writing whatsoever is to be esteemed a libel, unless it reflect upon some particular person; and that a writing full of obscene ribaldry (c), without any kind of reflection on any one, is not punishable at all by any prosecution at common law; but the author may be bound to his good behaviour, as a scandalous person of evil fame.

788. *Rex v. Wilkes*, 4 Burr. 2527. So, books reflecting upon Christianity. *Rex v. Woolston*, 2 Str. 834. *Fitzg.* 64. So, a treatise on hereditary right was holden to be a libel, though it contained no reflection on any part of the then government. *Reg. v. Bedford*, *Gilb. Rep.* K. B. 297. 11 St. Tr. 121.] [So a publication suggesting that the revolution was an unjust and unconstitutional proceeding, and representing the limitation established by the act of settlement as illegal, has been held libellous. See *Dr. Shebbeare's case*, and *Rex v. Paine*, *Holt on Libel*, 88, 89. and *Starkie on Libel*, 508. So, a publication stating *Jesus Christ* to be an impostor, and a murderer in principle, has been held a libel at common law. *Rex v. Waddington*, 1 Barn. & C. 26. And see *Butt v. Conant*, 4 Moore, 194. And a false statement in a newspaper that his majesty was insane, has been held a libel. *Rex v. Harvey*, 2 Barn. & C. 257. *S. C.* 3 Dow. & Ry. 464.]]

Poph. 252.

254. [*Rex v.*

Benfield,

2 Burr. 984.]

A scandal published of three or four, or any one or two of them, is punishable at the complaint of one or more, or all of them. (d)

[(d) Where the proprietor of a place for public amusement brought an action against a man for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage, it was held not to be sustainable, the injury being too remote. *Astley v. Harrison*, *Peake*, C. 194.]

¶ And persons in partnership may, without shewing the proportion of their respective shares, join in an action for a libel against them in respect of their business.¶

Foster v. Lawson, 3 Bing. 452.; and see Cooke v.

Batchelor, 3 Bos. & Pul. 150., and 2 Will. Saunders, 116. a.

The defendant was charged in an information with writing a libel against the Protestant religion and bishops, *innuendo* the bishops of *England*; he was found guilty; and in arrest of judgment it was offered, that the bishops libelled were not *English* bishops, nor could the *innuendo* support such construction; but the court took upon them to understand the libel in that sense, and over-ruled the exception.

3 Mod. 69.
The King v. Baxter,
12 Mod. 139.
Ld. Raym. 879.

An information was prayed for publishing a paper containing an account of a murder on a *Jewish* woman and her child, by certain *Jews* lately arrived from *Portugal*, and living near *Broad Street*, because the child was begotten by a Christian; and the affidavit set forth, that several persons mentioned therein, who were recently arrived from *Portugal*, and lived in *Broad Street*, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more: it was objected, that no information could be granted in this case, because it did not appear who in particular the persons reflected on were (a): and for this was cited *The King v. Orme*, (b) *Trin.* 11 *W.* 3., where an indictment was exhibited for a libel, called the *The Ladies' Invention*, and alleged to be to the scandal of several ladies unknown; and after verdict for the king, judgment was arrested, because it did not appear who the persons reflected on were. *Sed per Cur.*: Admitting that an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible; and in this case was cited the case of *The King* and *Franklin*, where, though only the word *ministers* was used in the libel, yet, by suitable averments (c) in the information, and proof made of them to the jury, they found those ministers to be ministers of state to his present majesty, and the defendant guilty.

The King v. Osborne, Trin. 5 *G.* 2. in *B.R.* Ses. Cas. 260.
2 Barnard. K. B. 138. 166.
Kel. 230.
pl. 183. ¶ S. C. 2 Swanst. 503. in note.¶
¶(a) So an information has been granted for a libel, reflecting on the clergy of a particular diocese, and generally upon the clergy of the Church of England, though no individual prosecutor was named. Rex v. Williams, 5 Barn. & A. 595. S. C. 1D & R. 197.¶
(b) 3 Salk. 224. pl. 5. Ld. Raym. 486.
Libel spelt badly, yet held well, 2 Sess.

Cas. 29. pl. 33. [(c) As to the manner of making the averments, see Rex v. Horne, Cowp. 672.]
¶ And see S. C. in error, 4 Bro. P. C. 368. Rex v. Marsden, 4 Maul. & S. 164. Rex v. Burdett, 4 Barn. & A. 314.¶

4. *Whether any Proceedings in a Court of Justice will amount to a Libel.*

It seems to be clearly agreed, that no proceeding in a regular course of justice will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecutions, in respect of their applications to a court of justice; and the chief intention of the law in prohibiting persons

Dyer, 285.
2 Inst. 228.
Yelv. 117.
2 Buls. 269.
Godb. 340.
Palm. 145.

to

188. Vent. 23. to revenge themselves by libels, or any other private manner, is
Hawk. P. C. to restrain them from endeavouring to make themselves their own
c. 73. § 8. judges, and to oblige them to refer the decision of their grievances
to those whom the law has appointed to determine them.

(a) 1 Lev. 240. Therefore it hath been resolved, that no false or scandalous
Sid. 414. matter contained in (a) a petition to a committee of parliament,
2 Keb. 832. or in (b) articles of the peace exhibited to justices of peace, are
(b) 4 Co. 14. libellous.
1 Hawk. P. C.

c. 73. § 8.

Astley v.

Younge,

2 Burr. 817.

[So, where a charge was, that the defendant in a certain affidavit before the court had said that the plaintiff in a former affidavit against the defendant had sworn falsely; the court held, that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing, and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood; this therefore being necessary in the course of legal proceeding, no action will lie for it.]

Moor, 627.
Hawk. P. C.
c. 73. § 8.

Also, it is held, that no presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence any way to discourage them from making their enquiries with that freedom and readiness which the public good requires.

2 Keb. 832.
4 Co. 14.
Hawk. P. C.
c. 73. § 8.
|| And see
McGregor v.
Thwaites,
3 Barn. & C.
24. S. C.
4 Dow. & Ry.
695.||

Also, it is holden by some, that no want of jurisdiction in the court to which such a complaint shall be exhibited will make it a libel; because the mistake of the court is not imputable to the party, but his counsel. But herein it is said by *Hawkins*, that if it shall manifestly appear from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, and commenced not with a design to go through with it, but only to expose the defendant's character, under the shew of a legal proceeding, there can be no reason why such mockery of public justice should not rather aggravate the offence than make it cease to be one, and make such scandal a good ground of an indictment at the suit of the king, as it makes the malice of their proceeding a good foundation of an action on the case at the suit of the party, whether the court had a jurisdiction of the cause or not.

(c) Curry v. Walter, 1 Bos. & Pul. 525.
(d) Stiles v. Nokes, 7 East, 493. S. C.
nom. Carr v. Jones, 3 Smith, 491. 503.
Rex v. Fisher, 2 Camp. 570.
Rex v. Fleet, 1 Barn. & A. 379. Rex v.
|| A fair, plain, unvarnished account of the proceedings of a court of justice is generally not a libel (c), but a coloured account of such proceedings, mixed up with insinuations of perjury against individuals, cannot be justified. (d) Nor is it lawful to publish even a correct account of the proceedings of a court of justice, if such account contain matter of a scandalous, blasphemous, or indecent nature (e); and the publication of preliminary and *ex parte* proceedings has been considered illegal. (f) It seems, however, that it is lawful to publish the result of what a magistrate may think fit to do upon a matter of criminal charge, previous to trial, if the publication contains no statement of the evidence, nor any comments upon the case. (g) But it is not lawful to

to publish a correct account of the proceedings on a coroner's inquest, accompanied with comments, although it be not maliciously done; "for the inquest before a coroner leads to a second enquiry, in which the conduct of the accused is to be considered by persons who ought to have formed no previous judgment of the case." (*h*)||

Lee, 5 Esp. 123. And where a true account of proceedings in a court of law was given, in the defendant's

newspaper, under the head of "Shameful conduct of an attorney," it was held a libel, because these words formed no part of the proceedings in the court of law. *Lewis v. Clement*, 3 Barn. & A. 702. S. C. in error, 3 Brod. & Bing. 297. And a question was made in this case as to the legality of publishing proceedings of a court of law, containing matter defamatory of a person, neither a party to the suit, nor present at the time of enquiry. (*e*) *Rex v. Mary Carlile*, 3 Barn. & A. 167. (*f*) *Per Lord Tenterden* in *Duncan v. Thwaites*, 3 Barn. & C. 583. *Per Heath J.* in *The King v. Lee*, 5 Esp. 123.; and see *McGregor v. Thwaites*, 3 Barn. & C. 24. 4 Dow. & Ry. 695. *Flint v. Pike*, 4 Barn. & C. 475. S. C. 6 Dow. & Ry. 458. *Rex v. Fisher*, 2 Camp. 570. (*g*) *Duncan v. Thwaites*, 3 Barn. & C. 556. (*h*) *Per Bayley J.* in *The King v. Fleet*, 1 Barn. & A. 379.

5. *Whether any Thing of this Kind can be justified, || and herein of pleading the Truth of the Libel.*||

It seems to be clearly agreed, that in an indictment or criminal prosecution for a libel the party cannot justify that the contents thereof are true, or that the person upon whom it is made had a bad reputation (*i*), since the greater appearance there is of truth in any malicious invective, so much the more provoking it is; for, as my Lord *Coke* observes, in a settled state of government the party grieved ought to complain for every injury done him in the ordinary course of law, and not by any means to revenge himself by the odious course of libelling or otherwise.

court see that it is true, or probably may be true, it is a good cause why they should not interfere, by granting a criminal information. *Rex v. Draper*, 3 Smith, 391.||

5 Co. 125. Hob. 253. Moor, 627. Hawk. P. C. c. 73. § 6. || (*i*) But although the truth of a publication is no justification, yet, if the they should not

Also, it seems now settled, that no scandal in writing is any more justifiable in a civil action brought by the party to vindicate the injury done him, than in an indictment or information at the suit of the crown; for though in actions for words, the law, through compassion, admits the truth of the charge to be pleaded as a justification, yet this tenderness of the law is not to be extended to written scandal, in which the author acts with more coolness; and deliberation gives the scandal a more durable stamp, and propagates it wider and farther: whereas in words men often in a heat and passion say things which they are afterwards ashamed of, and though they seem to act with deliberation, yet the scandal sooner dies away, and is forgotten; and therefore from the greater degree of mischief and malice attending the one than the other, though the law allows the party to justify in an action for words, yet it doth not for written scandal; from whence it follows, that the only favour truth affords in such a case is, that it may be shewn in mitigation of damages in an action (*k*), and of the fine upon an indictment or an information.

The King v. Roberts, Mich. 8 Geo. 2. in *B. R.* agreed *per Cur.* in a case for publishing a libel on Mr. Branley, recorder of Warwick. Str. 493. S. P. || (*k*) On the general issue, "not guilty," the truth of the words is not allowed to be given in evidence, in mitigation of damages. Underwood v. Parks, 2 Str. 1200. Smith v. Richardson, Willes, Rep. 20. The King v. J. Wright, 8 T. R. 298.; and see *Rex v. Sir F. Burdett*, 4 Barn. & A. 95. And the defendant cannot prove facts to negative the presumption of malice. *Waithman v. Weaver*, *per Lord Tenterden* C. J. 1 Dow. & Ry. N. P. C. 10. But he may prove, that the substance of the libel had been published in a newspaper, without producing the newspaper. *Wyatt v. Gore*, Holt's N. P. C. 299. If, however, there be a justification on the record, as well as the general issue, the defendant

Underwood v. Parks, 2 Str. 1200. Smith v. Richardson, Willes, Rep. 20. The King v. J. Wright, 8 T. R. 298.; and see *Rex v. Sir F. Burdett*, 4 Barn. & A. 95. And the defendant cannot prove facts to negative the presumption of malice. *Waithman v. Weaver*, *per Lord Tenterden* C. J. 1 Dow. & Ry. N. P. C. 10. But he may prove, that the substance of the libel had been published in a newspaper, without producing the newspaper. *Wyatt v. Gore*, Holt's N. P. C. 299. If, however, there be a justification on the record, as well as the general issue, the defendant

defendant is not at liberty to give such evidence as above in mitigation of damages. *Snowden v. Smith*, 1 Maul. & S. 286. note. And it has lately been decided, that evidence of the plaintiff's general bad character, is not admissible in mitigation of damages, under the general issue. *Jones v. Stevens*, 11 Price, 255., over-ruling the cases of — *v. Moor*, 1 Maul. & S. 284. and *Lord Leicester v. Walter*, 2 Camp. 251. and see *Waithman v. Weaver*, 11 Price, 257. n. Nor can the defendant give in evidence under the general issue that the slander was communicated to him by a third person. *Mills v. Spencer*, Holt's N. P. C. 534.; or that the plaintiff had been in the habit of libelling the defendant. *Wakley v. Johnson*, 1 Ry. & Moo. 442. S. P. *Finerty v. Tipper*, 2 Camp. 76. But in an action for a libel, in a report of a coroner's inquest, the defendant may, on the general issue, shew in mitigation of damages the correctness of the report, though not the truth of the facts stated. *East v. Chapman*, 1 Moo. & Malk. 46. and see *Rex v. Burdett*, 4 Barn. & A. 522. And after conviction of libel the defendant may in mitigation produce affidavits that he *believed* the charge to be true, but not that it is true. *Rex v. Halpin*, 9 Barn. & C. 65.]]

3 Wooddes.

180.

(a) Bull. N. P. 8., where

1 Saund. 120. and 2 Burr.

807. are cited; but those were

justifications rather from

the occasion than the truth

of the supposed libels, the

one being a parliamentary,

and the other a judicial proceeding.

So, in the case,

4 Co. 12. b. &c., which was

an action of *scandalum*

magnatum on the statute,

the plea was a relation of

circumstances to extenuate and explain the scandal, which is considered as a very distinct defence from alleging the truth of it. Poph. 67. 69. 2 Mod. 166. 1 Freem. 223. (b) *J'Anson v. Stuart*, 1 Term Rep. 748.; || and see Selw. N. P. 6th ed. 1039. note 6. and *Craft v. Boite*, 1 Saund. Rep. 243. e. note 6. 5th ed. (c) There is no reason to doubt that a libel may be justified in a civil action, by pleading its truth, although it do not impute an indictable offence. Such justifications are frequent in practice, and some are found in the books; see *Holmes v. Catesby*, 1 Taunt. 543. *Weaver v. Lloyd*, 2 Barn. & C. 678. *Edwards v. Bell*, 1 Bing. 403.

Where a libel consists of mere vituperation or ridicule, in many instances, from its nature, it may be impossible to allege and prove its truth; but wherever it conveys a distinct imputation of illegal or immoral conduct, or of any thing as to which truth or falsehood can be predicated, there seems no reason to doubt that the truth of the imputation may be pleaded in bar. How far it may be politic in the law to allow such latitude of publishing truth, may be doubtful. Though this doctrine is now established, yet Lord *Hardwicke*, in 1755, in *The King v. Roberts*, is said to have stated: — "I never heard a justification in an action of *libel* hinted " at; all the favour that I know truth affords in such a case is, that it may be shewn in " mitigation of damages in an action, and of the fine on an indictment or information." Selw. N. P. 986. Holt on Libel, 275. But Lord *Holt*, in 11 Mod. 99. 3 Salk. 225. had, nearly thirty years before, laid it down, that the defendant might justify in an action, though not in an indictment; and Lord *Hardwicke's* second position, that truth might be shewn in mitigation (though according to the practice then), was overruled by the resolution of the judges two years afterwards, in *Smith v. Richardson*, Willes' Rep. 20. and see *Underwood v. Parkes*, 2 Stra. 1200. *Bishop of Sarum v. Nash*, B. N. P. 9. Since which resolution the point has been settled,

[However, it is advanced in a very useful compilation (a), and is now settled, that the defendant may justify in an action for a libel, as in a common action of slander. And with respect to libels charging a man with an indictable offence, it is now the prevailing doctrine, that the defendant may plead in bar the truth of the defamatory paper: such a plea was allowed on demurrer (b) in the Common Pleas; and the cause being removed into the King's Bench, that court reversed, indeed, the former judgment, on account of the pleas being too general and indiscriminate; but no notice appears to have been taken of the question at large, except that one of the learned judges remarked, that "if the plaintiff had been a common swindler (as alleged), the defendant ought to have indicted him; but he had no right to libel him in that way;" which may be thought to give some countenance to what now perhaps may be called the old opinion. Still a libel may be very scandalous, and very pernicious in its effects, without charging the party libelled with an indictable offence. In that case, saith a very sensible writer, as I know of no determination that the truth of the libel may be pleaded in justification, I am at liberty to observe, the prevalence of such an opinion would not be very seasonable, nor very conducive to the peace and welfare of society. (c)]

circumstances to extenuate and explain the scandal, which is considered as a very distinct defence from alleging the truth of it. Poph. 67. 69. 2 Mod. 166. 1 Freem. 223. (b) *J'Anson v. Stuart*, 1 Term Rep. 748.; || and see Selw. N. P. 6th ed. 1039. note 6. and *Craft v. Boite*, 1 Saund. Rep. 243. e. note 6. 5th ed. (c) There is no reason to doubt that a libel may be justified in a civil action, by pleading its truth, although it do not impute an indictable offence. Such justifications are frequent in practice, and some are found in the books; see *Holmes v. Catesby*, 1 Taunt. 543. *Weaver v. Lloyd*, 2 Barn. & C. 678. *Edwards v. Bell*, 1 Bing. 403. Where a libel consists of mere vituperation or ridicule, in many instances, from its nature, it may be impossible to allege and prove its truth; but wherever it conveys a distinct imputation of illegal or immoral conduct, or of any thing as to which truth or falsehood can be predicated, there seems no reason to doubt that the truth of the imputation may be pleaded in bar. How far it may be politic in the law to allow such latitude of publishing truth, may be doubtful. Though this doctrine is now established, yet Lord *Hardwicke*, in 1755, in *The King v. Roberts*, is said to have stated: — "I never heard a justification in an action of *libel* hinted " at; all the favour that I know truth affords in such a case is, that it may be shewn in " mitigation of damages in an action, and of the fine on an indictment or information." Selw. N. P. 986. Holt on Libel, 275. But Lord *Holt*, in 11 Mod. 99. 3 Salk. 225. had, nearly thirty years before, laid it down, that the defendant might justify in an action, though not in an indictment; and Lord *Hardwicke's* second position, that truth might be shewn in mitigation (though according to the practice then), was overruled by the resolution of the judges two years afterwards, in *Smith v. Richardson*, Willes' Rep. 20. and see *Underwood v. Parkes*, 2 Stra. 1200. *Bishop of Sarum v. Nash*, B. N. P. 9. Since which resolution the point has been settled,

settled. The law of Scotland differs from the English law on this subject, and the rule, *veritas convicii non excusat*, applies equally to civil and criminal proceedings. In cases, however, where the publication takes place under circumstances favourable to the defendant,—such as the cases of characters of servants, friendly cautions, literary criticisms, reports of trials, &c.—here the truth is allowed to be shewn as a defence, along with the other circumstances, as tending to negative malice. In cases of publications wanting these extenuating circumstances, the truth can only be shewn in mitigation of damages, and not even then if express malice is clear. Borthwick, *Law of Libel*, ch. 5. sect. 3. The courts of Scotland in many cases award a “Palinode,” or formal recantation by the libeller, with a reduction of the damages conditional on the recantation being made. *Ibid.* p. 180. A *compensatio injuriarum*, or set-off of one libel or slander against another, is also allowed and encouraged by the Scotch law. *Ibid.* 279.||

|| If a defendant justify, his plea must state the facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life. Holmes v. Catesby, 1 Taunt. 545. Oliver v. Lord Wm. Bentinck, 5 Taunt. 456. Croft v. Boite, 1 Saund. 244. b. note, 5th ed. J’Anson v. Stuart, 1 Term Rep. 748.

Whether the publishing of slanderous words can be justified, on the ground that the utterer named at the time the person from whom he heard them, does not yet appear to be entirely settled; though it would seem, that such a justification is good, provided the utterer name the author at the time, and not merely in his plea; and provided he give the very words used, and express malice do not appear. Lord Northampton’s case, 12 Rep. 133. Davis v. Lewis, 7 Term R. 17. Woolnath v. Meadows, 5 East, 463. Mait-

land v. Goldney, 2 East, 426.; and see judgment of *Holroyd J.* Lewis v. Walter, 4 Barn. & A. 614.

But it is now settled, that, at all events, this justification does not apply to cases of written libel.|| De Crespigny v. Wellesley, 5 Bing. 392.; and see Lewis v. Walter, *ubi sup.* and Macgregor v. Thwaites, 3 Barn. & C. 24. The law of Scotland seems to agree with these decisions, and it seems doubtful whether the plea of previous report is even a justification of oral slander. Borthwick, *Libel*, p. 291.

[In an indictment or information for a libel, where issue is joined on not guilty, the statute of 32 G. 3. c. 60. declares and enacts, that the jurors may give a general verdict on the whole matter, and the judge shall not require them to find the defendant guilty merely on the proof of publishing, and on the sense ascribed to the supposed libel in such complaint or information. (a) But the statute does not express that the truth of the scandal shall be a defence, and is wholly silent as to actions of *scandalum magnatum*, or for a libel.] || (a) Where, in an information for a libel, the judge told the jury, in summing up, that the intention was to be collected from the paper itself, unless

explained by the mode of publication, or other circumstances; and that if its contents were likely to excite sedition, the defendant must be presumed to intend that which his act was likely to produce, and that if they found such to be the intent, he was of opinion that it was a libel, and that they were to take the law from him, unless they were satisfied that he was wrong, the Court of King’s Bench held it to be a correct mode of leaving the question to the jury under this act. Rex v. Sir F. Burdett, 4 Barn. & A. 95.||

(B) Who shall be said a Libeller: And herein,

1. *Who shall be the said Author or Composer of a Libel.*

9 Co. 59.
Moor, 813.
Lamb's case.

Rex v. Hall,
1 Str. 416.

Carth. 405.
5 Mod. 163—
167. Ld.
Raym. 729.
Salk. 281.
pl. 8. Comb.
359. The
King v. Paine.
(a) But in
Carth. 406. it
is said that he
who dictated
cannot be in-
dicted for
this libel, be-
cause he did
not write it,
and that
therefore, if

the writer could not, the crime would go unpunished. ||But an action for a libel may, it seems, be maintained against a person who procured it to be written by a third party, if it be shewn that the libellous part was in consonance with the defendant's instructions, or that he saw the letter in which it was contained after it was written. See *Harding v. Greening*, 1 Moor, 477. S. C. 8 Taunt. 42.||

Carth. 407.
2 Salk. 417.
646. pl. 13.
Ld. Raym.
414. 12 Mod.
218. The
King v. Bear.

(b) It will not

be a publication of a libel if he takes a copy of it, if he never publishes it. Com. Dig. tit. Libel, (B. 2.) Though he takes a copy, or reads it by command of his father or master. R. Mu. 813. So, if a man delivers by mistake a paper out of his study, it is not a publication, though it be a libel. 5 Mod. 167. ||In *Rex v. Burdett*, 4 Barn. & A. 95., it was discussed whether the writing and composing of a libel, with intent to publish, but not followed by publication, be an offence, but no decision was given on the point.||

2 Salk. 419.
Ld. Raym.
417. 12 Mod.
220, 221.

||Other libels
written by the
same person,

and concerning the same subject, may be received in evidence to prove the authorship. *Rex v. Pearce, Peake*, 75.||

IT has been already observed, that a libel may be expressed not only by printing or writing, but also by signs or pictures; but it seems that some of those ways are essentially necessary; and it is laid down in *Lamb's case*, that every person convicted of a libel must be the contriver, procurer, or publisher thereof.

[If a defendant has owned himself to be the author of a book, *errors of the press and small variations excepted*, it is sufficient to entitle the prosecutor to have the book read, and the defendant shall be put to shew, that there were material variances.]

It hath been strongly urged, that he who writes a libel, dictated by another, is not guilty of the composing and making thereof, because it appears that another is the author or contriver; but herein the court held, that the writing being the essential part of a libel, the reducing it into writing, in the first instance, was a making, and differed from a transcribing; and, according to the report of this case in 5 *Mod.*, it was held, that if (a) one dictates, and another writes, both are guilty of making it, for he shews his approbation of what he writes. So, if one repeats, another writes a libel, and a third approves what is written, they are all makers of it, as all who concur and assent to the doing of an unlawful act are guilty; and murdering a man's reputation by a libel may be compared to murdering a man's person, in which all who are present and encourage the act are guilty, though the wound was given by one only.

Also it hath been held, that transcribing and collecting libellous matter is highly criminal, though it be not found that the party composed or published it; for his having it in readiness for that purpose when occasion served, or its falling into such hands after his death as may publish it, might be injurious to the government. (b)

It is said by *Holt* Chief Justice, that when a libel appears under a man's handwriting, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man.

And

And it is said to have been resolved by the court, that in libels, *making* is the *genus*, composing or contriving is one *species*, writing a second *species*, and procuring to be written a third *species*; and finding a man guilty of writing only, is finding him guilty of one *species* of making.

and found guilty of composing and publishing a libel. See *Rex v. Williams*, 2 Salk. 419. *Rex v. Hunt*, *id.* 583. ||

But yet in some cases the writing of a libel may be a lawful or innocent act, as by the clerk that draws the indictment, or by a student who takes notes of it, because it is not done *ad infamiam* of the party; but, abstractly considered, the writing a copy of a libel is writing a libel, because such copy contains all things necessary to the constitution of a libel; *viz.* the scandalous matter, and the writing; and it has the same pernicious consequence, for it perpetuates the memory of the thing, and some time or other comes to be published.

2. *Who the Publisher, ||and herein of Proof of Publication in case of Libels in Newspapers.* ||

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material, whether he who disperses a libel knew any thing of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them.

|| Thus, the delivery of a pamphlet by the governor of a distant province to his attorney general, not for any public purpose, but in order that he might peruse it, is such a publication as will make him responsible in an action, if the pamphlet be a libel.

So, where *A.* sent a manuscript to the printer of a periodical publication, and did not restrain the printing and publishing of it, and he printed and published it in his publication, *A.* was held the publisher, and liable to an action. ||

And on this foundation it hath been constantly ruled of late, that the buying of a book or paper, containing libellous matter, in a bookseller's shop, is sufficient evidence to charge the master with the publication, although it does not appear that he knew of any such book being there, or what the contents thereof were; and it will not be presumed, that it was brought and sold there by a stranger, but the master must, if he suggests any thing of this kind in his excuse, prove it.

306. 2 Ses. Cas. 33. pl. 38. [*Rex v. Almon*, 5 Burr. 2687. Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper, under the stat. 29 G. 3. c. 50. § 10., and had occasionally applied to the stamp-office respecting the duties, was holden to be sufficient evidence of his being the publisher. 4 Term Rep. 126.] || And every copy of a libel sold by a defendant is a separate publication, and subjects him to a distinct prosecution. *Rex v. Carlile*, 1 Chit. R. 451. ||

|| The proceedings against the printers, publishers, and proprietors of newspapers, either civilly or criminally (*a*), for libels in

2 Salk. 419.
Ld. Raym.
418. 12 Mod.
220. || A de-
fendant may
be acquitted
of printing,
2 Camp. 646.

2 Salk. 418.
Ld. Raym.
416, 417.
12 Mod. 220.
Comb. 359.

9 Co. 59.
Moor, 627.
Hawk. P. C.
c. 73. § 10.
Fitz. 47.

Wyatt v.
Gore,
Holt, 299.

Burdett v.
Cobbett,
5 Dow. 301.

12 Vin. Abr.
229. pl. 5. The
King v. Nutt,
Hil. 2 G. 2. so
ruled on evi-
dence at
Guildhall
per Raymond
C. J. Fitzgib.
Barnard. K. B.

(*a*) The pro-
prietor of a
newspaper is

answerable, criminally as well as civilly, for the acts of his servants in the publication of a libel, although it can be shewn that such publication was without the privity of the proprietor.

Rex v. Walter, 5 Esp. N. P. C. 21.

(a) § 1.

(b) § 2.

(c) § 3.

(d) § 4.

(e) § 5.

(f) § 6.

(g) § 9.

in their papers, are much facilitated by the stat. 38 G. 3. c. 78., by which it is enacted (a), that no person shall print or publish any newspaper, until an affidavit (or affirmation, in case of a quaker,) shall have been delivered at the stamp-office, setting forth (b) the real and true names, additions, descriptions, and places of abode of the printer, publisher, and of all the proprietors, if they do not exceed two, exclusively of the printer and publisher; if they do, then of two of such proprietors, exclusively of the printer and publisher, specifying the amount of shares, the true description of the building wherein such paper is intended to be printed, and the title of such paper. If the proprietors exceed two (c), then two whose proportional shares in the property shall not be less than the proportional share of any other proprietor, exclusively of the printer and publisher, shall be named and described in the affidavit or affirmation. This affidavit or affirmation must be renewed as often as the printer, &c. shall change their abode or printing-office, or as often as the commissioners for stamp-duties shall require. (d) It must be signed by the parties making it (e), and be taken by a commissioner, or other person specially appointed by the commissioners. It must be sworn by all the parties (f) if they do not exceed four; if they do, then by four, who shall give notice to the other parties not swearing, under a penalty of 50*l*. Such affidavits or affirmations shall be filed (g), and the same, or certified copies thereof, shall in all proceedings, civil and criminal, touching any newspaper therein mentioned, be received as conclusive evidence of the truth of the matters contained in such affidavit, against the persons swearing, and against the proprietors named but not sworn, unless such persons shall have delivered to the commissioners, previously to the date of the newspaper in question, an affidavit or affirmation of their having ceased to be printers, &c. of such paper; and by the 11th section it is enacted, that after such affidavit shall be produced in evidence against the persons signing the same, &c., and after a newspaper shall be produced in evidence, intituled in the same manner as the newspaper mentioned in such affidavit, and wherein the name of the printer and publisher, and place of printing shall be the same, it shall not be necessary for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to prove that the newspaper to which such trial relates was purchased at any house, &c., belonging to or occupied by the defendants or their servants, &c., or where they usually carry on the business of printing or publishing such paper, or where the same is usually sold.

(h) Rex v. Hart, 10 East, 94. See also Rex v. White, 3 Campb. 100.

The affidavit, together with the production of a newspaper corresponding in every respect with the description of it in the affidavit (h), is not only evidence of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be. By the 13th section, certified copies of such affidavits, &c. shall be delivered by the commissioners, or proper officer, on payment of

of 1s. A copy of such affidavit, &c., certified to be a true copy under the hands of the commissioners or proper officer, shall, on the proof of handwriting only, without proving the person signing to be a commissioner or officer, be proof of the swearing or affirmation and contents, and that it has been sworn or affirmed according to the statute. Every printer or publisher must (a), within six days after publication, deliver a copy of his paper, signed by himself or his publisher, with his name and place of abode, to the commissioner or other officer (b); and any person may apply for and shall obtain the same at any time within two years from the day of publication (on giving surety to return it), for the purpose of producing it in evidence in any proceeding, civil or criminal.||

(a) See s. 17. but see *Rex v. White*, 5 Campb. 100. (b) And the delivery of a newspaper at the stamp-office is a sufficient publication to sustain an indictment for a libel in that paper. *Rex v. Amphlet*, 4 Barn. & C. 35.

The reading of a libel in the presence of another without knowing it before to be a libel, or the laughing at a libel read by another, or the saying that such a libel is made of *J. S.*, whether spoken with or without malice, amounts not to a publication of it.

|| And a person who, having a copy of a libellous caricature, shews it to another, on being requested so to do, is not thereby liable to an action for maliciously publishing.||

Smith v. Wood, 3 Camp. 323.

Also, it is held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is no way punishable: but of this *Hawkins* makes a doubt, for that jests of this kind are not to be endured, and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it. (c)

Moor, 627. *Hawk. P. C.* c. 75. § 14. || (c) Malice in common acceptance means ill will against a per-

son, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. *Per Bayley J.* in *Bromage v. Prosser*, 4 Barn. & C. 255. And "the man who publishes" slanderous matter calculated to defame another, must be presumed to have intended to do "that which the publication is calculated to bring about, unless he can shew the contrary; and it is for him to shew the contrary." *Per Lord Tenterden C. J.* in *Rex v. Harvey*, 2 Barn. & C. 257.||

But it seems to be agreed, if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it.

Moor, 813. 9 Co. 59. *Hawk. P. C.* c. 75. § 10.

It is said by my Lord *Coke*, in the case *de libellis famosis*, to have been resolved, that if one finds a libel (and would keep himself out of danger), if it be composed against a private man, the finder may either burn it, or presently (d) deliver it to a magistrate; but if it concern a magistrate, or other public person, the finder ought presently to deliver it to a magistrate, to the intent that by examination and industry the author may be found out and punished.

5 Co. 125. 15 Vin. Abr. 88. pl. 5. (d) But it has been since said, that the not delivering it to a magistrate was only punishable in

the Star-chamber, and that the bare having a libel in one's custody was no offence. 1 Vent. 31. —But *vide* 2 Salk. 418. Carth. 409, 410. 12 Mod. 220. *Ld. Raym.* 417. where it is said to be evidence of his being the author or publisher.

It seems to be a matter of doubt, whether the sending an abusive letter, filled with provoking language, to another, will bear

4 Inst. 180. 5 Inst. 174. *Hob.* 62. 215.

12 Co. 54.
Poph. 136.
Raym. 201.
Mod. 58.
Sid. 444.
Lev. 139. 240.
Keb. 931.
Skin. 123.
pl. 2.
((a) But de-

cided by Lord *Kenyon* C.J., in *Phillips v. Jansen*, 2 Esp. 625., not to be a sufficient publication to ground an action; and see *Rex v. Wegener*, 2 Stark. 245. It might be otherwise if the defendant knew that the letter would be opened by a third person. *Delacroix v. Thevenot*, 2 Stark. 65. (b) In *The King v. Burdett*, 3 Barn. & A. 717., and 4 Barn. & A. 95., it was mooted, but any decision on the point became unnecessary, Whether the composing and writing a libel with intent to publish, but not followed by publication, be an offence. So that the point made in the text still remains open; and see *Rex v. Rosenstein*, 2 Carr. & P. 416.]]

The King v. Pillborough,
Mich. 5 G. 2.
in *B. R.*
2 Barnard.
K. B. 102.
2 Kel. 58.
Pl. 2. [[And
see *Phillips v. Jansen*, 2 Esp.
624. But an allegation that a letter was written with intent to injure the prosecutor in his
profession cannot be supported if the letter were sent only to the prosecutor. *Rex v. Wegener*,
1 Stark. 545.]]

Sand. 133.
Lev. 240.
Sid. 414.
Keb. 832.

Hawk. P.
C. 75. § 15.
and the autho-
rities *supra*.
Vide Hardr.
470. [[And
see *Rex v. Wright*,
8 T. R. 293.]]

Rex v. Creevey,
1 Maul. & S.
273. *Rex v. Lord Abingdon*, 1 Esp. Ca. 226.

Rex v. Middleton,
1 Str. 77.

(b) 3 Barn. &
A. 717. and
4 Barn. & A.
95. See also
2 Stark. on Ev.
tit. Libel, 855.

bear an action as for a libel, because here is no publication. (a) But it seems to be clearly agreed, that the sending such letter, without other publication, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and causes a disturbance of the public peace; and if the bare making of a libel be an offence, whether it be published or not, as it seemeth to be holden (b), surely the sending of it to the party reflected on must be a much greater crime.

And on this foundation the Court of King's Bench granted an information against a person for sending an abusive letter to Mr. *Barnardiston*, therein calling him rascal and fool; although he swore that he wrote this to the party himself, and never made it public, being only a piece of private resentment. But the court held, that this method provoked persons to duelling; that the writing and sending was a good publication, and that the intent of the party shall not be explained by himself.

If one deliver a paper full of reflections on any person, in nature of a petition to a committee of parliament, to any other persons except the members of parliament, he may be punished as the publisher of a libel, in respect of such dispersing thereof among those who have nothing to do with it.

But it hath been held, that the bare printing of a petition to a committee of parliament, (which would be a libel against the party complained of, if it were made for any other purpose than as a complaint in a court of justice,) and delivering copies thereof to the members of the committee, shall not be looked upon as the publication of a libel, inasmuch as it is justified by the order and course of proceedings in parliament, whereof the king's courts will take judicial notice.

[[But a member of parliament is answerable civilly and criminally for a libel, if he publish a speech delivered in parliament containing libellous matter, though the publication be a correct report of the speech.]]

[If a man sends a libel to *London* to be published, it is his act in *London*, if the publication be there.]

[[In the recent case of *The King v. Burdett* (b), in which the question of what shall amount to a publication was fully discussed, the court (*dub. Bayley J.*) held, 1st, That a defendant writing and composing a libel in one county with intent to publish and afterwards publishing it in another, may be indicted in either;

either; and, 2d, That a delivery of a sealed letter containing a libel at the post-office is a publication there.||

(C) *The Offenders how punished.*

THERE can be no doubt but that a person who writes or publishes a libel is subject to the action (a) of the party injured, in which damages shall be recovered; and that being convicted on an indictment or information, he shall pay such fine, and also suffer such corporal punishment, as to the court in discretion shall seem proper, according to the heinousness of the crime, and the circumstances of the offender. (b)

Cro. Car. 175.— (a) In an action for a libel, it must be laid to be of and concerning the plaintiff.
Lowfield v.

Bancroft, P. 5 Geo. 2. Stra. 934. (b) A libeller may be fined and bound to his good behaviour, on his confession in court. Rex v. Middleton, 9 Geo. Fort. 201. At common law, on conviction upon indictment, he may be fined and imprisoned, according to the nature of the offence. 5 Co. 125. 3 Inst. 174. Cro. Car. 175. 504., or may be put in the pillory. 5 Co. 125. b. ||The punishment of the pillory is now in the case of libel taken away, by 56 Geo. 3. c. 138.||

|| And by 60 G. 3. c. 8., passed for the more effectual prevention and punishment of blasphemous and seditious libels, a person offending a second time after the passing of this act, and thereof lawfully convicted before any commission of *oyer* and *terminer* or gaol delivery, or in the Court of King's Bench, may on such second conviction be adjudged, at the discretion of the court, either to suffer such punishment as might at the passing of the act be inflicted in cases of high misdemeanor, or to be banished from the united kingdom, and all other parts of his majesty's dominions, for such term of years as the court in which such conviction shall take place shall order.

And in case he shall not depart the kingdom within thirty days after the pronouncing of sentence against him, for the purpose of going into banishment in pursuance of it, the king may, by and with the advice of his privy council, convey him to parts out of his dominions; and if after the end of forty days from the time that sentence was pronounced against him he be at large within any part of the united kingdom, or any other part of his majesty's dominions, without some lawful cause, before the expiration of the term for which he shall have been banished, and be thereof lawfully convicted, he shall be transported to such place as shall be appointed by his majesty, for any term not exceeding fourteen years, and he may for such offence be either tried before any justices of assize, &c. for the county, city, borough, or place where he shall be apprehended, or in the county, &c. in which he was sentenced to banishment.

This act does not extend to *Scotland*.||

Sect. 10.

(D) *Of the Pleadings and Evidence.*

IN declaring on a libel no unnecessary averment should be introduced, and regard must be paid to the libel itself, which is admissible as proof of all that is positively averred or stated therein (c): if separate passages of it are to be set out in one

(c) Jones v. Stevens, 11 Price, 235. Buckingham v. Murray,

2 Carr. & P. 46. count of the declaration, they should be described as separate and distinct parts (*a*); and if it be written in a foreign language, it must be so set forth; a translation of it will not be sufficient (*b*); for, independently of the different meanings which different translators might give to particular words, the law requires the very words of the libel to be set out in the declaration, in order that the court before whom it is brought may see whether it be a libel or not. Therefore to state that a defendant published a libel containing false and scandalous matter of and concerning the plaintiff, "in substance as follows:" and then proceeding to set out the libellous matter with innuendoes, would be bad. (*c*) The word "tenor" binds the party to set out the very words. (*d*)

(*a*) Tabart v. Tipper, 1 Camp. 352. (*b*) Zenobio v. Axtel, 6 T.R. 162. (*c*) Wright v. Clements, 5 Barn. & A. 503. See also Lord Ellenborough's judgment in Cook v. Cox, 9 Maul. & S. 116. Maitland v. Goldney, 2 East, 426. Wood v. Brown, 6 Taunt. 169. S.C. 1 Marsh. 522. Bell v. Byrne, 13 East, 554. Cartwright v. Wright, 5 Barn. & A. 615. Craft v. Boite, 1 Saund. 242. note (*a*). And see Rex v. Burdett, 4 Barn. & A. 314. (*d*) 1 Saund. 121. 5 Barn. & A. 503.

(*e*) See judgment of *De Grey* C. J. Rex v. Horne, Cowp. 684. Hawkes v. Hawkey, 8 East, 427. The office of an innuendo is to explain the natural meaning of the words of a libel, and not to extend what has gone before (*e*); and where the words are not necessarily actionable in themselves, but the inducement makes them so by stating facts to which the libel alludes, the libel as stated must be connected with that inducement. (*g*)

Goldstein v. Foss, 6 Barn. & C. 159. Rex v. Burdett, 4 Barn. & A. 314. (*g*) See Holt v. Scholefield, 6 T.R. 691., and Goldstein v. Foss, *ut supra*. Clement v. Fisher, 7 Barn. & C. 459.

(*h*) See Craft v. Boite, 1 Saund. 242. a. note (2). A declaration must shew a malicious intent in the defendant, though it is not necessary to use the word *maliciously*, for the word *falsely* alone has been held to be sufficiently expressive of a malicious intent. (*h*)

(*i*) Rex v. Burke, 7 T.R. 4. But an indictment or information for a libel need not allege that the libellous matter is false, nor charge the offence to have been committed *vi et armis*. (*i*) The charge in an information should be of an intention to excite the prosecutor to a breach of the peace. Rex v. Wegener, 1 Stark. 543.

(*k*) J'Anson v. Stuart, 1 T.R. 748. Holmes v. Catesby, 1 Taunt. 543. Lane v. Howman, 1 Price, 76. In an action for a libel imputing misconduct, if the defendant seeks to justify, he must in his pleas state the particular instances of misconduct (*k*), and shew a sufficient justification for publishing the libellous matter (*l*); but, however insufficient his plea may be, the plaintiff cannot *at the trial* object to its insufficiency, for he ought to have demurred to it, and if the plea be proved, the defendant will be entitled to a verdict upon it. (*m*)

Carr v. Jones, 3 Smith, 491.; and see Jones v. Stevens, 11 Price, 325. Duncan v. Thwaites, 3 Barn. & C. 556. S.C. 5 Dow. & Ry. 447. (*l*) Oliver v. Bentinck, 3 Taunt. 456. (*m*) Edmonds v. Walter, 3 Stark. 7.

(*n*) What is a publication, see *ante*, (B) 2. and 2 Stark. on Ev. tit. Libel. Before a libel can be read in evidence, proof must be given that it was published by the defendant (*n*); and formerly, on the trial of an indictment for a libel, the only questions for the jury were the fact of publishing, and the truth of the innuendoes (*o*); but now, by the statute 32 Geo. 3. c. 60., the jury are empowered in indictments on informations for libel to give a general verdict on

on the whole matter, and the judge shall not require them to find the defendant guilty merely on the proof of publishing, and on the sense ascribed to the supposed libel in such complaint or information. (a)

3 T. R. 428. (a) See *Rex v. Burdett*, 4 Barn. & A. 95. as to what is a correct mode of leaving the question to the jury under this statute.

If the libel be contained in a newspaper, the defendant has a right to have read in evidence any extract from the same paper connected with the subject of the passage charged as libellous, although disjoined from it by extraneous matter and printed in a different character.

112. *Mullett v. Hulton*, 4 Esp. 248. *Weaver v. Lloyd*, 1

As a defendant cannot on the general issue give evidence of the truth of the libellous matter in mitigation of damages (b); so neither can the plaintiff go into evidence to shew that the allegations in the libel are false. (c)

See further on the subject of evidence Mr. Starkie's 2d volume on the Law of Evidence, p. 844. tit. Libel; and see *ante*, (A) s. 5.

In an action for libel where the general issue and also justifications are pleaded, the defendant may either give at the outset all his evidence to rebut the justifications, or he may give it in reply after the defendant's evidence in justification; but he cannot give part at first, and reserve the remainder till after the defendant's case.||

St. Asaph (Dean), 5 T. R. 428. n. S. P. Rex v. Withers,

Rex v. Lambert, 2 Camp. 398., and see *Cook v. Hughes*, 1 Ry. & Moo. Carr. & P. 296.

(b) See *ante*, (A) s. 5. (c) *Stuart v. Lovell*, 2 Stark. 95.

Browne v. Murray, 1 Ry. & Moo. 254.

LIMITATION OF ACTIONS.

- (A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8. c. 2.
- (B) Of the Limitation of Real Actions, pursuant to 32 H. 8. c. 2. and 21 Jac. 1. c. 16.
- (C) Of the Limitation of Time in regard to Actions on Penal Statutes.
- (D) Of the Limitation of Time in regard to Personal Actions, pursuant to the 21 Jac. 1. c. 16.: And herein,
 1. Of Actions of Assault and Battery.
 2. Of Actions of Slander.
 3. Of Actions arising upon Contract and founded in Maleficio: And herein,

1. Of what Nature or Degree the Action must be so as to be barred by the Statute.
2. Whether a Trust or Equitable Demand be within the Statute.
3. At what Time the Right of Action shall be said to have accrued, before which the Statute can be no Bar.
4. In what Court the Demand must be made, or what Courts are bound by the Statute.

(E) Of the Exceptions in the Statute 21 Jac. 1. c. 16., and what will save a Bar thereof: And herein,

1. *What Actions are within the Savings of the Statutes.*
2. *Of the Exception in relation to Infants, &c.*
3. *Of the Exception in relation to Accounts between Merchants.*
4. *Of the Exception with relation to Persons beyond Sea.*
5. *Where no Executor or Administrator to sue or be sued.*
6. *Where no Jurisdiction to sue in, or where hindered by some Authority.*
7. *Where the suing out a Writ will save the Bar of the Statute.*
8. *Where a Debt barred by the Statute shall be said to be revived.*

(F) Of the Manner of pleading, and taking Advantage of the Statute of Limitations.

(A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8. c. 2.

IT seems that by the common law there was no stated or fixed time as to the bringing of actions; for though it be said by (a) *Bracton*, that *omnes actiones in mundo infra certa tempora limitationem habent*; yet my Lord *Coke* (b) says, that the limitation of actions was by force of divers acts of parliament; also, says he, this general position of *Bracton's* admitted of several exceptions.

But we find that by the ancient law there was a stated time for the heir of the tenant to claim after the death of his ancestor, else he lost his land, according to the feudal text, *Præterea si quis infeudatus major quatuordecim annis, sua incuria, vel negligentia, per ann. et diem steterit, quod feudi investituram a proprio domino non petierit, transacto hoc spatio, feudum amittat et ad dominum redeat.*

The fixing upon this period of a year and a day, upon several other occasions, seems to have been deduced from this ancient rule, and on this occasion was pitched upon because the services appointed seem to be annually computed; and therefore the feud

was

(a) *Bract. lib.*
2. fol. 228.
(b) 2 *Inst.* 95.
Co. Lit. 115.
4 *Co.* 10, 11.

Spelm. Gloss.
32.

Spelm. Gloss.
annus et dies,
32, 33.

was ordered to be taken up within such time as such annual services became due, else it was lost and returned to the lord. The same time that was appointed to the tenant to claim from the lord, was also appointed to make his claim upon any disseisor; and if no such claim was made, the disseisor, dying seised, cast the right of possession upon the heir. And this was to keep the same uniformity of time through the law; as also that the lord might be at a certainty who he might take for his tenant, and admit upon every descent; and since the heir of the tenant anciently lost the whole land, in case he did not take it up within time, it was fit the tenant should lose the right of possession in case he did not claim within the same time upon the disseisor, that the heir of such disseisor might be in peace, in case the person that had right did not make his claim upon him, and that from thenceforth the lord might receive him into his feud; and, as upon the ancient plan of the feudal constitution, if the heir did not take up the feud within a year and a day, a desertion and dereliction was presumed; so also, if the disseisee did not claim within the same time, the right of possession was relinquished.

Before the 32 H. 8. c. 2. certain remarkable periods were fixed upon within which the titles upon which men designed to be relieved must have accrued: thus in the time of H. 3., by the statute of Merton, c. 8., the limitation in a writ of right, which was then from the time of King Henry 1., by that statute is reduced to the time of King Henry 2.; and as to assizes of *Mortdaucestor*, they were thereby reduced from the last return of King John out of Ireland, which was 12 *Johannis*; and assizes of *novel disseisin*, a *prima transfretatione regis in Normaniam*, which was 5 Hen. 3., and which before that had been *post ultimum reditum Henric. 3. de Britannia*; and this limitation was also afterwards, by the statutes Westm. 1. c. 39. and Westm. 2. c. 46., reduced to a narrower compass, the writ of right being limited to the first coronation of Rich. 1.

But for the ancient limitations, *vide* Co. Lit. 114. b. 115. a. 1 Inst. 94, 95. 2 Roll. Abr. 111. Hale's Hist. of the Law, 122. 2 Keb. 45.

(B) Of the Limitation of Real Actions, pursuant to 32 H. 8. c. 2. and 21 Jac. 1. c. 16.

THE limitations above mentioned being, as hath been remarked, set periods, in process of time of necessity grew too large, whereby, as my Lord Coke observes, many suits, troubles, and inconveniences did arise; and therefore a more direct and commodious course was taken, which was to endure for ever, and calculated so to impose diligence on and vigilancy in him that was to bring his action, so that by one constant law certain limitations might serve both for the time present and for all times to come.

And this was effected by 32 H. 8. c. 2., by which it is enacted, " That no person shall from henceforth sue, have, or maintain any writ of right, or make any *prescription*, *title*, or *claim* to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments of the

2 Inst. 95.

“ possession of his or their ancestor or predecessor, and declare
 “ and allege any further seisin or possession of his or their an-
 “ cestor or predecessor, but only of the seisin or possession of
 “ his ancestor or predecessor, which hath been, or now is, or
 “ shall be seised of the said manors, lands, tenements, rents,
 “ annuities, commons, pensions, portions, corodies, or other he-
 “ reditaments, within *threescore* years next before the *teste* of the
 “ same writ, or next before the said prescription, title, or claim,
 “ so hereafter to be sued, commenced, brought, made, or had.”

And it is further enacted by the said statute, § 2. “ That no
 “ manner of person shall sue, have, or maintain any *assise* of
 “ *Mortdauncestor*, cosenage, ayle, writ of entry upon disseisin
 “ done to any of his ancestors or predecessors, or any other
 “ *action possessory* upon the possession of any of his ancestors or
 “ predecessors, for any manors, lands, tenements, or other he-
 “ reditaments, of any further seisin or possession of his or their
 “ ancestor or predecessor, but only of the seisin or possession
 “ of his or their ancestor or predecessor, which was or hereafter
 “ shall be seised of the same manors, lands, tenements, or other
 “ hereditaments, within *fifty* years next before the *teste* of the
 “ original of the same writ hereafter to be brought.”

And it is further enacted, by § 3. of the said statute, “ That
 “ no person shall sue, have, or maintain any *action* for any
 “ manors, lands, tenements, or other hereditaments, of or upon
 “ his or their *own seisin or possession* therein, above *thirty* years
 “ next before the *teste* of the original of the same writ hereafter
 “ to be brought.”

And further, by § 4. “ That no person shall hereafter make
 “ any *avowry* or *cognizance* for any rent, suit, or service, and al-
 “ lege any seisin of any rent, suit, or service in the same avowry
 “ or cognizance in the possession of any other, whose estate he
 “ shall pretend or claim to have, above *fifty* years next before
 “ the making of the said avowry or cognizance.”

And it is further enacted by the said statute, § 5. “ That all
 “ *formedons* in *reverter*, *formedons* in *remainder*, and *scire facias*
 “ upon *fines* of any manors, lands, tenements, or other heredita-
 “ ments, at any time hereafter to be sued, shall be sued and
 “ taken within *fifty* years next after the title and cause of action
 “ fallen, and at no time after the fifty years passed.”

Also by the said statute, § 6. it is enacted, “ That if any per-
 “ son do sue any of the said actions or writs for any manors,
 “ lands, tenements, or other hereditaments, or make any avowry,
 “ cognizance, prescription, title, or claim of or for any rent,
 “ suit, service, or other hereditaments, and cannot prove that he
 “ or they, or his or their ancestors or predecessors, were in actual
 “ possession or seisin of and in the same manors, lands, tene-
 “ ments, rents, suits, services, annuities, commons, pensions,
 “ portions, corodies, or other hereditaments, at any time or
 “ times (a) within the years before limited and appointed in this
 “ present act, and in manner and form as is aforesaid, if the
 “ same be traversed or denied by the party, plaintiff, demand-

“ ant,

(a) In 8 Co.
 65. the statute
 is recited thus:
 That no per-
 son or persons
 shall hereafter
 make any
 avowry or
 conusance for
 any rent, suit,
 or service in
 the same
 avowry or
 conusance, in
 the possession

“ant, or avowant, or by the party, tenant, or defendant; that
 “then, and after such trial therein had, all and every such per-
 “son and persons, and their heirs, shall from thenceforth be
 “utterly barred for ever of all and every the said writs, actions,
 “avowries, cognizance, prescription, title, or claim hereafter to
 “be sued, had, or made, of and for the same manors, lands,
 “tenements, hereditaments, or other the premises, or any part
 “of the same, for the which the same action, writ, avowry, cog-
 “nizance, prescription, title, or claim hereafter shall be at any
 “time had, sued, or made.”

of his or their
 ancestor or
 predecessor,
 &c. above
 forty years
 next before
 the making of
 the said avow-
 ry or conu-
 sance.
 [And so it is
 in Comyn's
 Digest, tit.

Temps. (G 3.). But Mr. Reeves states it to be *fifty* years. 4 Vol. 268.] ¶ And *fifty* years is the only period mentioned in Mr. Ruffhead's edition of the Statutes, and so in Runnington's edition, where it is said to be *fifty* in the record.]]

Note.—This statute hath the usual savings for infants, *femes covert*, persons in prison and beyond sea.

In the construction of this statute it hath been holden,

That in a (*a*) *formedon in reverter* or remainder, or on a *scire facias* on a fine of such nature, the demandant need not mention the statute in order to make out his title, but the tenant, if he would take advantage of it, must plead it.

Dyer, 315. b.
 pl. 101.
 (a) So in
 avowry for
 rent. Moor,
 Roll. Rep. 50.

31. pl. 102.

It hath been held, that this statute, being in restraint of the common law, ought to be construed strictly; and that therefore it does not extend to a *formedon in descender* (*b*)*, *cessavit*, nor *rescous*.

4 Co. 8. And.
 16. Lit. Rep.
 342.
 (b) Not to a
cessavit for

two reasons: 1. Because this writ is not comprised within the statute; 2. Because the seisin of services is not material nor traversable in this writ. Moor, 44, pl. 155. Whether it extends to a pension in the spiritual court, *vide* 3 Keb. 366. 392. Vent. 265. * See *infra*, the statute of 21 Jac. 1. c. 16.

¶ Nor does it extend to dignities, for as a dignity cannot be aliened, surrendered, or extinguished by the person possessed of it, neither can it be lost by the negligence of any person entitled thereto in not claiming it within a particular time.

Lords' Journ.
 vol. xxxi. 530.
 Cru. Dig. tit.
 26. c. 2.

But offices with fees and profits are within its intent and meaning.

Lords' Journ.
 vol. xxxvi.
 225.

So, this statute does not extend to a corporation aggregate, as mayor and commonalty, nor to a dean and chapter, for they do not count upon a seisin of any ancestor or predecessor, but upon their own possession. But it is otherwise with a corporation sole; for if a bishop or other sole corporation sue upon a seisin of his predecessor, he shall be barred if the seisin was not within sixty years.]]

Bro. Stat.
 Lim. 53.

If *A.* by deed indented make a feoffment in fee to *B.* and his heirs, rendering 10s. *per ann.* to *A.* and his heirs, of which rent *A.* or his heirs have not been seised within forty years, yet the heirs of *A.* may distrain, &c., for the statute must be intended in such cases (*d*) only where before the statute the avowant was obliged to allege a seisin; and that was where the seisin was so

8 Co. 64.
 Copper and
 Foster, ad-
 judged.
 Brownl. 169.
 S. C. [Mo.
 51. S. P.

material,

According to material, and of such force, that though it was by encroachment, Sir *W. Jones*, yet it could not be avoided in an avowry. this exemption

of rent should be understood with this qualification: that the *certainty* of the rent should appear in the deed; because otherwise the *quantum* or *quality* of the rent is no more ascertained by the deed than if there was not one existing. Therefore if the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over, without expressing what that is, and the latter rent not having commenced by deed is one, of which seisin is the proper proof; in such a case, seisin, as Sir *W. Jones* thought, is equally requisite to both rents, and, consequently, both ought to be equally deemed within the limitation of this statute. Sir *W. Jon.* 238.] (d) So, this statute extends not to a new rent created by act of parliament. Cro. Car. 80, 81. 214. Lit. Rep. 42. Hetl. 28. 36. Jon. 233. || But quit-rents, and other customary and prescriptive rights, are comprised within it. 1 Inst. 115. a. ||

2 Vern. 255.
Collins and
Goodall.

To a bill in Chancery, to be relieved touching a rent charged upon lands by a will, the defendant pleaded the statute of limitations, and that there had been no demand or payment in forty years; and it was held, that this statute concerns only customary rents between lord and tenant, and not any rent that commences by grant, or whereof the commencement may be shewn.

Co. Lit. 115. a.

2 Inst. 95.

4 Co. 10.

Bevil's case.

8 Co. 65.

9 Co. 36.

|| Bennet v.

King, 3 Lev.

21. || (a) But although homage, fealty, and escuage be out of the statute 32 H. 8. c. 2., yet are they within the ancient statute. 2 Inst. 96.

2 Inst. 96.

4 Co. 8 b.

Winch. 52.

Hutt. 52.

2 Roll. Rep.

392.

(b) That seisin

of a superior service is a seisin of all inferior services which are incident thereto. 4 Co. 8. b. So, seisin of fealty is a sufficient seisin of homage and escuage; for when the tenant does fealty, he swears to do all other services. 4 Co. 8. a. So, seisin of homage is a seisin of all other services, as well inferior as superior, because in the doing thereof the tenant takes upon himself to do all services. 4 Co. 8. But seisin of one annual service is no seisin of another annual service; for in that case it is the folly of the lord if he hath not an actual seisin of the other service itself, when it becomes due yearly. 4 Co. 9. a.

Bro. Stat.

Lim. 20, 21.

|| So this statute does not extend to actions in which seisin need not be alleged, as waste, for the land is not directly in demand, and the plaintiff does not declare of any seisin in it.

Bro. Stat.

Lim. 26.

Neither does it extend to annuity, for the plaintiff does not declare upon a seisin, but upon his grant. ||

[This statute, so far as regards *advowsons*, is no longer of any use; it being enacted by

By the 1 Mar. sess. 2. c. 5. § 4. it is enacted, " That the
" 32 H. 8. c. 2. shall not extend to any writ of right of advow-
" son, *quare impedit*, or assise of *darrein presentment*, nor *jure*
" *patronatus*, nor to any writ of right of ward, writ of ravishment
" of ward for the wardship of the body, or for the wardship of
" any castles, honours, manors, lands, tenements, or hereditaments

“ments holden by knight’s service, but that such suits may be brought as before the making the said act.” 7th Ann. c. 18. that no usurpation

shall displace the estate of the patron, and that he may present on the next avoidance, as if there had not been any usurpation; which provision, in effect, takes away all limitations of suits about the right of patronage.]

By the 21 Jac. 1. c. 16. for quieting men’s estates, and avoiding suits, it is enacted, “That all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*, at any time hereafter to be sued or brought of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of parliament; and after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements, or hereditaments; and that all writs of *formedon in descender*, *formedon in remainder*, *formedon in reverter*, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title, or cause hereafter happening, shall be sued and taken within *twenty* years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and that no person or persons that now hath any *right or title of entry* into any manors, lands, tenements, or hereditaments, now held from him or them, shall thereinto enter, but within *twenty* years next after the end of this present session of parliament, or within *twenty* years next after any other title of entry accrued; and that no person or persons shall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within *twenty* years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law, &c.

“Provided, That if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of one-and-twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas; that then such person and persons, and his, her, and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his or her action, or make his or her entry, as he or she might have done before this act, so as such person and persons, or his, her, or their heir and heirs, shall within *ten* years next after his, her, and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death(a), take benefit of and sue forth the same, and at no time after the said ten years.”

||(a) Where no account can be given of a person within the exceptions in this clause, he will be presumed to be dead at the expiration of seven years from the last account of him. *Per Lord Ellenborough in Doe dem. George v. Jesson*, 6 East, 84.||

(a) *Cotterell v. Dutton*, 4 Taunt. 826.; and see *Tolson v. Kaye*, 5 Bro. & B. 217. 6 B. Moo. 542. S. C. (b) 2 Prest. Ab. of Tit. 341. *Shep. Touchst.* 31. 3 Co. Litt. by Thomas, p. 18. note (L). *Dillon v. Le-man*, 2 H. Blac. 584. *Doe d. George v. Jes-son*, 6 East, 80.; and see *Blanshard on Lim.* 19. *et seq.*

|| In the construction of this saving clause it has been said (a), that if before one disability cease another commence in a *different* person, — as if a right of entry accrue to a *feme covert*, and she die, leaving her heir *within age*, or the like, — the statute does not begin to run until after the latter disability ceases; a contrary opinion, however, now prevails (b), and it seems settled that a person upon whom the right *first* descends, being under disability at the time of the right or title of entry descending upon him, has the benefit of successive disabilities in *his own person*, and may enter within the time given by the statute after the removal of his last disability; but that where the disabilities are in *different* persons, as where, like the above case, the right of entry descends upon a *feme covert*, and she die under coverture, leaving a son under age, the latter has not the time allowed by the saving clause after the removal of his own disability, but must enter within ten years from the death of his mother; for she was the person upon whom the right *first* descended, and her death terminated her coverture.||

In the construction of this statute it hath been holden,

Salk. 285. pl. 19. || *Ford v. Gray*,

That the possession of one joint-tenant is the possession of the other, so far as to prevent this statute.

6 Mod. 44. *Fisher v. Prosser*, Cowp. 218. *Fairelaim d. Empson v. Shackleton*, 2 W. Bl. 690.||

Roe v. Row-lin-ston, 2 Taunt. 441.

|| But although joint-tenants and coparceners have a seisin *per my et per tout*; yet if there be a disseisin of both, one of them may be barred by the statute, although it shall not have effect as a bar to the other.||

Salk. 285. pl. 19. (c) And by 4 & 5 Ann. c. 16. upon

That a (c) claim or entry to prevent the statute of limitations must be upon the land, unless there be some special reason to the contrary.

such claim or entry an action must be commenced within one year next after the making of such entry and claim, and prosecuted with effect, otherwise of no force to avoid the statute.

(d) *Clarke v. Pywell*, 1 Saund. 319. e. note; and see *Runn. Ejectm.* 2d edit. p. 251.

|| But an actual entry upon the lands claimed is not required to prevent the operation of the statute and support an ejectment (d), unless the claimant proceeds by ejectment or on a vacant possession (e), or where he is desirous of trying his title in a court of limited jurisdiction. (g)||

(e) *Savage v. Dent*, Stra. 1064. *Jones v. Marsh*, 4 T. R. 464.; and *Tidd's Pract.* 8th edit. 519. (g) *Rex v. Mayor of Bristol*, 1 Keb. 690. *Sherman v. Cooke*, 1 Keb. 795.

Lutw. 781. *Hunt and Bourn. Salk.* 339. pl. 5. 2 *Salk.* 422. pl. 7. S. C.; || and see *Plowd.* 368.||

That if a person be barred of his *formedon*, he is not thereby hindered to pursue his right of entry which afterwards accrues to him, no more than a person who has several remedies, and discharges one of them, is excluded thereby from pursuing the others.

2 *Salk.* 421. pl. 5. said to have been twice so ruled by *Holt*.

If *A.* has had possession of lands for twenty years without interruption, and then *B.* gets possession, upon which *A.* is put to his ejectment; though *A.* is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession;

session; because a possession for twenty years is like a descent which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment.

That if one tenant in common receives the whole profits for twenty years, or more, yet this does not bar his companion; for the statute of limitations never runs against a man but where he is actually ousted or disseised. Salk. 423. pl. 10.

|| It has, however, been ruled, that the possession of one tenant in common claiming the *whole*, and denying possession to the other, is evidence of an actual ouster of his companion. || Fisher v. Prosser, Cowp. 218. Doe dem. Hellings v. Bird, 11 East, 50.

It has been ruled that copyholds are within the statute of limitations, because an act made for the preservation of the public quiet, and no ways tending to the prejudice of the lord or tenant. Moor, 410. || Creach v. Wilmot, 2 Taunt. 160. Lyford v.

Coward, 1 Vern. 195. Knight v. Adamson, 2 Freem. 106. Widdowson v. Harrison, 1 Jac. & Walk. 532. ||

But ecclesiastical persons are not bound by any of the statutes of limitations, because it would be a side-wind to evade the statutes made to prohibit their alienations. (a) Comp. Incumb. 429. || Magdalen Col. Ca.

11 Rep. 78. b. 1 Roll. Rep. 151. Cru. Dig. tit. 31. c. 2. s. 46. (a) This position must be understood with this qualification: that though ecclesiastical persons cannot bar their successors by a neglect to bring actions for the recovery of their possessions within the times prescribed by these statutes, yet, by submitting to an adverse possession, they may themselves individually be barred. Croft v. Howel, Plowd. 358. Runcorn v. Cooper, 5 Barn. & C. 696. ||

[In the year 1772, an attempt was made to limit the claims of the church; but happily failed.]

Neither was the crown bound by any of these statutes, the ancient doctrine being *nullum tempus occurrit regi*. But by a late statute, the crown is barred from recovering any estate or hereditaments (other than liberties or franchises), where the title did not first accrue within the last sixty years. 9 Geo. 3. c. 16. § 1. 10. || This statute does not give a title to the first wrongful possessor, and

those claiming under him, but only bars the remedy of the crown against them after sixty years continuing adverse possession of them. Goodtitle dem. Parker v. Baldwin, 11 East, 488. ||

(C) *Of the Limitation of Time in regard to Actions on Penal Statutes.*

BY the 31 Eliz. c. 5. § 5. it is enacted, "That all actions, suits, bills, indictments, or informations, which shall be brought for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the *queen*, her heirs and successors *only*, shall be brought within *two* years after the offence committed, and not after two years; and that all actions, suits, bills, or informations, which shall be brought for any forfeiture upon any penal statute, made or to be made, except the statute of tillage, the benefit and suit whereof is or shall be by the said statute limited to the *queen*, her heirs or successors, and to any other that shall prosecute in that behalf, shall be brought by any person that may lawfully sue for the same

All popular actions were limited to a certain time by 7 H. 8. c. 3. which is repealed by this statute.

[(a) This statute extends to all actions brought upon penal statutes, whether made before or since the statute.

Barber v. Tilson, 3 Maul. & S. 436. ||

“ same within *one* year next after the offence committed ; and in
 “ default of such pursuit, that then the same shall be brought for
 “ the queen’s majesty, her heirs or successors, any time within
 “ the *two* years *after that year ended* ; and if any action, suit, bill,
 “ indictment, or information shall be brought after the time so
 “ limited, the same shall be void : And it is provided, that where
 “ a shorter time is limited by any penal statute, the prosecution
 “ must be within that time.” (a)

By the 18 Eliz. c. 5. § 1. it is enacted, “ That upon every in-
 “ formation that shall be exhibited on any penal statute, a spe-
 “ cial note shall be made of the very day, month, and year of the
 “ exhibiting thereof into any office, or to any officer which law-
 “ fully may receive the same, without any antedate thereof to
 “ be made ; and that the same information be accounted and
 “ taken to be of record from that day forward, and not before ; and
 “ that no process be sued out upon such information until the
 “ information be exhibited in form aforesaid, &c. and that every
 “ clerk making out process contrary to this act shall forfeit 40s.”

(b) It hath been adjudged, that if an officer receive an information without such previous oath, yet the proceedings on it are not erroneous. Cro. Car. 316. and

It is further enacted by 21 Jac. 1. c. 4. § 3. “ That no officer
 “ shall receive, file, or enter of record, any information, bill,
 “ plaint, count, or declaration, grounded on any penal statute
 “ (being within the provision of the said statute of 21 Jac. 1.), until
 “ the informer or relater hath first taken a (b) corporal oath be-
 “ fore some of the judges of the court, that he believes, in his
 “ conscience, the offence was committed within a year before
 “ the information or suit within the county where the said in-
 “ formation or suit was commenced,” &c.

vide 2 Inst. 192. 4 Inst. 272. But *quære*, whether motion will not set aside such process as having issued contrary to the directions of the statute ? Salk. 376. pl. 19. —* In actions the oath is not now used ; and *quære*, if in criminal prosecutions ? *

Salk. 372.
pl. 13.

5 Mod. 425.
|| Rex v. Gaul,
Salk. 372.
pl. 13.

Shipman v. Henbest, 4 T. R. 109. Barber v. Tilson, *per* Ld. Ellenborough C. J. 3 Maul. & S. 439. ||

Hob. 270.
4 Mod. 144.

In the construction of these statutes it hath been holden, that the 21 Jac. 1. c. 4. does not extend to any offence created since that statute ; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is to them, as it were, repealed *pro tanto*.

Cro. Car. 331.
Cro. Jac. 366.
and *vide* Dalis.
60.

That if an offence prohibited by any penal statute be also an offence at common law, the prosecution of it, as of an offence at common law, is no way restrained by any of these statutes.

That if an information *tam quam* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the king, it is nought only as to the informer, but good for the king.

Rex v. Hymen,
7 T. R. 536.

|| That where a statute creates a penalty, and says, that one moiety shall be to the use of the king, and the other to a common informer, the king may sue for the whole by an information filed in the King’s Bench by the attorney general, unless a common informer has commenced a *qui tam* suit for the penalty. ||

Show. Rep.
353. ; || and

That if a suit on a penal statute be brought after the time limited,

limited, the defendant need not plead the statute, but may take advantage of it on the general issue. (a) see Hodsdon v. Harridge, 2 Saund. 63.]]

(a) For the statute says the same shall be void; consequently, the party does not owe the penalty demanded, the informer, in such case, not having a right to demand the penalty.

That the party grieved is not within the restraint of these statutes, but may sue in the same manner as before. Cro. Eliz. 645. Noy, 71. 3 Leon. 237.

Show. Rep. 354. and Carth. 233. S. P. That where the penalty is given to the party alone, this is out of the statute 31 Eliz. c. 5.; but *per Holt*, if given to the king and party separately, it seems within the statute; but hereof the other judges doubted. *¶ Holt's* opinion seems, however, to be sound law, on the ground that the informer being bound, when the king is joined with him, ought with much greater reason to be bound when he sues by himself; in confirmation of his opinion see *Chance v. Adams*, 1 Ld. Raym. 78. *Tidd's Pract.* 8th ed. p. 13.]]

It seems doubtful, whether a suit by a common informer on a penal statute, which first gives an action to the party grieved, and in his default, after a certain time, to any one who will sue, be within the restraint of these statutes. (a) Show. 353, 354. *¶*(a) The court of C. P. has decided that

it is. *Frederick v. Lookup, qui tam*, §c. 4 Burr. 2018. Bull. N. P. 195.]]

It has been held by three judges, that the suing out a *latitat* within the year was a sufficient commencement of the suit to save the limitation of time on a penal statute, because the *latitat* is the original of *B. R.* and may be continued on record as an original. But *Holt* held otherwise, for the action being for a penalty given by a statute, the plaintiff might have brought an action of debt by original in *B. R.*, because the statute gives the action; and he held, that there was a difference between a civil action and an action given by statute; for in the first case the suing out a *latitat* within the time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceeds by bill, he ought to file his bill within time, that it may appear so to be upon the record itself. Carth. 232. Culliford v. Blandford, Show. Rep. 353. S. C. [Upon a writ of error, all the judges in the Exchequer chamber held, that a *latitat* is a kind of original in the King's Bench. 2 Ld. Raym. 835. Accordingly, in two]

subsequent cases, it was holden to be a good commencement of the suit in a penal action. *Bridges v. Knapton*, and *Hardiman v. Whitaker*, cited in 2 Burr. 950. 3 Burr. 1423. Cowp. 454. But if it be replied to a plea of the statute of limitations, the defendant, in order to maintain his plea, may aver the *real* time of suing it out, in opposition to the *teste*. 2 Burr. 950. 3 Burr. 1423.]

In debt *qui tam* on the statute 1 H. 5. c. 4. for practising as an attorney during the time he was under-sheriff, the point was on the 31 Eliz. c. 5. which limits informers and plaintiffs in popular actions to a year; the defendant in this case was taken upon a *testatum cap.* that bore *teste* 13 January, when his office expired in November twelvemonth before, and so a year and two months after his offence; but by antedating the original, and making it of *Mich.* term before, it was brought within the year; and *North* and *Wyndham* said it was well warranted by the practice of the court, and therefore they would make no rule to stop the filing of the original; but *Atkins* was against it, and said it was nothing but a practice to evade the statute of 31 Eliz. c. 5. (b) Trin. 3 Car. 2. in C. B. Greenwood v. Scott. *¶*(b) Such a proceeding as this, it is suggested, would not at the present day be allowed, but the court would enquire into the actual time of suing the writ.]]

Serjeant *Hawkins* makes it a question, Whether the clause in 31 Eliz. c. 5. § 4., by which it is enacted, *That nothing in the said act contained shall extend to champerty, king's customs, or forestalling, &c.* 2 Hawk. P. C. c. 26. § 50.

&c. but that every such offence may be laid in any county, any thing in the said act to the contrary notwithstanding, doth except the said offences out of the above-recited clause, relating to the time within which suits on penal statutes must be brought; for the words above mentioned, viz. but that every such offence may be laid in any county, seem to restrain the generality of the precedent words, which say, that nothing in the act contained shall extend to such offences.

(D) Of the Limitation of Time in regard to Personal Actions, pursuant to the 21 Jac. 1. c. 16.: And herein,

1. Of Actions of Assault and Battery.

BY the 21 Jac. 1. c. 16. "All actions of trespass, of assault, "battery, wounding, imprisonment, or any of them, shall be "commenced and sued within four years next after the cause of "such actions or suits, and not after."

Salk. 206. It seems, that if a man brings trespass for beating his servant,
pl. 5. *per quod servitium amisit*, this is not such an action as is within
5 Mod. 74. this branch of the statute, being founded on the special damage.
Ld. Raym. 851. ||but see *contrà*, *Cooke v. Sayer*, 2 Wils. 85. Bull. N. P. 128. *Macfadzen v. Olivant*, 6 East,
588. and *Blansh. on Lim. 95. et seq.*||

Lev. 51. If to an action of assault, battery, and imprisonment, the de-
(a) But the fendant pleads, as to the assault and imprisonment, the statute of
general form limitations, without answering particularly to the battery, other-
and best mode wise than by using the words *transgressio prædicta*, it is sufficient,
of pleading is for these words are an answer to the whole. (a)
to say, not guilty of the trespass aforesaid, &c.

2 Salk. 425. In trespass for assault and battery, the defendant pleaded *non*
pl. 11. *culp. infra sex annos* by mistake, and not according to the statute,
Blackmore which is but four years; and upon demurrer it was adjudged an
v. Tiddler, ill plea: for if it be considered as at common law, there was no
6 Mod. 240. such plea; if on the statute, the act is not pursued; and the de-
S. C. fendant could not take issue on it, for *quod est culp. infra sex annos*
2 Ld. Raym. is an issue immaterial, because it may be the jury might find him
1099. S. C. not guilty *infra quatuor annos*, but guilty *infra sex annos*.

2. Of Actions of Slander.

By the 21 Jac. 1. c. 16. § 3. it is enacted, "That all actions
"on the case for words shall be commenced and sued within two
"years next after the words spoken, and not after."

In the construction of this branch of the statute it hath been holden,

Lit. Rep. 342. That an action of *scandalum magnatum* is not within the
3 Keb. 645. statute.

||and see
2 Stark. Ev. 8 O. n. (g).||

Cro. Car. 141. That it extends not to actions for slander of title, for that is not

not properly slander, but a cause of damage, and the slander intended by the statute is to the person.

Law and Harwood, adjudged, S. C. adjudged.

Ley, 82. Palm. 550. Jon. 196.

That if the words are of themselves actionable, without the necessity of alleging special damage, although a loss ensues, yet in this case the statute of limitations is a good bar; but if the words at the time of the speaking of them are not actionable, but a subsequent loss ensues, which entitles the plaintiff to his action, in such case the statute is no bar.

Sid. 95. Saunders v. Edwards, Raym. 61. S. C. and *vide* 3 Mod. 111. S. C. cited.

As, for calling a woman whore, by which she lost her marriage seven years afterwards, the statute is no bar; for it is not the words, but the special damage, which is the cause of action in this case.

Sid. 95. Salk. 206. pl. 5. S. P. ||Tonson v.

Springe, 1 Rol. Abr. 35. l. 15.|| It was incumbent upon the plaintiff to prove the special damage; otherwise the action would not have lain for the words. ||And see Moore v. Meagher, in error, Exch. Ch. 1 Taunt. 59.||

Also, for calling a man thief, and procuring him to be indicted and imprisoned for felony, and the defendant is found guilty of the whole; the statute in this case seems no bar, for the action is not for words barely, but is an action upon the case in nature of a conspiracy.

Cro. Car. 163. Topsal and Edwards, adjudged on the branch of this statute that

says, that for slanderous words the plaintiff shall have no more costs than damages, &c.

That if an action for words be founded upon an indictment, or other matter of record, it is not within the statute, but such action may be brought at any time.

Sid. 95.

In an action for words, the defendant pleaded *non locutus est verba prædicta infra duos annos*; and upon a special demurrer it was objected, that it ought to have been *non culp. infra duos annos*; for, as it is, it may be the defendant spoke the substantial words of the slander, and yet did not speak all the words; and yet the plaintiff could not have a verdict upon this issue; as, in an action of debt for 10*l.*, if the defendant says *non debet* the 10*l.*, without adding *nec aliquem inde denarium*, it would be naught: but the court held the cases not alike; for in an action of debt, every penny that stands in demand is of equal weight; but here the action is founded upon the substantial words only, and the *verba prædicta* shall refer only to them; and it was held well enough.

Keb. 820. 918 Lidiate and Buttle.

3. *Of Actions arising upon Contract and founded in maleficio:* *And herein,*

1. Of what Nature or Degree the Action must be so as to be barred by the Statute.

By the 21 Jac. 1. c. 16. § 3. it is enacted, “ That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for the taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, Vol. V. Q “ cialty,

“cialty, all actions of debt for arrearages of rent, and all actions
 “of assault, menace, battery, wounding, and imprisonment, or any
 “of them, which shall be sued or brought at any time after the
 “end of the then session of parliament, shall be commenced and
 “sued within the time of limitation hereinafter expressed, and
 “not after; that is to say, the said actions upon the case, (other
 “than for slander,) and the said actions of account, and the said
 “actions for trespass, debt, detinue, and replevin for goods or
 “cattle, and the said action of trespass *quare clausum fregit*, with-
 “in three years next after the end of the then session of parlia-
 “ment, or within *six* years next after the cause of such actions
 “or suit, and not after; and the said actions of trespass, of
 “assault, battery, wounding, imprisonment, or any of them, with-
 “in one year next after the end of the then session of parliament,
 “or within *four* years next after the cause of such actions or suit,
 “and not after; and the said action upon the case for words,
 “within one year after the end of the then session of parliament,
 “or within *two* years next after the words spoken, and not
 “after.

“Nevertheless, that if in any the said actions or suits judg-
 “ment be given for the plaintiff, and the same be reversed by
 “error, or a verdict pass for the plaintiff, and upon matter al-
 “leged in arrest of judgment, the judgment be given against the
 “plaintiff, that he take nothing by his plaint, writ, or bill; or if
 “any the said actions shall be brought by original, and the de-
 “fendant therein be outlawed, and shall after (a) reverse the
 “outlawry, that in all such cases, the party plaintiff, his heirs,
 “executors, or administrators, as the case shall require, may
 “commence a new action or suit from time to time, within a year
 “after such judgment reversed, or such judgment given against
 “the plaintiff, or outlawry reversed, and not after.

(a) Whether reversed by plea or writ of error, not material, Cro. Car. 294, 5.

Winch.82. Jon. 312.

“*Provided*, that if any person or persons, that is or shall be
 “entitled to any such action of trespass, detinue, action *sur trover*,
 “replevin, actions of accounts, actions of debt, actions of
 “trespass for assault, menace, battery, wounding, or imprison-
 “ment, actions upon the case for words, be or shall be, at the
 “time of any such cause of action, given or accrued, fallen or
 “come, within the age of twenty-one years, *feme covert*, *non compos*,
 “imprisoned, or beyond the seas; that then such person
 “or persons shall be at liberty to bring the same actions, so as
 “they take the same within such times as are before limited,
 “after their coming to or being of full age, discover, of sane
 “memory, at large, and returned from beyond the seas, as other
 “persons having no such impediment should have done.”

(b) But though a bond or specialty be out of the statute, yet it seems to be the practice

Here we shall consider and set down such cases, about which there hath been any contest, as to the actions being grounded on a contract or lending, as the statute speaks; those by (b) specialty, as all others of a superior nature, being plainly excepted out of the statute.

at this day, where an action is brought on a bond of twenty years' standing, and on which no interest has been paid for that time, to admit the defendant on a plea of *solvit ad diem*, ||where interest

interest has been paid more than twenty years back, on the plea of *solvit post diem*,|| to give this matter in evidence, which, from the length of time, will be presumptive proof of payment. So, in Chancery, an obligee on a bond of twenty years' standing was refused any relief. Chan. Rep. 78. 88. 106. [Vide tit. Evidence.] ||And see Oswald v. Legh, 1 T. R. 270. Anon. 6 Mod. 22. A bond may also in some cases be presumed satisfied though twenty years have not elapsed. Rex v. Stephens, 1 Burr. 434. n. (a). Colsell v. Budd, 1 Camp. 26. 1 T. R. 272. Tidd's Pract. 8th ed. p. 18. This presumption is not confined to actions of debt on bond; but has been made after twenty years in an action of debt or *scire facias* on a judgment. Flower v. Bolingbroke, 1 Str. 639. Tidd's Pract. 18. And in a case where it appeared that the bond was not satisfied, the jury under the particular circumstances, and on account of the great lapse of time, presumed it to have been released. Washington v. Brymer, Hil. 42 G. 3. K. B. Peake's Evid. Blanshard on Lim. 93.||

And to this purpose it hath been adjudged, that an action of debt on the 2 & 3 E. 6. c. 13. for not setting out tithes, is not within the statute, the action being grounded on an act of parliament, which is the highest record.

Cro. Car. 513. Talory and Jackson, Sand. 38. 2 Saund. 66. Sid. 305. 415. Keb. 95. 2 Keb. 462.

||But by the statute 53 Geo. 3. c. 127. s. 5. "No action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action be brought, or such suit commenced, within six years from the time when such tithes became due."||

So, it hath been adjudged, that an action of debt for the arrearages of rent reserved on a lease by indenture, is out of the statute, the lease by indenture being equal to a specialty. Hutt. 109. Freeman and Stacy, Saund. 38. S. C. cited 2 Saund. 66. S. C. cited, and S. P. admitted; and there said, that the statute extends to rent reserved on parol leases only. ||And see Leigh v. Thornton, 1 Barn. & A. 625. Selw. Ni. Pri. 615. 2 Saund. 67. n. (z).||

Also it hath been adjudged, that an action of debt for an escape is not within the statute, not only because it is founded in *maleficio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute, but also because it is grounded on the 1 R. 2. c. 12. which first gave an action of debt for an escape (a), there being no remedy for creditors before but by action on the case. Saund. 37. Jones v. Pope, Lev. 191. S. C. adjudged. 2 Keb. 93. S. C. and Sid. 305. S. C. where it is said, that an action on the case, for an escape is within the statute; and by Wyndham, debt upon a tally is not within the statute. (a) For this vide 2 Inst. 383. and title *Escape*.

So, it hath been adjudged, that this statute cannot be pleaded to an action of debt brought against a sheriff for money by him levied on a *feri facias*, because the action is founded in *maleficio*, as also upon the judgment on which the *feri facias* issued, which is a matter of record. Mod. 245. Cockram v. Welby, 212. and 2 Show. Rep. 79. S. C. 2 Mod. 212. S. C.

It has been adjudged, that an action of debt on an award under the hand and seal of the arbitrator, though the submission was by parol, is not within the statute; for though in strictness the award cannot be said to be equal to a specialty, yet by being under hand and seal it becomes matter of that notoriety, that it cannot be liable to any of the inconveniences the statute was made to prevent; such as perjury in witnesses, and the oppression

pression of defendants when their witnesses are dead, or vouchers lost. Also, it was never intended that the statute should extend to all kinds of actions of debt, but only to those which arose on a *contract or lending*.

Hutt. 109.
Sherwin and
Cartwright,
Lit. Rep. 541.
S. C. adjudged.
Saund. 37.
2 Saund. 64.
S. C. cited, and
admitted to be
law. ||Arch.
pl. 29.||

It hath been adjudged, that the statute does not extend to the writ *de rationabili parte bonorum*, founded on the custom of *Nottingham*, although it conclude in the *detinet*; for this is an original writ in the register; and though it conclude in the *detinet*, is yet a different action to the common action of *detinue* mentioned in the statute, which being frequent in practice, is the *detinue* plainly intended by the statute, and not this, which, being founded on a custom, seldom happens; and as the statute is in derogation of the common law, it ought to be construed strictly.

2 Keb. 536.
Lev. 275.

An action of debt for a fine of a copyholder is not within the statute.

2 Vern. 540.
per curiam.
||(a) Judgments
in the superior
courts of *Ireland*, since the Union, have in a late case been decided *not* to be *records* in
England; therefore *assumpsit* is maintainable upon them. See *Harris v. Saunders*, 4 Barn. & C.
411. overruling *Collins v. Lord Matthew*, 5 East, 475.||

If a man recovers a judgment or sentence in *France* for money due to him, the debt must be considered here only as a debt by simple contract, and the statute of limitations will run upon it. (a)

2 Lev. 166.
3 Keb. 645.
Comb. 70.

It seems, that to an *assumpsit* brought by the assignees of a bankrupt for a debt due to the bankrupt, this statute is a good bar; for though the assignment is by force of an act of parliament, yet the assignees stand only in the place of the bankrupt, and can have no other right or remedy than he had.

3 Lev. 567.
Ld. Raym.
Oliver and
Thomas.

It hath been adjudged, that this statute is a good plea in bar to an *assumpsit* brought by an attorney for his fees; for though the attorney be of record, yet his fees are not.

Carth. 3.
Renew v.
Axton.
(b) Carth. 226.
judged.
||(c) Chevely v.
Bond, 4 Mod. Rep. 105.||

It hath been adjudged, that this statute is a good bar to an action brought against the drawer of a bill of exchange; and that such bill is not of as high a nature as a specialty (b), neither is it within the exception in the statute relating to merchants' accounts. (c)

2. Whether a Trust or Equitable Demand be within the Statute.

March, 129.
2 Salk. 224.
pl. 12. ||(d) But

It seems clearly agreed, that, though the statutes of limitations bind the courts of equity, yet a trust (d) is not within these statutes. (e)

the rule of equity, that the statute of limitations does not bar a *trust* estate, holds only as between *cestuy que trust*, and *trustees*, not between *cestuy que trust* and *trustee* on one side, and *strangers* on the other; for that would be to make the statute of no force at all; because there is hardly any estate of consequence without such trust, and so the act would never take place: therefore, where a *cestuy que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both. *Per Lord Hardwicke* in the case of *Llewellyn v. Mackworth*, 2 Eq. Ca. Abr. 579. pl. 8. See too *Townshend v. Townshend*, 1 Br. Ch. Rep. 534.] ||15 Vin. 155. pl. 1. and see 1 *Sander's Uses and Trusts*, 280., and *Cholmondeley v. Clinton*, 1 Meriv. 257. *et seq.* (c) This only applies to declared trusts, and not to cases where the trustee is appointed by the decree of a court of equity. 2 Scho. and Lef. 633. Com. Dig. Hardy, Lim. Stat. of, II. 5.||

And

And therefore, where the plaintiff, who was the son and executor of Ch. Just. *Heath*, who was made chief justice at *Oxon* during the difference between the king and parliament, but never sat at *Westminster-hall*, exhibited a bill against the defendants, prothonotaries of the *K. B.* at that time, to have an account of the money, &c. received by them during that time by an implied trust *virtute officii*, to which the defendants pleaded the statute of limitations, the plea was, upon argument, over-ruled.

So, where the plaintiff exhibited a bill to have an account of money received by the defendant from his father, (whose executor he was,) who gave it to him to compound for his estate, sequestered for delinquency at *Goldsmiths'-Hall*; it was ordered accordingly, the court declaring it a trust, and therefore not within the statute of limitations.

Chan. Ca.
20. Sir Edward Heath v. Henley, *et al.*
2 Ld. Raym.
1204.

2 Chan. Ca.
26. Sheldon v. Weldman.
|| Warner v. Conduit,
East. T. 6 G.2.
1753. M.S.

cited 2 Madd. Chan. 310. note (u).||

So, where my Lady *Hollis* lent 100*l.*, and in the note which was given for it mention was made, that it should be disposed of as my lady should direct; and a bill being exhibited for it, the court held it a *depositum* or trust, and decreed payment of it; though otherwise it had been barred by the statute of limitations.

2 Vent. 345.

A charity is not barred by length of time, nor within the statute of limitations.

2 Vern. 399.

|| The crown is not bound by the statute — and therefore in an action on a promissory note given by defendant to *J. S.* who was returned *felo de se* by a coroner's inquest, whereupon the note was forfeited to the crown, who granted it to the plaintiff, and the defendant pleaded that the cause of action did not accrue to *J. S.*, the *felo de se* within six years of exhibiting the bill, the plea was held bad after verdict, for it did not show that *J. S.* was barred by the statute at the time of his death; and after that time the statute ceased to operate, since the note vested in the crown. ||

Lambert v. Taylor, 4 Barn. & C. 158.

So, it hath been held, that a legacy is not within the statute of limitations.

|| But though the statutes of limitations do not expressly apply to legacies, yet courts of equity will, after a long lapse of time, presume payment, and twenty years unexplained seems by analogy to raise a presumption of payment, unless repelled by evidence of particular circumstances. (a) But if the legatee allege that he knew not of his right, it should seem that the presumption cannot be raised. (b) ||

(a) Jones v. Tuberville, 2 Ves. jun. 11. Higgins v. Crawford, 2 *ibid.*
571. Pickering v. Stamford,
2 Ves. jun. 272.
4 Bro. C. C. 214.

Montresor v. Williams, 1 Roper on Leg. 792.; and see *Lee v. Brown*, 4 Ves. 362. *Wills*, 316 n. (8). *Blanshard* on Lim. 79. (b) *Ord v. Smith*, Sel. Ca. Ch. II. and see 1 Fonblaque's Tr. Eq. 332. note (r).

362. Lovelass on and see 1 Fon-

It seems to be the doctrine of courts of equity, that mortgages are not within the statute of limitations; yet, where a man comes in at an old hand, it hath been sometimes decreed, that the possessor should account no farther than for the profits made in his own time, to discourage the stirring in such dormant titles. Also the courts have allowed length of time to be pleaded in bar, where the mortgaged estate hath descended as a fee without entry or claim from the mortgagor, and where the possessor

Chan. Ca. 102.
but now by the
7 Geo. 2. c. 20
the redemption of mortgages is expressly limited to 20 years, which *vide tit. Mortgages.* || This

would

seems a mistake, for the 7 Geo. 2. c. 20. entitled

would be entangled in a long account; and in these cases the statute of limitations hath been mentioned as a proper direction to go by.

"An Act for the more easy redemption and foreclosure of mortgages," does not even mention a limitation of time to equities of redemption: however, it is now settled, from analogy to the statute of *James*, in case of lands, that after twenty years a right of redemption will be presumed to be abandoned. See *Clapham v. Bowyer*, 1 Ch. Rep. 286. *White v. Ewer*, 2 Vent. 340. *Floyer v. Lavington*, 1 Peere Wms. 270. *Meldicot v. O'Donel*, 1 Ball & Beatty, 156. 1 Saunder's Uses and Trusts 281. || [And therefore, to a bill to redeem a mortgage, if the mortgagee has been in possession twenty years, the statute of limitations may be pleaded. *Aggas v. Pickerell*, 3 Atk. 225. And indeed a demurrer has been allowed in this case, where the possession has appeared upon the face of the bill, 5 P. Wms. 287. note B. 1 Vern. 418. *Bunb. 54.* though later cases seem to be to the contrary. *Aggas v. Pickerell*, *ubi supra*. *Deloraine v. Smith*, 5 Br. Ch. Rep. 634]. || See *Redesdale's Tr. Pl. 213.* 2d ed. *affirm.* Welsh mortgages are redeemable at any time, *Lawley v. Hooper*, 3 Atk. 280. But if a man be permitted to hold over twenty years after the debt is fully paid, Lord *Eldon* has said, "then such a holding may "I think amount to saying that he is barred, upon the same principle as if it were a mortgage of an ordinary nature." *Fenwick v. Reed*, 1 Mer. 125, and see 1 Madd. Chancery, 519. n. (x). ||

3. At what Time the Right of Action shall be said to have accrued, before which the Statute can be no Bar.

Godb. 437.
[*Fenton v. Emblers*, 1 Bl. Rep. 553.]
|| 1 Hen. Bl. 651.
Com. Dig.
Temps, G. 6.
Tidd's Pract. 8th ed. 16. ||

This statute cannot be a bar, unless the six years are expired after there hath been complete cause of action; as, if a man promise to pay 10*l.* to *J. S.* when he comes from *Rome*, or when he marries, and ten years after *J. S.* marry, or come from *Rome*, the right of action accrues from the happening of the contingency, from which time the statute shall be a bar, and not from the time of the promise.

Godb. 437.
Shutford v. Burroughs, adjudged.
|| 1 Hen. Bl. 651.
Tidd's Pract. 8th ed. 16. ||

So, in action on the case, wherein the plaintiff declared, that, in consideration that he would forbear to sue the defendant for some sheep killed by his (the defendant's) dog, the defendant promised to make him satisfaction upon request, and that such a time he requested, &c.; it was held, that the right of action accrued from the request, and not from the time of killing the sheep; and that therefore the defendant could not plead the statute of limitations, the request being within six years, though the killing the sheep, and promise of satisfaction, was long before.

Browne v. Howard, 2 Bro. & B. 73. Short v. McCarthy, 3 Barn. & A. 626. *Battley v. Faulkner*, 3 Barn. & A. 288. *Granger v. George*, 5 Barn. & C. 149. *Howell v. Young*, 5 Barn. & C. 259.

|| And where the breach of a contract is attended with special damage, the statute runs from the time of the breach, which is the gist of the action, and not from the time when it was discovered, or the damage arose. Thus, where plaintiff employed defendant in 1808, to lay out money for him in the purchase of an annuity; and discovered in *February* 1814, that the security provided by the defendant was void within the defendant's own knowledge at the time of the purchase, and in January 1820 sued defendant in *assumpsit*, for breach of an implied contract to provide good security; it was held, that the action proceeding on the contract, and not on the *fraud*, was too late, and the statute was a good bar. ||

Lev. 48. *Webb and Martin*. Sid. 66. *Keble*.

So, in *assumpsit*, in consideration that the plaintiff would deliver to the defendant such a deed, the defendant promised, that

that he would re-deliver it to him on request; and also in consideration that he had, upon request, delivered to him another deed, the defendant promised to pay him 40*l.*, and alleges, that he had delivered to him the first deed, and although at such a day afterwards he made request, yet he had not re-delivered the first deed, nor paid the 40*l.*: the defendant pleads the statute of limitations, and that he did not promise within six years before the action brought; whereupon the plaintiff demurs: for the cause of action, as to the first deed, did not arise upon the promise, but upon the refusal after request; and the request was within six years; and so held the court.

177. S. C.
|| In case of notes payable on or after demand, the statute runs from the time of demand, not from the date.
Holmes v. Kerrison,
2 Taunt. 323.
Thorpe v. Booth,
v. Booth,
1 Ry. & Moo. 538. ||

So, in *assumpsit*, in consideration that the plaintiff, at the defendant's request, would receive *A.* and *B.* into his house *ut hospites*, and diet them, the defendant promised, &c., *non assumpsit infra sex annos* was pleaded; the plaintiff demurred, and held no plea; for the defendant cannot in such case plead *non assumpsit infra sex annos* (*a*), but *actio non accrevit infra sex annos*; for it is not material when the promise was made, if the cause of action be within six years, and the dieting might be long afterwards.

2 Salk. 422.
pl. 9. 2 Ld. Raym. 838.
Gould and Johnson. [So, in equity.
5 Atk. 70.]
(a) For this vide 1 Vent. 191.
5 Keb. 613.

An executor, several years before the action brought, left some household stuff in the house, by the consent of the heir, who used them after; and within six years of the action brought, the executor demands the goods, and the heir refused to let him have them; whereupon trover was brought, and the statute of limitations pleaded. And *per cur.*, the user before the demand was no conversion, nor evidence of it, for it was the consent of the executor till then, and the demand being within six years, the refusal which ensued it, and is the only evidence of a conversion in the case, was within the six years; and (*b*) where a trover is before six years, and a conversion after, the statute cannot be pleaded.

7 Mod. 99.
Wortley Montague v. Lord Sandwich.
|| Compton v. Chandless,
4 Esp. N. P. R. 20.
Granger v. George, 5 Barn. & C. 149.
Topham v. Brad-dick, 1 Taunt. 572. And it appears now

to be fully settled that the statute does not begin to run until the happening of the last event necessary to complete the cause of action. See *Hibbert and others v. Martin*, 1 Camp. 559. ||
(b) But for this vide *Cro. Car.* 245-6. 335. *Jon.* 252. 3 Mod. 111.

In an action upon the case against an executor, the plaintiff declares, that upon a marriage treaty it was agreed between the plaintiff and testator, that he should pay to the plaintiff 100*l.*, and whilst that should be unpaid he should pay the plaintiff 10*l.* *per annum*, which agreement was made *anno* 1618, and the action was brought for all the arrears by the space of twenty-eight years. The defendant pleaded the statute of limitations; and on demurrer it was held, that all could not be barred by the statute; and therefore the plaintiff had judgment.

Allen, 62.
Harvey and Thorne, adjudged, nobody appearing for the defendant.

Trespass for imprisoning the plaintiff, and detaining him in prison from 32 Car. 2. till the third of April 4 Jac. 2. The defendant pleaded as to all till 32 Car. 2. such a day, *non culp. infra quatuor annos*, and as to the rest, a *plaint*, and *capias* issued; the plaintiff demurred. *Et per Curiam*, though the imprisonment be complained of as one continued imprisonment, yet the defendant may divide the time, and plead the statute as to

2 Salk. 420.
pl. 3.
Coventry v. Apsley, and vide 3 Mod. 110.
Comb. 26.

part; and the plaintiff may reply the continuance; therefore, as to this, judgment was given against the plaintiff upon his demurrer, but for him as to the rest, because the *capias* was awarded by the court *ex officio*, and it did not appear that the defendant meddled in it.

6 Mod. 26.

In case of seamen, the duty does not arise from the contract, but from the service done; and therefore, though the contract be above six years, if any part of the service be within that time, it is out of the statute.

Wittersheim
v. Countess
Dowager of
Carlisle,
1 H. Bl. Rep.
631. ||Holmes
v. Kerrison,
2 Taunt. 323.||

[A bill of exchange was drawn, payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill. The payee was allowed to recover the money on an action for money lent, although six years had elapsed since the time when the loan was advanced; the statute of limitations beginning to operate only from the time when the money was to be repaid, that is, when the bill became due.]

4. In what Court the Demand must be made, or what Courts are bound by the Statute.

March, 129.
2 Salk. 424.
pl. 15.

It is clearly agreed, that the statute of limitations is a good plea in a court of equity; but it seems the safest way for him who pleads it, in his answer, also to say, that he has paid the money; because, otherwise, the court supposes a trust between the plaintiff and defendant, and that the money is a *depositum* in the hands of the defendant for the benefit of the plaintiff; and the statute of limitations, as has been observed, does not reach trusts.

Gardner v.
Griffith,
2 P. Wms.
403.
Boteler v.
Allington,
3 Atk. 458.
||Redesd.
Tr. Pl. 2d ed.
p. 213.; and
see 2 Madd.
Chan. 311.||

[To a bill, on an equitable title to a presentation to a living, seeking to compel the defendant to resign, plenarty six months before the bill was filed may be pleaded in bar; the statute of *Westminster* the second being considered for this purpose as a statute of limitation, in bar of an equitable as well as of a legal demand. But if a *quare impedit* is brought before the six months are expired, though the bill is filed after, it may, in some cases, be a ground for the court to interfere, and, consequently, plenarty would not in such cases be pleadable in bar.

South Sea
Company v.
Wynmondsell,
5 P. Wms.
143.
||Redesd.

If a bill charges a fraud, and that the fraud was not discovered till within six years before the filing of the bill, the statute of limitations is not a good plea, unless the defendant denies the fraud, or avers that the fraud, if any, was discovered within six years before filing the bill.

Tr. Pl. 218. 2d edit.; see the case cited 2 Madd. Chan. 309. note (a), and *Clarke v. Copley*, 2 Cox, 173. || But even at law, fraud will not prevent the statute of limitations from operating, though discovered by the plaintiff within six years before the commencement, unless it can be shewn that the defendant was consant of it. *Bree v. Holbech*, Dougl. 655. || And now, at law, even if it can be shewn that the defendant was consant of it, it will not prevent the statute running from the time the breach of contract actually took place. See *Howel v. Young*, 5 Barn. & C. 259. and *ante*, p. 474. ||

Bicknell v.
Gough,
2 Atk. 558.

Upon a bill for discovery of a title, charging fraud, and praying possession, the statute of limitations alone is not a good plea to

to the discovery ; for the defendant must answer to the charge of fraud.]

¶ If, however, it appear that the circumstances of fraud imputed were known to the party, and that with such knowledge he has lain by a considerable time ; in such case, length of time may be objected, for otherwise the mere imputation of fraud might operate as a fraud, as the evidence might be lost by which the imputation might have been repelled.¶

Shelly v. Brewster, Rolls, T. 1795.
Weston v. Cartwright, Sel. Ca. Chan. 54. Fonbl.

Eq. 1. 550. note. ; and see Alden v. Gregory, 2 Eden, 280. Whalley v. Whalley, 1 Mer. 456.

[Although the statute of limitations is a bar in equity to the claim of a debt, it is not to a discovery when the debt became due ; for, if that is set forth, it will appear to the court whether the time limited by the statute is elapsed.

Mackworth v. Clifton, 2 Atk. 51.

The statute of limitations may be pleaded to a bill of revivor, if the proper representative does not proceed within six years after abatement of a suit, provided there has been no decree.]

Hollingshead's case, 1 P. Wms. 742.

But it seems to be agreed, that the statute of limitations is no plea in the court of Admiralty, or spiritual court, where they proceed according to their law, and in a matter in which they have consue.

6 Mod. 25,
26. 76.
2 Salk. 424.
pl. 12.
3 Keb. 366.
392.

Therefore it hath been agreed, that for a suit upon a contract *super altum mare*, no prohibition should go upon their refusal of a plea of the statute of limitations.

6 Mod. 26.

So, it has been held not to be pleadable to a proceeding in the spiritual court, *pro violenta manu injectione super clericum*, because the proceeding is *pro reformatione morum*, and not for damages.

2 Salk. 424.
pl. 12.

It has been doubted, whether, to a suit in the Admiralty for mariners' wages, this statute is a good plea ; because it is said, that this is a matter properly determinable at common law ; and the allowing the Admiralty jurisdiction therein, only a matter of indulgence.

2 Salk. 424.
pl. 12.
6 Mod. 25.

But this is now settled by the 4 & 5 Ann. c. 16., by which it is enacted, "That all suits and actions in the court of Admiralty for seamen's wages, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after."

[With respect to certain suits in the spiritual court, it is enacted by st. 27 G. 3. c. 44. that "no suit for defamatory words shall be commenced in any of the ecclesiastical courts, unless the same shall be commenced within six calendar months from the time when such defamatory words shall have been uttered." And by § 2. "no suit shall be commenced in any ecclesiastical court for fornication, or incontinence, or for striking or brawling in any church or churchyard, after the expiration of eight calendar months from the time when such offence shall have been committed."]

See Sec
19 of 11
abp's
regard
may of
Regd

(E) Of the Exceptions in the Statute 21 Jac. 1. c. 16. and what will save a Bar thereof : And herein,

1. *What Actions are within the Exceptions of the Statutes.*

Cro. Car.
245. 333.
2 Saund. 120.
2 Mod. 71.
Sid. 453.

Debt upon
escape is out

of the statute, Saund. 37.; but an action on the case for an escape is not. Sid. 305. So is debt for not setting out of tithes, for these are not grounded upon any contract. Cro. Car. 515. Hutt. 109. ¶ As has been shewn, *ante*, p. 226. actions for not setting out tithes must now by 53 G. 3. c. 127. s. 5. be brought within six years from the time when such tithes became due.¶

AS to this, it hath been adjudged, that the last proviso in the statute not only extends to those actions therein enumerated, but also to an *assumpsit*, though not mentioned, and to all other actions on the case, being of equal mischief, and plainly within the intention of the legislature.

2. *Of the Exception in relation to Infants, &c.*

Lev. 31.

As to this it hath been holden, that the statute being general, infants had been included, had they not been particularly excepted.

2 Saund.
121. a.

It hath been holden, that if an infant, during his infancy, by his guardian, brings an action, the defendant cannot plead the statute of limitations; although the cause of action accrued six years before, and the words of the statute are, *That after his coming of age, &c.*

Abr. Eq. 504.
Lockey v.
Lockey.

It hath been held in Chancery, that if one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, the statute of limitations is as much a bar to such a suit, as if he had brought an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust as, being a creature of the court of equity, the statute shall be no bar to; for he might have had his action of account against the defendant at law, and therefore no necessity to come into this court for the account; for the reason why bills for an account are brought here, is from the nature of the demand, and that the party may have a discovery of books, papers, and the party's oath, for the more easy taking of the account, which cannot be so well done at law. But if the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court.

Mallack v.
Galton,
3 P. Wms.
352.

Wych v. The
East India
Company,
3 P. Wms.
309.

¶ And in equity, the interest of infants is so far taken care of, that they are allowed a day after their full age before a decree of foreclosure is allowed to be made against them.

But if an executor, or administrator, or trustee for an infant neglect to sue within six years, the statute of limitations binds the infant.¶

3. *Of the Exception in relation to Merchants' Accounts.*

Jon. 401.

As to the exception relating to merchants, it hath been a matter

ter of much controversy, whether it extends to all actions and accounts relating to merchants and merchandize, or to actions of account open and current only, the words of the statute being, *That all actions of trespass, &c., all actions of account and upon the case, other than such accounts as concern the trade of merchants; so that by the words, other than such actions, not being said actions of account, it has been insisted that all actions concerning merchants are excepted.*

Cranch v. Kirkman, Peake's C. 164. Welford v. Liddell, 2 Ves. 400. Sir W. Jones, 401. ||

But it is now settled, that accounts open and current only are within the statute; and that therefore, if an account be stated and settled between merchant and merchant, and a sum certain agreed to be due to one of them, if in such case he to whom the money is due does not bring his action within the time limited, he is barred by the statute.

So, it hath been adjudged, that by the exception in the statute concerning merchants' accounts, no other actions are excepted but actions of account. (a)

exception in the statute applies also to *actions on the case*. See Webber v. Rep. by Williams, 127 b. note (7). ||

Also, it hath been adjudged, that bills of exchange for value received, are not such matters of account as are intended by the exception in the statute of limitations.

[But, though the exception in the statute is so far limited to transactions merely between merchant and merchant, that where there is no item of account at all within six years before the action brought, the plaintiff will be precluded, unless he can shew that the accounts were between merchant and merchant, &c.; yet a mutual account of any sort between a plaintiff and defendant, though neither of them of the description of merchant, for any item of which credit has been given within six years, is evidence of a promise to pay the balance, and will take the case out of the statute of limitations. But where all the items of an open, unliquidated account are on one side, the last item which happens to be within six years shall not draw after it those that are of longer standing.]

4. *Of the Exception in relation to Persons beyond Sea.*

It seems to have been agreed, that the exception as to persons being beyond sea, extends only where the creditors or plaintiffs are so absent, and not to debtors or defendants, because the first only are mentioned in the statute; and this construction hath the rather prevailed, because it was reputed the creditor's folly, that he did not file an original, and outlaw the debtor, which would have prevented the bar of the statute.

But as the creditor's being beyond sea is saved by the "21 Jac. 1. c. 16., so now by the 4 & 5 Ann. c. 16. it is enacted, "That if any person or persons, against whom there is or shall

2 Sand. 124.
125.
Lev. 287.
2 Keb. 622.
Lev. 298.
Vent. 90.
Mod. 70. 270.
2 Mod. 512.
2 Vern. 456.
|| Bull. N. P.
149, 150.
Jones, 401. ||

Vide the authorities supra.

Carth. 226.
||(a) The law is now taken to be, that the
Tivill, 2 Saund.

Carth. 226.

Catling v. Skoulding,
6 Term Rep. 189.
|| Cranch v. Kirkman, Peake's C. 164. and see Duff v. East India Company, 15 Ves. 198. Barber v. Barber, 18 Ves. 386. ||
Cotes v. Harris, Bull. N. P. 149.

Cro. Car. 245. 355.
Jon. 252.
Lev. 145.
3 Mod. 511.
2 Lutw. 950.
2 Salk. 420.
pl. 1.

Show. 98.
Carth. 136.

" be

“ be any cause or suit of action for seamen’s wages, or against
 “ whom there shall be any cause of action of trespass, detinue,
 “ action *sur trover*, or replevin, for taking away goods or chat-
 “ tels, or of action of account, or upon the case, or of debt
 “ grounded upon any lending or contract without specialty, of
 “ debt for arrearages of rent, of assault, menace, battery, wound-
 “ ing, and imprisonment, or any of them, be or shall be, at the
 “ time of any such cause or suit of action given or accrued,
 “ fallen or come, beyond the seas, that then such person or per-
 “ sons, who is or shall be entitled to any such suit or action,
 “ shall be at liberty to bring the said actions against such person
 “ and persons after their return from beyond the seas, within
 “ such times as are limited for the bringing of the said actions
 “ by the 21 Jac. 1. c. 16.”

Strithorst v.
 Græme, 2 Bl.
 Rep. 723.

[This exception is not confined to *Englishmen*, who may occa-
 sionally go beyond sea, but is general, and extends to foreigners,
 who are constantly resident abroad.]

King v.
 Walker, 1 Bl.
 Rep. 286.

As the statutes of 21 Jac. and 4 & 5 Ann. are both express,
 that the party to be excused must be *beyond sea*, of course *Scot-*
land is not included in the exception.

Smith v. Hill,
 1 Wils. 134.

|| See Lord
 Kenyon’s ob-
 servations in
 Doe dem.

Duroure v.
 Jones, 4 Term.

Rep. 311.; and see Doe dem. Griggs v. Shawe, mentioned in the note to Duroure v. Jones.||

Perry v. Jack-
 son, 4 Term.
 Rep. 510.

The absence of one of several co-plaintiffs will not prevent
 the statute of limitations from attaching, for it lays the others
 under no disability of suing.]

Williams v.
 Jones, 13 East,
 439.

|| If the cause of action accrue in *India*, and the plaintiff sues
 the defendant in *England* within six years after the defendant’s
 return to this country according to 4 Ann. c. 16. s. 19., the de-
 fendant cannot plead the statute of limitations, although more
 than six years elapsed in *India* after the cause of action accrued
 there; and although plaintiff might have sued in the courts
 there, which, by their charter, have the same jurisdiction in civil
 cases as the King’s Bench by the common law.||

5. Where no Executor or Administrator to sue or be sued.

Salk. 422. pl.

4. Curry v.
 Stephenson,
 Skin. 555. pl. 3.
 S. C. 4 Mod.

376. S. C.
 Carth. 335. S. C.
 in which last
 book it is said,
 that Holt was of

opinion, that the administrator should have six years from the time of granting administration,
 according to Stanford’s case, cited in Saffin’s case, Cro. Jac. 60, 61. but in the principal case there
 was judgment against the plaintiff on another point. [(a) Note: This statement of the facts of
 the

If *A.* receives money belonging to a person who (*a*) afterwards
 dies intestate, and to whom *B.* takes out administration, and
 brings an action against *A.*, to which he pleads the statute of li-
 mitations, and the plaintiff replies, and shews that administration
 was committed to him such a year, which was *infra sex annos* ;
 though six years are expired since the receipt of the money, yet
 not being so since the administration committed, the action is not
 barred by the statute.

the case of *Curry v. Stephenson* is incorrect. It appears from *Skinner's Report*, that the money was not received by *A.* until *after* the death of the intestate: so that, before administration was granted, there was no person who could claim it; and the statute begins to operate only from the time a right to demand the thing in question vests in some one. In *Stanford's* case the fine was not levied till *after* the death of the intestate. Had the money been received in the lifetime of the person who died intestate, that person would have had a right of action against *A.* vested in him, and from that period the time of limitation would have commenced; and the statute would have been a bar. For, when once the time of limitation has begun to run, it suffers no interruption from the death of the claimant, nor does it revive in favour of any person upon whom the right of claim may devolve.] || And see *Hickman v. Walker, Willes, 27.* *Murray v. East India Company, 5 Barn. & A. 204.*||

|| So, where a bill of exchange was drawn payable to the intestate in his life, but *accepted after* his death, in an action by the administrator against the acceptor, it was held, that the statute only began to run from the date of the letters of administration, for till that time there was no person capable of suing, and consequently no cause of action.||

Murray v. East India Company, 5 Barn. & A. 204; and see *Pratt v. Swaine, 285.*

8 Barn. & C.

It is said in general, that where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor. (a)

2 Salk. 424. pl. 15: (a) See *Stra. 907.* the next case.

But if an executor sues upon a promissory note to the testator, and dies before judgment, and six years from the original cause of action are actually expired, and the executor of the executor brings a new action in four years after the first executor's death, the statute of limitations shall be a bar to such action; for though the debt does not become irrecoverable by an abatement of the action after the six years elapsed by the plaintiff's death, yet the executor should make a recent prosecution, to which the clause in the statute, that provides a year after the reversal of a judgment, &c. may be a good direction; or shew that he came as early as he could, because there was a contest about the will, or right of administration; for the statute was made for the (b) benefit of defendants, to free them from actions when their witnesses were dead, or their vouchers lost.

Trin. 5 G. 2. Wilcox and Huggins, Barnard. K. B. 535. Fitzgib. 170. 2 Stra. 907. Hodsdon v. Harridge, 2 Saund. 63. h.; and see Blanshard on Lim. 110.|| (b) That the statute of limitations was one of the best of sta-

tutes, and the pleading thereof no disparagement to any body. *Per Holt C. J. 7 Mod. 12.* [It is a noble, beneficial act. *Per Wilmot J. 1 Bl. Rep. 287.* It is allowed to be pleaded in the courts both of C. P. and K. B. after an order for time to plead on the terms of pleading issuably. *Rucker v. Hannay, 5 Term. Rep. 124. Vide Studholme v. Hodgson, 2 Term. Rep. 390. contr.*]

[Where a statute for allotting waste lands within a manor directed all disputed claims to be tried by a feigned issue, and limited the time of bringing the action to six months; it was holden, that an action brought against a copyholder, within time, if abated by his death, must be revived against the heir within six months after the plaintiff had notice of the descent, though the heir were not admitted till long after that time.]

Knight v. Bate, Cowp. 738.

If there is no executor against whom the plaintiff may bring his action, he shall not be prejudiced by the statute of limitations, nor shall any laches in such case be imputed to him.

2 Vern. 695.

6. *Where no Jurisdiction to sue in, or where hindered by some Authority.*

Keb. 157.

Lev. 31. 111.

Carth. 137.

2 Salk. 420.

pl. 1. || Aubry

v. Fortescue,

10 Mod. 206. ||

(a) In Plow.

9. b. that things

happening

by an invinci-

ble necessity,

though they

be against the

common law,

or an act of parliament,

shall not be

prejudicial. —

Therefore to say the courts

were shut, is a good excuse,

on voucher of record. Bro. tit. Failure of Record. — So, in the

times of domestic war, when the courts of justice are shut, a descent shall not take away an

entry, though the disseisin was in times of peace; for then the disseisee would be without all

remedy, there being no courts open to bring his action in. Co. Lit. 249. (b) In some books

it is said, that the defendant rejoined, and set forth the act of oblivion, and that for confirmation

of judicial proceedings; and for this reason also the replication was held ill. Keb. 157.

Lev. 111.

3 Lev. 283.

It seems agreed, that there being no courts, or the courts of justice being shut, is no plea to avoid the bar of the statute of limitations; as, where after the civil war an *assumpsit* was brought and the defendant pleaded the statute of limitations; to which the plaintiff replied, that a civil war had broke out, and that the government was usurped by certain traitors and rebels, which hindered the course of justice, and by which the courts were (a) shut up, and that within six years after the war ended he commenced his action; this replication was held ill (b); for the statute being general, must work upon all cases which are not exempted by the exception.

Or an act of parliament, shall not be prejudicial. — Therefore to say the courts were shut, is a good excuse, on voucher of record. Bro. tit. Failure of Record. — So, in the times of domestic war, when the courts of justice are shut, a descent shall not take away an entry, though the disseisin was in times of peace; for then the disseisee would be without all remedy, there being no courts open to bring his action in. Co. Lit. 249. (b) In some books it is said, that the defendant rejoined, and set forth the act of oblivion, and that for confirmation of judicial proceedings; and for this reason also the replication was held ill. Keb. 157.

And in confirmation of this doctrine we find, that an act of parliament was made 1 W. & M. whereby it is enacted, that from the 10th of *December* (which was the day that King *James* departed, till the 12th of *March* 1688, when King *William* assumed the government) shall not be accounted any part of the time within which any person by virtue of the statute of limitations might bring his action; but that he shall have so much allowance of time as is from the 10th of *December* to the 12th of *March* for bringing his action.

Lev. 31. 111.

Carth. 136,

137.

It is clearly agreed, that the defendant's being a member of parliament, and entitled to privilege, will not save a bar of the statute; because the plaintiff might have filed an original without being guilty of any breach of privilege.

Vern. 73, 74.

But it seems,

that there

must be some

equitable cir-

cumstances

attending his

case; and

therefore in 2 Chan. Ca. 217. it is said, that unless the plaintiff was stayed by some act of the

court, as injunction, &c., the court will not interpose.

It is said, that if a man sues in Chancery, and, pending the suit there, the statute of limitations attaches on his demand, and his bill is afterwards dismissed, the matter being properly determinable at common law; in such case, the court will preserve the plaintiff's right, and will not suffer the statute to be pleaded in bar to his demand.

Sid. 228.

3 Keb. 263.

Beven and

Chapman,

Lev. 143. S.C.

but same point

does not ap-

pear. (c) The

plaintiff must

aver, that the cause of action in the court below, and that removed, is the same. Cro. Car.

294. But a difference in value is not material. Vent. 252.

If the statute of limitations be pleaded to an action, the plaintiff to save his action may reply, that he had commenced (c) the suit in an inferior court within the time of limitation, and that it was removed to *Westminster* by *habeas corpus*; and this shall be allowed by a favourable construction of the statute of limitations; although in strictness the suit is commenced in the court above, when it is removed by *habeas corpus*.

So, in a like case, where debt was brought in the Palace-court, and after some proceedings there, the six years expired, the defendant sued a *habeas corpus*, and removed the cause into *B. R.*, where the plaintiff declared *de novo*; and the defendant pleaded, that the cause of action did not accrue within six years before the *teste* of the *habeas corpus*; this was held to be a good plea; but that the plaintiff might reply the suit below, and shew that to have been within the six years; not that this suit was a continuance of the suit below, but that the plaintiff had rightfully and legally pursued his right; and it should not be in the power of the defendant to defeat or hinder him of a remedy without any default. (a)

¶ To a plea of the statute of limitations the plaintiff may also reply the fourth section of the stat. 21 Jac. c. 16., that heretofore he obtained a judgment which was reversed, and that he now sues within a year after the reversal; or that he obtained a verdict and judgment which was reversed, and that he now sues within a year after the reversal; or that he obtained a verdict and judgment which was arrested. So the plaintiff may say in his replication, that he sued out an original, upon which the defendant was outlawed, and the outlawry was afterwards avoided by plea or reversed on error, and he sued within a year afterwards.¶

7. *Where the Suing out a Writ will save the Bar of the Statute.*

It is clearly agreed, that the suing out an original will save a bar of the statute of limitations, and that thereupon the defendant may be outlawed; and that if beyond sea at the time of the outlawry, though it shall be reversed after his return, yet the plaintiff may bring another original by (b) *journies accounts*, and thereby take advantage of his first writ.

Also, it is agreed, that the suing out a *latitat* is a sufficient commencement of a suit, to save the limitation of time, because the *latitat* is the original of *B. R.* and may be continued on record as an original writ (c).

Ld. Raym. 1441. 2 Burr. 961. ¶ (c) But if a *latitat* be replied for part of the demand, it must be averred that the cause of action is the same. *Holloway v. Thurston*, 8 Mod. 109.¶

Also, it hath been ruled, that to a plea of the statute of limitations the plaintiff may reply, that he sued out a *latitat*, and continued it down by a *vicecomes non misit breve*, without concluding *prout patet per recordum*; for the *latitat* roll is only for the private use of the court, and no record.

¶ And where the replication to a plea of the statute of limitations set forth a writ returned, and continued down to the time of declaring, adding a *prout patet* at the conclusion; this averment was taken to refer to the first writ alleged to have been returned, as well as to the last.¶

Lister v. Jackson, Trin. Term. 8 Geo. 4.

So, it seems, the plaintiff may reply, that he sued out a *latitat* of such a term, without setting forth the day of the *teste*; and that

2 Salk. 424. pl. 15. *Matthews v. Phillips*.

(a) *Soofa* plaint in the sheriff of London's court. *Stra.* 719. *Lord Raym.* 1427.

Finche v. Lambe, Sir W. Jones, 312. *S. C.* Cro Car. 294. *Whitwick v. Hovendon*, 3 Lev. 245.

Carth. 136. *Salk.* 420. pl. 1. 3 Mod. 311. (b) For this vide *Lutw.* 260.

Sid. 53. 60. *Carth.* 233. *Salk.* 421. 1 *Str.* 550. 2 *Str.* 734.

2 Keb. 46. *Bottle and Wood*.

Harrington v. Taylor, 15 East, 378.; and so ruled in the Exchequer,

Style, 178. 2 Keb. 369. *S. C.* cited.

[But in this case, the defendant may in his rejoinder shew the true day on which the *latitat* was sued out, in opposition] to the *teste*. Johnson v. Smith, 2 Burr. 950.] ¶ And where a declaration is intituled generally the defendant may give evidence of the time when it was actually filed, in order to support the allegation in his plea, "that the cause of action did not accrue within six years next before the exhibiting of the plaintiff's bill." Granger v. George, 5 Barn. & C. 149.]

Carth. 144. But though the suing out of an original, or *latitat*, will be
2 Salk. 420. a sufficient commencement of a suit, yet the plaintiff, in order
pl. 2. Lutw. to make it effectual, must shew that he hath (a) continued the
101. 254. writ to the time of the action brought.
3 Mod. 33.

(a) That the attorney's writing the continuances on the writ in his chambers is sufficient, Sid. 53. Keb. 140. [The continuances, it seems, may be entered at any time. Bates *qui tam* v. Jenkinson, E. 24 G. 3. cited in 6 Term Rep. 618.] ¶ Beardmore v. Rattenbury, 5 Barn. & A. 452. But the first writ must be *duly returned* before the statute has run. Therefore, where *alias* and *pluries* writs had been sued out in 1812, 1813, against the plaintiff, and indorsed *non est inventus*, but had not been returned and filed until Trin. Term 1821, after which the roll had been carried in and continuances entered down to the term next preceding the date of a commission of bankruptcy issued against the plaintiff, in an action to try the validity of this commission, it was held that the continuances did not set up the writs so as to take the claim out of the statute, and make it a good petitioning creditor's debt. Gregory v. Hurrill, 5 Barn. & C. 541. overruling S. C. 1 Bing. 324. It has been held, that a suit regularly commenced within six years, and entered down in one court, prevents the debt being barred, so that it may be recovered in another court. Gregory v. Hurrill, 2 Brod. & B. 212.]

Carth. 144. As, in *assumpsit* for fees due to an attorney, the defendant
Rudd v. pleaded *non assumpsit infra sex annos*, the plaintiff replied, that
Berkenhead, on such a day two years before he had sued out an attachment of
2 Salk. 420. privilege against the defendant; upon which writ *taliter processum*
pl. 2. S. C. *fuit*, that the defendant (on such a day) in *Hilary* term *anno*
2 Will. &c. appeared, and the plaintiff declared against him *modo*
et forma, &c. And upon demurrer to this replication it was held
ill; because the plaintiff did not set forth any continuance of this
writ of attachment, (*per vic. non misit breve*,) which was sued out
two years before; for it is impossible that the defendant should
appear in *Hilary* term *anno* 2 Will. to a writ returnable two
years before, and no other writ is set forth by the plaintiff; but
if the plaintiff, after the *taliter processum fuit*, had shewn the last
attachment, and the return thereof, upon which, in truth, the
defendant did appear, it had been well enough without shewing
any of the continuances.

Salk. 421. An *indebitatus assumpsit* was laid several ways; the defendant
Green v. pleaded, *actio non, quia dicit quod billa predict. exhibit. fuit 20*
Rivett. *die Junii, et non antea, et quod ipse ad aliquod tempus infra sex*
annos ante exhibitionem billæ predict. non assumpsit, &c. The
plaintiff replied a bill of *Middlesex* tested *die Lunæ prox. post*
tres septimanas, &c. returnable the same day; whereupon was
returned *non est inventus*, and continued down by *vic. non misit*
breve et præcept. sicut alias. To this it was demurred, and judg-
ment given for defendant; for there cannot be such a bill of *Mid-*
dlesex as this, which is returnable the very day of the *teste*; and
the statute of limitations, on which the security of all men depends,
is to be favoured.

Smith v. [An attachment of privilege is not a continuance of a bill of
Bower, *Middlesex*.
5 Term. Rep.
662. Leadbeater v. Markland, 2 Bl. Rep. 1151.]

¶ But

¶ But it has been held that a bailable writ with an *ac etiam* clause is a sufficient continuance of a bill of *Middlesex* not bailable, and that the continuances need not be by *alias* and *pluries* writs.

Plummer v. Woodburne, 4 Barn. & C. 625.

So a plaintiff may reply a *capias*, without an original writ first sued out, to a plea of the statute of limitations, if it be duly returned, entered, and continued, as well as a *latitat*; for a *capias* is now considered to be the actual commencement of the suit in the Common Pleas.¶

Leader v. Moxon, 2 Blac. Rep. 925. 3 Wils. 461.

Although a suit actually commenced, though informally or irregularly, will have the effect of preventing the operation of the statute, yet the plaintiff must shew that the first writ was (a) returned; for until the return of the writ the court is not in possession of the cause.

(a) Harris v. Woolford, 6 Term Rep. 617. Bull. N. P. 151. Kinsey v. Hayward, Stratton v.

1 Lutw. 256. S. C. 1 Ld. Raym. 432. Brereton v. Moyse, 1 Lutw. 279, 280. Savignae, 3 Bos. & Pul. 330. S. P. Brown v. Babington, 2 Ld. Raym. Atwood v. Burr, 7 Mod. 5. Stanway v. Perry, 2 Bos. & Pul. 157. Weston v. Fournier, 14 East, 491. Gregory v. Hurrill, 5 Barn. & C. 341.¶

A bill may be filed against an attorney in the vacation, in order to prevent the statute from attaching.]

Lane v. Wheat, B. R. M. 23 Geo. 3.

Dougl. 313. n.; ¶ decided in Waghorne v. Fields, 5 Term Rep. 173., to be a general rule, and not merely an exception in the case of the statute of limitations.¶

¶ But where in an action against an attorney the plaintiff takes issue on the plea of the statute, and relies on the title of his bill, the defendant may shew by evidence that the bill was filed in the vacation after the term of which it is entitled. (b)¶

Snell v. Phillips, Peake's N. P. Ca. 275.

the practice, when a bill is filed in vacation, to insert the day of filing it in the memorandum. Dodsworth v. Bower, 5 Term Rep. 325. Mellor v. Walker, 2 Saund. 1 a. note (1).

(b) It is now

8. *Where a Debt barred by the Statute shall be said to be revived.*

It is clearly agreed, that if after the six years the debtor acknowledges the debt, and promises payment thereof, that this revives it, and brings it out of the statute; as, if a debtor by promissory note, or simple contract, promises within six years of the action brought that he will pay the debt; though this was barred by the statute, yet it is revived by the promise; for as the note itself was at first but an evidence of the debt, so that being barred, the acknowledgment and promise is a new evidence of the debt, and being proved, will maintain an *assumpsit* for recovery of it.

Salk. 28. pl. 16, 29, 19. Carth. 470. 5 Mod. 425, 426. 2 Show. 126. pl. 104. 2 Vent. 151. Hurst v. Parker, 1 Barn. & A. 93. Triggs v. & Payne, 631.¶

Newnham, 1 Carrington

Also, it hath been adjudged, that a conditional promise will revive a debt barred by the statute of limitation; as, where to an *assumpsit* by an executor for goods sold and delivered by the testator, the defendant pleaded the statute; and upon evidence it appeared, that the defendant within six years, being applied to by the executor for the debt, said, *If you prove that I had the goods, I will pay you*; which being fully proved at the trial, it was held that this conditional promise revived the debt; and that though made to the executor, after the death of the testator, it was sufficient to maintain the issue (c); because the promise did

Com. 53. S. C. Carth. 470. Heylin v. Hastings, Salk. 29. pl. 19. S. C. 5 Mod. 425. S. C. cited. (c) Where the plaintiff declared as executor, on a promise to the

testator, and the defendant pleaded *non assumpsit infra sex annos*; and upon the trial of the issue it appeared, that there was a new promise made within six years, but it was a promise made to the plaintiff himself, and not to the testator, it was held *per cur.* that he should have declared accordingly. Salk. 28. Dean v. Crane, 6 Mod. 309. S. C. [Bull. N. P. 150. S. C.] || Executors of the Duke of Marlborough v. Widmore, 2 Stra. 890. Ward v. Hunter, 6 Taunt. 210.]]

Carth. 470. So, it hath been held, that a bare (*b*) acknowledgment of the said to be so. debt within six years of the action, is sufficient to revive it, and held by all the judges in prevent the statute, though no new promise was made. (*c*)

Serjeants-Inn. (*b*) As, stating an account of the goods sold, March, 105, 106. — [And an acknowledgment of the debt even after the commencement of the action will take it out of the statute. Yea v. Fouraker, 2 Burr. 1099. What is an acknowledgment is matter for the consideration of a jury. Lloyd v. Maund, 2 Term Rep. 760. || Frost v. Bengough, 1 Bing. 266.]] But although a promise is not necessary to take the demand out of the statute, yet the declaration of the defendant must amount to an acknowledgment of a *debt*; and therefore, where a person sued by an executor said, "I acknowledge the receipt of the money, but the testatrix gave it me," *Clive* Baron, held it not sufficient. Owen v. Wolley, Bull. N. P. 148. || Craig v. Cox, Holt, N. P. 380. 4 Esp. Rep. 184. 5 Esp. 81. Bicknell v. Keppel, 1 New Rep. 20. So where the defendant promises to pay when he is able, the plaintiff must prove his ability to do so. Davies v. Smith, 4 Esp. 36. Scales v. Jacob, 3 Bing. 638. Ayton v. Bolt, 4 Bing. 105. 3 Dow. and Ry. 267. Tanner v. Smart, 6 Barn. & C. 605. And an acknowledgment to take a case out of the statute need not come from the debtor himself. Burt v. Palmer, 5 Esp. Rep. 145. Anderson v. Sanderson, 2 Stark. Rep. 204. S. C. Holt, 591. Gregory v. Parker, 1 Camp. 394. (*c*) But see 9 Geo. 4. c. 14. s. 1. and *post*.]]

2 Vent. 151. But if an *indebitatus assumpsit* for goods sold be brought Bland v. Haselrig, adjudged by three judges against *Ventris*, who inclined against four persons who plead the statute of limitations, and it be found that one of them promised within six years, there can be no judgment against him, for the contract being entire, it must be found that they all promised.

to the contrary; because the plea of *non assumpsit infra sex annos* implies a promise at first; and if one should renew his promise within six years, it is reasonable it should bind him; and the plaintiff must sue them all, else he will vary from the original contract. — [But it hath been lately determined, that the acknowledgment of one out of several drawers of a joint and several promissory note, will take it out of the statute as against the others, and may be given in evidence in a separate action against any of the others. Whitcombe v. Whiting, Dougl. 652. And if in such case one of the drawers becomes bankrupt, and the payee receives a dividend under the commission on account of the note, this payment of the dividend under the commission will amount to such an acknowledgment of the debt as will prevent any of the others from availing themselves of the statute of limitations in an action brought against them for the remainder of the money due on the note. Jackson v. Fairbank, 2 H. Bl. 340. — The case of Bland v. Haselrig in the text, Mr. Douglas observes, may be explained on the manner of the finding; for, as the plea was *joint*, and the declaration must have alleged a *joint undertaking*, the verdict did not find what the plaintiff had bound himself to prove. But, according to the principle in Whitcombe v. Whiting, the jury were to consider the promise of one as the promise of all, and therefore to find a general verdict against all. Dougl. 653. n.] || Since the above note was written, it has been decided that an acknowledgment by one of several drawers of a joint and several promissory note, must, to charge the others, be an express acknowledgment. Holme v. Green, 1 Stark. C. 489. Atkins v. Tredgold, 2 Barn. & C. 23. S. C. 3 Dow. & Ry. 200. And in the case of executors, Lord Tenterden C. J. in a case before him against two executors, both of whom had acknowledged, and one of them expressly promised to pay the debt within six years, nonsuited the plaintiff, saying, "I think as against an executor an acknowledgment merely is not sufficient to take the case out of the statute: there must be an express promise—the promise by one only is not enough to entitle the plaintiff to recover; there ought to be a promise by both." Tullock v. Dunn, 1 Ry. & Mood. 416. And see Brandram v. Wharton, 1 Barn. & A. 463. But a payment made by one of two makers of a joint joint.

joint and several note, operates as a promise to the full extent of the promise in the instrument, and consequently takes the note out of the statute as against the administrator of the other maker, who died after the payment made. *Burleigh v. Stott*, 8 Barn. & C. 36. recognizing *Whitcomb v. Whiting*, and *Jackson v. Fairbank*. And see *Perham v. Raynal*, 2 Bing. 306.; but see 9 Geo. 4. c. 14. § 1. *post.*||

|| Where the acknowledgment, to save the statute, is of a less sum than the one originally due, it seems that a jury would only find for the smaller sum acknowledged to be due. (a)

Collyer v. Willock, 4 Bing. 315. where the payment of the principal sum was held not to revive a claim for interest.

And now, by the 9 Geo. 4. c. 14. § 1., it is enacted, "That in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence (b) of a new or continuing contract, whereby to take any case out of the operation of the said enactments, [of the Eng. Act, 21 Jac. 1. c. 16; and the Irish Act, 10 Car. 1. sess. 2. c. 6.] or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment (c) of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

(a) *Shaddock v. Bennet*, 4 Barn. & C. 769, and see

(b) It has been held by Lord *Tenterden C.J.* (the author of this useful law), by *James Parke, J.*, and other judges, that it applies to acknowledgments made before the day when the act took effect, as well as to those made subsequently. See a different construction put on the statute of frauds as to agreements by Lord *Nottingham*, *Ash v. Abdy*, 3 Swanst. R. 664. and *Gilmore v. Shooter*, 2 Mod. 310.

(c) But *query*, whether such payment can now be proved by the parol admission of the party?

And by the 3d sect. of the same statute it is further enacted, "That no indorsement or memorandum of any payment written or made after the time appointed for this act to take effect (d), upon any promissory note, bill of exchange, or other writing by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes." (e)

(d) 1st January, 1829.

(e) 21 Jac. 1. c. 16. and 10 Car. 1. sess. 2. c. 6.

And by sect. 4. it is further enacted, "That the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off

“ on the part of any defendant, either by plea, notice, or otherwise.”

Salk. 154.

pl. 3.

2 Vern. 141.

[See, as to

this point,

Blakeway v.

Earl of Straff-

ford, 2 P.

It seems to be the doctrine of the courts of equity, that if a man by will or deed subject his lands to the payment of his debts, debts barred by the statute of limitations shall be paid, for they are debts in equity, and the duty remains; and the statute hath not extinguished that, though it hath taken away the remedy.

Wms. 375. Andrews v. Brown, Pr. Ch. 385. Jones v. Earl of Strafford, 3 P. Wms. 77.

Vaughan v. Guy, Mos. 245. Legastick v. Cowne, *id.* 391. Lacon v. Briggs, 3 Atk. 107.

Truman v. Fenton, Cowp. 548. Oughterlony v. Earl of Powis, Ambl. 231.]

Burke v.

Jones, 2 Ves.

& B. 275.

Lovell on

Wills, p. 313, note (7), 11th ed. by Mr. Gow.

¶ However, it is now settled that a devise in trust for payment of debts will not revive a debt upon which the statute of limitations has taken effect *before* the testator's death.

Hughes v.

Wynne, Turn.

& Russ.

307.

But when a debt is not barred at the death of the testator by the statute, time does not run in equity after his death.¶

Abr. Eq. 305.

Andrews v.

Brown.

Also it hath been ruled in equity, that if a man has a debt due to him by note, or a book-debt, and has made no demand of it for six years, so that he is barred by the statute of limitations; yet if the debtor, or his executor, after the six years, put out an advertisement in the *Gazette*, or any other newspaper, that all persons who have any debts owing to them may apply to such a place, and that they shall be paid; this (though general, and therefore might be intended of legal subsisting debts only) yet amounts to such an acknowledgment of that debt which was barred, as will revive the right, and bring it out of the statute again.

(F) Of the Manner of Pleading, and taking Advantage of the Statute of Limitations.

Lev. 111. Sid.

253. and *vide*

Cro. Jac. 115.

(a) And there-

fore if the de-

fendant

pleads, that if

any such promise was made, it was not within six years, and so within the statute of limitations; such conditional plea is not good; *vide* head of Pleadings. — But pursuant to the statute 4 & 5 Annæ, c. 16. for amendment of the law, the defendant, by way of double plea, may plead *non assumpsit*, and *non assumpsit infra sex annos*; though it may seem inconsistent, the plea of *non assumpsit infra sex annos* implying a promise. (b) If a man devises all the rest and residue of his personal estate, after debts and legacies paid, to *J. S.*, and several of the creditors are barred by the statute of limitations, who notwithstanding bring actions against the executor, and he refuses to plead the statute of limitations; yet equity will not in favour of *J. S.*, to whom the surplus is devised, compel the executor to plead the statute. Abr. Eq. 305. Castleton v. Lord Fanshaw. (c) That though it appears upon the face of the declaration that the cause of action did not arise within six years, yet the defendant shall not take advantage of that without pleading, because there might be an original sued out, which the plaintiff cannot otherwise shew, than by way of replication, upon the defendant's putting him upon it. 2 Salk 422, 3. ¶ Puckle v. Moor, 1 Ventr. 191. Gould v. Johnson, 2 Lord Raym. 838.]

But

But in debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence; for the statute has made it no debt at the time of the plea pleaded, the words being in the present tense. (a)

the statute apply equally to both actions, the modern practice is to plead the action of debt as well as in *assumpsit*. *Duppa v. Mayo*, 1 Saund. 283. note (2.); and *Bayley J.* held that the statute could not be given in evidence on *nil debet*, because the debt remained though the remedy was barred. *Woodhouse v. Williams*, York Sum. Ass. 1829. ||

In replevin the defendant pleaded not guilty *de capt. prædict. infra sex annos jam ultimo elapsos*; and though it was urged that this was the same with pleading *non cepit*, and if he did not take he could not be guilty of the detainer; and if this way of pleading were not allowed, the statute would be entirely evaded as to this action; yet the plea was held ill, because he ought to have answered to the detainer as well as to the taking; for there may be a detainer without a taking: besides, a thing may be lawfully distrained, although unlawfully kept; as, by being put into a castle, &c. by which means it could not be replevied.

In trespass, for a trespass done thirteen years before, the defendant pleads, that *infra sex annos, &c. non est inde culpabilis*. Plaintiff replies, that he brought his action such a term, and that within six years before that time the defendant did the trespass; and upon this the defendant takes issue, and is found guilty; and it was held, 1st, That the defendant's plea was good in bar, without pleading the statute. 2^{dly}, That the plaintiff's replication was no departure; although it was objected, that he could have replied nothing, but that he was under some of the disabilities, for which there is a saving in the statute; for the plaintiff is not tied to the time or place laid in the declaration, but may vary from it upon evidence; and so when the defendant, by his plea, pleads to a certain time or place, and thereby makes the time or place material, the plaintiff may follow him without any (b) departure.

plea, as the time laid in the declaration.

[In equity, where a particular special promise is charged to avoid the operation of the statute, the plaintiff must deny the promise charged, by averment in the plea, as well as by answer to support the plea.]

Salk. 278.
pl. 1. *per Holt*.
|| (a) Since the same reasons for pleading

Sid. 81. Arundel and Trevill, Keb. 279. S.C.

Raym. 86.
Lev. 110. Keb. 566. S.C. Lee v. Rayner.
|| And see 2 Saund. 84. d. note. ||
(b) This case seems to differ from Tyler and Wall, Cro. Car. 229., for there the plaintiff in his replication varies as well from the time laid by the defendant in his

Anon. 3 Atk. 70. || Redesdale's Tr. Pl. 2d ed. 212. ||

MAIHEM.

(A) What it is.

(B) How punished.

(A) What it is.

Co. Lit. 126.
128. 3 Inst.
62. 118.
Hawk. P.C.
c. 44. 3 Bl.
Comm. 121.

MAIHEM is defined to be any hurt done to a man's body whereby he is rendered less able in fighting, either to defend himself, or annoy his adversary; such as the cutting off, disabling, or weakening a hand or finger, striking out an eye or fore-tooth, or castration, &c., and these are properly said to be maihems, and to come under the notion of felonies; but the cutting off an ear, or nose, are said not to be properly maihems, because they do not weaken a man, but only disfigure him.

(B) How punished.

Bract. 144.
3 Inst. 62.

BY the old common law castration was punished with death, and other maihems with the loss of member for member; but of later days maihem was punishable only by fine and imprisonment.

|| (a) This act is now repealed by 9 G. 4. c. 31. s. 1. ||
The occasion of this act was an assault that was made on Sir John Coventry, a member of the House of Commons, by slitting his nose, and thence called Coventry's act. || (b) This does not imply concealment, but merely that the defendant waited in some particular place for the prosecutor, intending to wound or maim him as soon as he should arrive. See *Rex v. Carrol, et al.* 1 East, P.C. 394. *Rex v. Mills*, 1 Leach, 259. ||

And by the statute (a) 22 & 23 Car. 2. c. 1. it is enacted,
“ That if any person shall on purpose, and of malice forethought,
“ and by lying in wait (b), unlawfully cut out or disable the
“ tongue, put out an eye, slit the nose, cut off a nose or lip, or
“ cut off or disable any limb or member of any subject of his
“ majesty, with intention in so doing to maim or disfigure, in any
“ the manners before mentioned, such his majesty's subject, that
“ then, and in every such case, the person or persons so offend-
“ ing, their counsellors, aiders, and abettors, knowing of and
“ privy to the offence as aforesaid, shall be and are by the said
“ statute declared to be felons, and shall suffer death as in cases
“ of felony without benefit of clergy.

“ Provided, that no attainder of such felony shall extend to
“ corrupt the blood, or forfeit the dower of the wife, or the lands,
“ goods, or chattels of the offender.”

If

If a man attack another of malice forethought, in order to murder him with a bill, or any other such like instrument, which cannot but endanger the maiming him, and in such attack happen not to kill, but only to maim him, he may be indicted on this statute, together with all those who were his abettors, &c., and it shall be left to the jury on the evidence, whether there was a design to murder by maiming, and, consequently, a malicious intent to maim, as well as to kill; in which case the offence is within the statute, though the primary intention was murder. (a)

Stat. Tri. vol. 6. f. 211. so ruled in *Coke's* trial, who together with *Woodburne* were condemned and executed at Suffolk assizes, 8 Geo. 1. for slitting the nose of Mr. *Crispe*.

(a) REMEDY by Action.—For a threat, assault, battery, or maihem, the party shall have a remedy by action of trespass, *quare manus imposuit ita quod*, &c. Lut. 1428.—*Quare in ipsum insultum fecit et ipsum verberavit*, &c. F. N. B. 86. I.—And such is the form, though he does not wound him. F. N. B. 86. K. — *Quare in ipsum insultum fecit, verberavit, vulneravit, et imprisonavit*, &c. F. N. B. 86. K. — *Quare, cepit, imprisonavit, et in prisona quousque finem*, &c. *fecisset, detinuit*. F. N. B. 86. K.

By Indictment. — So, maihem is the greatest offence under felony. Co. Lit. 127. a. — So, for a maihem a man may be indicted, fined, and ransomed. Co. Lit. 127. a. b. 3 Inst. 63. — Though the maihem be done by himself. Co. Lit. 127. b. — Though the person be his villein, who cannot maintain an action for it against his lord. Co. Lit. 127. a. — So, an indictment lies for an assault, battery, or imprisonment of a subject. Com. Dig. 1 V. 526.

When the Damages shall be increased for a Maihem. — If the declaration mention a maihem, the court, upon view of the maihem, may increase the damages given by the jury. — 1 Roll. 572. l. 10. 15 R. 1 Leo. 139. — Though the particular part in which the maihem was, be not specified. R. Hard. 408. [In *Brown v. Seymour*, the court seemed to think a declaration, that defendant assaulted and maimed the plaintiff in the left hand, particular enough, though they did not allow the circumstances of the case to be such as called for an increase of damages. 1 Wils. 6.] So, in battery, where the manner of the battery is described, the court, upon view, may increase the damages. *Per Hale*. Hard. 408. — So, the court may increase damages, upon view, and examination of witnesses, where the declaration is general *quod maihemavit*, without making any description of the maihem, if the judge of assize certify the particulars of the maihem, or be in court, and affirm, that the particulars, now proved, were given in evidence at the trial. 1 Sid. 108. — But where the declaration does not mention a maihem, nor describe the manner of the battery, the court cannot increase the damages upon view. Hard. 408. — So, if the maihem was not the act of the defendant directly, but by an horse, after the plaintiff was thrown down by the defendant. R. 1 Sid. 433. — Or, by a gun, which the defendant let off, and which maimed the plaintiff against his will. R. 1 Sid. 108. — So, if the declaration be general *quod maihemavit*, without describing how, and the judge do not certify it. 1 Sid. 108. — [In *Smallpiece v. Bokenham*, M 27 Car. 2. C. B. upon a motion to increase damages *super visum vulneris*, the court said, it was necessary to be proved to be the same wound for which the damages were given, and ordered notice to be given to the defendant who appeared, and witnesses on the one part and on the other were examined, and several of the jurymen, who all said, that no evidence was given to them that any blow was given upon the eye, or that the plaintiff had lost his eye by the battery; and for this reason the court would not increase the damages; for new evidence ought not to be given, this being a censure on the first verdict, and a correction of it. Bull. N. P. 21.]

By Appeal. — So, he may prosecute his appeal of maihem. Han. Ent. 270. Co. Ent. 50. c. — And the writ of appeal and indictment shall say, *quod felonice maihemavit*. 3 Inst. 63. 118. — To an appeal of maihem, the defendant may plead not guilty. Han. 271. — So, if he did it *se defendendo*, he may plead in bar, *son assault demesne*. Han. 271. 277. Co. Ent. 52. — And he must plead it; for he cannot give it in evidence upon not guilty. 2 Inst. 316. — So, the defendant may plead a release of the maihem. Com. Dig. 1 V. 597. — Or, of all actions personal; for the damages only are recovered in such appeal. Lit. s. 502. — So, the defendant may plead 20l. or other sum given in satisfaction. Han. 274. — A recovery in trespass for the same maihem. Co. Ent. 50. b.

¶ The statute 9 Geo. 4. c. 31. repealing, but embodying and extending the 43 Geo. 3. c. 58. (Lord *Ellenborough's* act), enacts, § 12., "That if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at

“ any person, or shall unlawfully and maliciously stab, cut, or
 “ wound any person, with intent, in any of the cases aforesaid,
 “ to maim, disfigure, or disable such person, or to do some
 “ other grievous bodily harm to such person, or with intent to
 “ resist or prevent the lawful apprehension or detainer of the
 “ party so offending, or any of his accomplices, for any offence
 “ for which he or they may respectively be liable by law to be
 “ apprehended or detained, every such offender, and every per-
 “ son counselling, aiding, or abetting such offender, shall be
 “ guilty of felony, and being convicted thereof, shall suffer death
 “ as a felon: provided always, that in case it shall appear on
 “ the trial of any person indicted for any of the offences above
 “ specified, that such acts of shooting, or of attempting to dis-
 “ charge loaded arms, or of stabbing, cutting, or wounding as
 “ aforesaid, were committed under such circumstances, that, if
 “ death had ensued therefrom, the same would not in law have
 “ amounted to the crime of murder, in every such case, the per-
 “ son so indicted shall be acquitted of the felony.”

By the stat. 6 Geo. 4. c. 126., reciting the title of the repealed statute 43 Geo. 3. c. 58., similar provisions for the prevention of some of the crimes mentioned in that statute are enacted with regard to Scotland.

By the 24 Geo. 3. sess. 2. c. 47. s. 11. shooting at or dangerously wounding any officer of the navy, customs, or excise, in the execution of his duty, is made felony without benefit of clergy.

The following cases upon the construction of the statute 43 Geo. 3. c. 58. may assist in the construction of the new law.

(a) *Rex v. Kitchen*, Mich. T. 1805. MS. *Bayley J.*, and *Russ. & Ry.* 95.; and see *Russ. on Crimes*, vol. 1. 596.

(b) *Rex v. M'Dermot*, East. T. 1818. *Russ. & Ry.* 356. *Rex v. Whitfield*, *cor. Bayley J.* *Salop Sum. Ass.* 1822. M. T.; and see *Russ. on Crimes*, 597.

Shooting has been held within the statute 43 Geo. 3. c. 58., where the instrument was loaded with powder and paper only, but fired so near the person, and in such a direction, as made it likely it would kill, &c. (a) But it has been ruled in a variety of cases upon that statute, that the words “stab or cut,” contained in it, relate only to such wounds as are made by an instrument capable of stabbing or cutting; stabbing being properly a wounding with a pointed instrument, and cutting being a wounding with an instrument having a sharp edge. (b) This defect is, however, obviated in the new act, by the insertion of the word “wound,” which it is supposed will include all cases of injuring the person, whether they be perpetrated by blunt or other instruments.

(c) *Anon. cor. Dallas C. J.* and *Burton J.* at *Chester*. 5 *Evans*, Col. Stat. part 5. cl. 4. p. 534. n. (5). *Rex v. Duffin* and *Marshall*, East. T. 1818. MS. *Bayley J.* and 1 *Russ. & Ry.* 365. (d) *Rex v. Ricketts*, *Worcester Sum. Ass.* 1811. *cor. Lawrence J.*, 3 *Camp.* 68.; and see the cases cited in *Russell on Crimes*, 1 V. p. 600, 1.

Upon the stat. 43 Geo. 3. c. 58., it has also been held that the cutting must be expressly laid with the intent stated in the act, and that an indictment for cutting with intent to do some grievous bodily harm, without saying “in so doing or by means thereof,” was not sufficient. (c) And where the offence is charged to have been committed with intent to obstruct, &c. a lawful apprehension, it must be shewn that the offender had some notification of the purpose for which he was apprehended before he inflicted the wound. (d)]]

(d) *Rex v. Ricketts*, *Worcester Sum. Ass.* 1811. *cor. Lawrence J.*, 3 *Camp.* 68.; and see the cases cited in *Russell on Crimes*, 1 V. p. 600, 1.

MAINTENANCE, AND THE OFFENCE OF BUYING OR SELLING A PRETENDED TITLE.

MAINTENANCE in general signifies an unlawful taking in hand, or upholding of quarrels, or sides, to the disturbance or hinderance of common right; and is said to be twofold : [See Mr. J. Buller's comment on the doctrine of maintenance, 4 Term Rep. 340.] Co. Lit. 368. b. 2 Inst. 208. 212. Hawk. P. C. c. 83.

1. *Ruralis*, or in the country; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtlety; or, where one stirs up quarrels and suits in the country, in relation to matters wherein he is no way concerned; for this kind of maintenance is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea, or not; but it is said not to be actionable. Co. Lit. 368. 2 Inst. 213. 2 Roll. Abr. 115.

2. *Curialis*, or in a court of justice; where one officiously intermeddles in a suit depending in any such court, which no ways belongs to him, by assisting either party with money, or otherwise, in the prosecution or defence of any such suit. 2 Inst. 212. 2 Roll. Abr. 115.

Of this second Kind of Maintenance there are said to be three Species :

1. *Where one maintains one side to have part of the thing in suit, which is called champerty.*
2. *Where one laboureth a jury, which is called embracery.*
3. *Where one maintains another without any contract to have part of the thing in suit, which generally goes under the common name of maintenance; and of which in the following order.*

(A) What shall be said to amount to an Act of Maintenance.

(B) In what Respects some such Acts may be justified: And herein,

1. *How far they are justifiable in respect of an Interest in the Thing in variance.*
2. *How far in respect of Kindred or Affinity.*
3. *How far in respect of other Relations; as that of Lord and Tenant, Master and Servant.*
4. *How far in respect of Charity.*
5. *How far in respect of the Profession of the Law.*

(C) How

(C) How Maintenance is restrained, and punished by the Common Law.

(D) How restrained and punished by Statute.

(E) Of the offence of Buying or Selling a pretended Title.

(A) What shall be said to amount to an Act of Maintenance.

See Vol 7 Journal part 1 pages 557-5903
 pages 557-5903
 Bro. Maint. 7.
 14. 2 Roll.
 Abr. 118.
 Hawk. P. C.
 c. 83. § 5.

IT is said, that not only he who assists another with money in his cause, as by retaining counsel for him, or otherwise bearing him out in the whole or part of the expense, but also he who, by his friendship or interest, saves him that expense, which otherwise he may be put to, is guilty of maintenance; as where one persuades, or but endeavours to persuade, a man to be of counsel for another *gratis*.

Hetl. 78, 79.
 Cro. Eliz. 755.
 Roll. Abr. 593.
 2 Roll. Abr.
 118. || But
 see the judgment of Buller
 J. in Master
 v. Miller, 4 Term Rep. 340.||

Also, it seems to be an act of maintenance to open evidence to the jury, or to give evidence officiously without being called upon to do it, or to speak in a cause as one of counsel with the party, or to retain an attorney for him; and some have said, that it is maintenance even barely to go along with him to enquire for a person learned in the law.

Hawk. P. C.
 c. 83. § 7. and
 several authorities there
 cited.

It seems to be maintenance for a man of great power and interest to say publicly, that he will spend 20*l*. on one side, or that he will give 20*l*. to labour the jury; and it hath been said to be maintenance for such a person to come to the bar with one of the parties, and stand by him while his cause is tried, without saying any thing: but a promise to maintain another is not maintenance, unless it be in respect of the public manner in which it is made, or the power of the person by whom it is made.

Hawk. P. C.
 c. 83. § 8.

It is said to be maintenance for a juror to solicit a judge to give judgment according to the verdict; but it seems to be no maintenance for a juror to exhort his companions to join with him in such a verdict as he thinks right.

Hawk. P. C.
 c. 83. § 9.

It seems to be no maintenance for a man to give another friendly advice what action is proper for him to bring for such a debt; or what method is safest to free him from such an arrest; or what counsellor or attorney is likely to do his business most effectually; for it would be extremely hard to make such neighbourly acts of kindness, which seem rather commendable than blame-worthy, to come under the notion of maintenance; which always seems to imply a contentious and over-busy intermeddling with other men's matters, in which respect it is so highly criminal; yet it is said, that a man of great power, not learned in the law, may be guilty of maintenance, by telling another, who asks his advice, that he has a good title.

It is no maintenance to give a man money, who has no suit then depending, unless it plainly appear that it was given with a design to assist him in a suit intended, which suit is afterwards actually brought. (a)

interested with others, plaintiffs in an action for the recovery of a debt, may, by releasing his interest in that debt to those others, (for the purpose of making him a competent witness to prove it on the trial) be guilty of maintenance. See *Bell v. Smith*, (in error) 5 Barn. & C. 188. S. C. 7 Dow. & Ry. 846.||

Hawk. P. C. c. 83. § 10.
 ||(a) *Semble*,
 That a party
 jointly in-

It is as much an act of maintenance to support a man after judgment given, as to do it pending the plea.

Hawk. P. C. c. 83. § 11.

|| Where the representatives of a deceased navy officer entitled to prize-money assigned a share of it to certain navy-agents, on condition of their indemnifying the representatives against all costs of proceedings in the prize suit then depending, this was held by Sir *W. Grant* M. R. to be a void agreement, as amounting to champerty; viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it, which is not confined to suits in the courts of common law.

Stevens v. Bagwell,
 15 Ves. 139.
 and see *Wallis v. Portland*, 3 Ves. 394. 502. and
Hartley v. Russell, 2 Sim. and Stu. 244.

And beneficial contracts or conveyances obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, are liable to the charge of champerty, and have been decreed to stand as security only for what was actually due.||

Wood v. Downes,
 18 Ves. 120.

(B) In what Respects some such Acts may be justified: And herein,

1. *How far they are justifiable in respect of an Interest in the Thing in Variance.*

IT seems clear, that not only those who have an actual interest in the thing in variance, as those who have a reversion expectant on an estate-tail, or on a lease for life, or years, &c., but also those who have a bare contingency of an interest in the lands in question, which possibly may never come *in esse*, and even those who, by the act of God, have the immediate possibility of such an interest, as heirs apparent, or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands; and if a plaintiff, in an action of trespass, alien the lands, the alienee may produce evidence to prove that the inheritance, at the time of the action, was in the plaintiff, because the title is now become his own.

2 Roll. Abr. 115. 117.
 2 Inst. 564.
 Bro. Maint. 28. 53.

Also, he who is bound to warrant lands may lawfully maintain the tenant in the defence of his title, because he is bound to render other lands to the value of those that shall be evicted.

Bro. Maint. 51.

Also, he who has an equitable interest in lands or goods, or even in a chose in action, as, a *cestui que trust*, or a vendee of lands, &c., or an assignee of a bond for a good consideration, may lawfully maintain a suit concerning the thing in which he has such an equity; and from the same ground it seems plainly to follow, that the grantee of a reversion for good consideration might, without any attornment, maintain the tenant of the land, before the

Noy, 99, 100.
Moor, 620.
Cro. Eliz. 552.
Sid. 217.

statute

statute 4 & 5 Annæ, c. 16. which makes such attornment needless.

Hawk. P. C.
c. 83. § 18.

Wherever any persons claim a common interest in the same thing, as, in a way, church-yard, or common, &c. by the same title, they may maintain one another in a suit concerning such thing; and a man's bail may take care to have his appearance recorded; but, as some say, they cannot safely intermeddle farther.

2. *How far in respect of Kindred or Affinity.*

2 Inst. 564.
Hawk. P. C.
c. 83. § 20.

Whoever is of kin, or godfather, to either of the parties, or related by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, and pray another to be of counsel for him; but cannot lawfully lay out his money in the cause, unless he be either father, or son, or heir apparent to the party, or husband of such an heiress.

3. *How far in respect of other Relations; as that of Lord and Tenant, Master and Servant.*

Co. Litt. 65.
101. 384.
2 Roll. Abr.
116, 117.

Not only the actual lord, but also the *cestui que use* of a seignior, may come with the tenant to a trial in an assize against him, and stand by him, and assist him, and also pray the sheriff to return an indifferent jury; and it seems a plausible opinion, that he may also justify laying out his money in defence of his tenant's title: also, the lord of a town may maintain the inhabitants in an action, wherein the right to their common burying-place is questioned, by shewing authentic evidence of it to the jury.

Hawk. P. C.
c. 83. § 22.

A tenant may lawfully come with his lord, and stand with him at a trial.

Bro. Maint.
44. 52.
Hetley, 79.
Moor, 814.

A master may go along with his servant, or with his domestic chaplain, to retain counsel: also, he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in court in favour of his cause: also, if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but the master cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hands; but those, with the servant's consent, he may safely disburse.

Hawk. P. C.
c. 83. § 24.

A person retained generally as a servant, and not for a particular occasion only, may lawfully ride about to speed his master's business, and may go to counsel for him, and shew his evidence to the counsel, or to the jury, and stand by him at a trial, but cannot lawfully lay out his own money in the suit.

(a) *Payne v. Rogers*,
Doug. 407.
(b) 3 P. Wms.
375.
(c) 3 Ves. 503.

|| A landlord may sue in the name of his tenant to try a right (a); and a mortgagee, not a party in a suit, may, without being guilty of maintenance, advance money to support the title (b); for maintenance is justifiable from the privity of the parties in estate. (c) ||

4. *How far in respect of Charity.*

Any one may lawfully give money to a poor man to enable him to carry on his suit: also, any one may lawfully go with a foreigner, who cannot speak *English*, to a counsellor, and inform him of his case. Bro. Maint. 14.

5. *How far in respect to the Profession of the Law.*

A counsellor, having received his fee, may lawfully set forth his client's cause to the best advantage; but can no more justify giving him money to maintain his suit, or threaten a juror, than any other person. 2 Inst. 564.
2 Roll. Abr. 116.

Also, an attorney specially retained may lawfully prosecute or defend an action in the court wherein he is an allowed attorney, and lay out his own money in the suit, and maintain an action against his client for the money so laid out, by virtue of the retainer, without any special promise: also, an attorney so retained may in like manner maintain his client in a court wherein he is not an allowed attorney; but as some say cannot have an action for the money laid out in the suit, without a special promise: but an attorney, who maintains another, is no way justified, by a general retainer, to prosecute for him in all causes; neither can an attorney lawfully carry on a cause for another at his own expense, with a promise never to expect a re-payment; and it is questionable whether solicitors, who are no attorneys, can in any case lawfully lay out their own money in another's case. Keilw. 50.
2 Inst. 564.
Winch. 52.
Jon. 208.
Cro. Car. 159.
3 Mod. 98.

But counsellors and attorneys, using deceitful practice in maintenance of their clients' causes, are punishable by the common law, as well as by the statute of Westm. 1. c. 28., which enacts, "That if any serjeant, pleader, or other, do any manner of deceit or collusion in the king's court, or consent unto it in deceit of the court, or to beguile the court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man; and if he be no pleader, he shall be imprisoned in like manner by the space of a year and a day at the least; and if the trespass require greater punishment, it shall be at the king's pleasure." 2 Inst. 215.

It is an offence within this statute for an attorney to sue out an *habere facias seisinam*, falsely reciting a recovery where there was none, and by colour thereof to put the supposed tenant in the action out of his freehold. Dyer, 249.
pl. 84.
2 Inst. 215.

Also, it is an offence within the statute to bring a *præcipe* against a poor man, having nothing in the land, on purpose to oust the true tenant; or to procure an attorney to appear for a man, and confess a judgment without any warrant; or to plead a false plea, known to be utterly groundless, and invented merely to delay justice, and to abuse the court. (a) 2 Inst. 215.
(a) In most of these cases the court would grant an attachment against the offender, on motion.

(C) How Maintenance is restrained and punished by the Common Law.

2 Roll. Abr.
114.
2 Inst. 208.
Hetley, 79.

BY the common law, all unlawful maintainers are not only liable to render damages in an action at the suit of the party grieved, but may also be indicted and fined, and imprisoned, &c. and it seems that a court of record may commit a man for an act of maintenance in the face of the court.

(D) How restrained and punished by Statute.

BY the 1 E. 3. c. 14. and 20 E. 3. c. 4. it is enacted, "That none of the king's ministers, nor no great man of the realm, by himself nor by other, by sending of letters nor otherwise, nor none other great nor small, shall take upon them to maintain quarrels, nor parts, in the country, to the disturbance of common right."

And by the 1 R. 2. c. 4. it is enacted, "That no person whatsoever shall take or sustain any quarrel by maintenance in the country or elsewhere, on grievous pain, that is to say, the king's counsellors and great officers, on a pain that shall be ordained by the king himself, by the advice of the lords of this realm, and other officers of the king, on pain to lose their offices and to be imprisoned, and ransomed, &c. and all other persons, on pain of imprisonment and ransom," &c.

In the construction of these statutes the following points have been holden :

Hawk. P. C.
c. 83. § 40,
41.

That *nul tiel record* is a good plea to an action on these statutes, by which it appears that they extend not to taking out an original, which is never returned, but they extend as well to maintenance in a court-baron, as to maintenance in a court of record; neither is it material whether the plaintiff in the action, wherein there was such maintenance, were nonsuited or recovered: But it is said, that none of the statutes of maintenance extend to the spiritual court.

Hawk. P. C.
c. 83. § 42.

He who fears that another will maintain his adversary, may, by way of prevention, have an original grounded on these statutes, prohibiting him to do it.

By the 32 H. 8. c. 9. "No person shall unlawfully maintain or cause or procure any unlawful maintenance in any suit, in any of the king's courts, where any person shall have authority by the king's commission, patent, or writ to hold plea of lands, or to examine, hear, or determine any title of lands, &c. and no person shall unlawfully maintain, for maintenance of any suit or plea, any person or persons, or embrace any freeholders or jurors, or suborn any witness by letters, rewards, or promises, or any other sinister means, to maintain any matter or cause, or to the disturbance of justices, &c. on pain of 10*l.*, one moiety to the king, the other to the informer."

Hawk. P. C.
c. 83. § 45.

In an information thereon, it is not sufficient to say, that the defendant maintained the party, without adding, that he did it unlawfully;

unlawfully; neither is it sufficient to say, that a bill was exhibited, without further shewing that a plea was depending. (a) *Vide also the statutes, 3 Ed. 1. c. 25. 28. and 33. 13 Ed. 1. c. 36. and c. 49. 28 Ed. 1. c. 11. 4 Ed. 3. c. 11. 20 Ed. c. 7. 13 R. 2. stat. 5. 20 R. 2. c. 1. 8 H. 6. c. 9. and 7 R. 2. c. 15. et infra.*

(E) Of the Offence of Buying or Selling a pretended Title.

IT seems an high offence at common law, as plainly tending to oppression, for a man to buy, at an under rate, a doubtful title known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do; and it seems not to be material whether the title be good or bad; or whether the seller were in possession or not, unless the possession were lawful and uncontested.

Also by the 1 R. 2. c. 9. reciting, that many persons having true title to lands, &c. were wrongfully delayed, by means that the defendants did make gifts and feoffments of their lands in debate, and of their goods to great men, against whom the said pursuants durst not make their pursuits; and also that many persons used to disseise others, and anon to make feoffments sometimes to great men to have maintenance, and sometimes to persons unknown, to the intent to delay the said disseisees, &c.; therefore it is enacted, "That no gift or feoffment of tenements or goods be made by such fraud or maintenance, and that if any be so made, they shall be holden for (a) none; and that the said disseisees shall recover against the first disseisor their lands and damages, without having regard to such alienations, so that they commence their suit within a year after the disseisin."

It is further enacted by 32 H. 8. c. 9. "That no person shall bargain, buy, or sell, or by any means obtain any pretended rights or titles, or take, promise, grant, or covenant to have any right or title to any (b) hereditaments, unless the seller, &c. his ancestors, or they from whom he claims, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, for one whole year next before the said bargain and sale, &c. on pain that such seller shall forfeit the whole (c) value of the hereditaments so sold; and the buyer or taker, knowing the same, shall forfeit the value of the hereditaments so by him bought or taken; the one half of the said forfeitures to be to the king, and the other to him who will sue."

But it is provided, "That it shall be lawful for any person, being in lawful possession, by taking of the yearly farm-rents or profits of any hereditaments, to buy or get, by any reasonable means, the pretended right or title of any other person to the same."

"Provided, that no one shall be charged with these penalties, unless he be sued within one year after the offence."

In the construction of this statute the following opinions have been holden:

Moor, 751.
pl. 1031. Hob.
115. Plow. 80.

(a) In respect of the disseisees; but they are effectual between the feoffor and feoffee. Co. Lit. 369.

(b) Whether freehold or copyhold. 4 Co. 26 a. Co. Lit. 369. b. Moor, 655.

(c) And therefore the plaintiff in his action must shew the value at the time of the bargain. Cro. Car. 233.

That

Lit. Rep. 369. That the statute being public, there is no need to recite it in
 Plow. 84. Cro. an action brought upon it; but if you take upon you to recite it,
 Car. 233. a material misrecital will be fatal.
 Dyer, 74.

Leon. 167. Lit. In an action against the buyer of a pretended title, it must
 Rep. 369. expressly appear that the defendant knew that the seller had not
 been a year in possession; but in such an action by the buyer,
 the contrary must expressly appear; for otherwise it may be in-
 tended that he was *particeps criminis*.

Dyer, 74. It is not sufficient to shew that the seller had not been in pos-
 pl. 19, 20. session a year before, &c. without averring, that he had a pre-
 Plow. 80. 87. tended right or title, for that is the point of the action.
 Cro. Car. 233.

Co. Lit. 369. A contract for a lease for years, unless fairly made to try a
 Leon. 166. title in ejectment, is within the statute, whether it were made off
 And. 76. the land, or upon the land, by a person in or out of possession;
 and in an action on the statute for making such a lease, there is
 no need to shew its commencement or end, because the plaintiff
 is supposed to be a stranger to it.

Plow. 88. Co. No conveyance by one who has the uncontested possession and
 Lit. 369. Leon. absolute undisputed propriety of lands, as by a disseisor having
 166. Savil, 95. obtained a release from the disseisee who had the true right not
 contested by any other person whatsoever, or by a mortgagor
 having redeemed his lands, is within the meaning of the statute;
 because it no way savours of maintenance, and can be prejudicial
 to no one: neither is a lease for the usual rent, by one who re-
 covers lands by virtue of an ancient title, within the meaning of
 the statute, though he had the absolute property and possession of
 the land; for the intent of the statute was to restrain all persons
 from transferring any disputed right to strangers.

Co. Lit. 369. Whoever has a reversion or remainder vested in him may law-
 fully take any conveyance which will strengthen his estate; but
 cannot take a covenant from a stranger for a conveyance from
 him, when he shall have recovered the land.

MANDAMUS.

3 Bl. Comm.
 110.

[THE writ of *mandamus* is a high prerogative writ, issuing in
 the king's name, out of the Court of King's Bench, and
 directed to any person, corporation, or inferior court of judica-
 ture within the king's dominions, requiring them to do some par-
 ticular thing therein specified, which appertains to their office
 and duty, and which the Court of King's Bench has previously
 determined, or at least supposes, to be consonant to right and
 justice.

3 Burr. 1267. The original nature of the writ, and the end for which it was
 4 Burr. 2188. framed, direct upon what occasions it should be used. It was in-
 Cowp. 378. troduced to prevent disorder from a failure of justice, and defect
 of police. Therefore, it ought to be used upon all occasions
 where

where the law has established no specific remedy, and where in justice and good government there ought to be one. In the more ancient cases, the grounds upon which the Court of King's Bench have granted or refused a *mandamus* are not explicitly stated. Within the last century, it has been liberally interposed for the benefit of the subject and the advancement of justice. The value of the matter, or its importance to the public police, is not scrupulously weighed. If the party making the application has a right, a *legal* right, and no other *specific legal remedy*, *this* will not be denied: for his having a remedy in *equity* will not be considered as any ground of refusal. And even though he may have another *legal* specific remedy, if such remedy be *obsolete*, the *mandamus* will be granted.

¶ And it has been decided to be no objection to the granting a *mandamus* to do a particular act, that an indictment will also lie for the omission to do that act, for the indictment does not compel the doing of the act, and therefore is not equally effectual with the *mandamus*.¶

Rex v. Commissioners of Dean Inclosure, 2 Maul.

This writ is the proper remedy to enforce obedience to acts of parliament, and to the king's charters, and, in such cases, is demandable *ex debito justitiæ*. But where the right is of a private nature, as in the case of an office, in which the public are not concerned, such as that of deputy register, it is discretionary in the court either to grant or refuse it.]

1 Term Rep. 404.

3 Burr. 1267.

3 Term Rep. 651. ¶ 8 East, 2198.¶

1 Term Rep. 404. 3 Term Rep. 652.

Rex v. the Severn and Wye Railway Company, 2 Barn. & A. 646. See also & S. 80.

Bull. N. P. 199.

Ca. temp. Hardw. 99. 4 Burr. 2189.

(A) Of the Nature of the Writ: And herein of the Suggestion and Manner of awarding thereof.

(B) Of the Form thereof, and for what Irregularities it may be quashed or superseded.

(C) In what Cases to be granted: And herein,

1. *Where it lies to restore or admit a Person to an Office, and what shall be said such a public Office for which a Mandamus will lie.*
2. *Where the Party's having another Remedy is a sufficient Foundation to deny it; and therein of granting Mandamuses to restore Members of Colleges, &c.*
3. *What Removal or Turning out of an Officer will entitle him to a Mandamus.*

(D) Where it lies to inferior Courts, and Magistrates, to oblige them to do that Justice which the Public Good requires, and the Law enjoins.

(E) Of the Authority by which it issues: And herein of the discretionary Power in the Court of granting or refusing it.

(F) To whom to be directed.

Vol. V.

S

(G) By

- (G) By whom to be returned.
- (H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.
- (I) What shall be said a good Return.
- (K) Of traversing the Return, and taking Issue thereon.
- (L) Of the Party's Remedy for a false Return.
- (M) Of awarding a peremptory *Mandamus*.

- (A) Of the Nature of the Writ: And herein of the Suggestion and Manner of awarding thereof.

A *MANDAMUS* is a writ commanding the execution of an act, where otherwise justice would be obstructed, or the king's charter neglected, issuing regularly only in cases relating to the public and the government; and is therefore termed (a) a prerogative writ.

(a) 4 Mod.
281.
March, 101.

(b) There is a writ called a *mandamus*, which lay where the king's tenant, who held of him by knight's service, died, his heir within age, and no writ of *diem clausit extreme*, &c. was sued out within a year and a day after his death; then issued a *mandamus* to the escheator, commanding him to enquire of what lands holden by knight's service the tenant died seised, &c., but for this vide F.N.B. 253. B. Dyer, 209. pl. 19. 248. pl. 18. Lamb. 36.

(c) Lev. 23. Show. 263. Ca. Law. and Eq. 53. 57. (d) 11 Co. 94. Roll. Rep. 173. S. C. (e) Lev. 23. Palm. 51. Dyer, 333. Skin. 293. pl. 3. 310. pl. 4. [(g) Lord Mansfield said, that in a manuscript book of reports which he had seen, the reporter cites (in reporting Dr. Bonham's case) a *mandamus* in the time of Ed. 3. directed to the University of Oxford, commanding them to restore a man that was *bannitus*. 4 Bur. 2189.]

4 Mod. 52.
Carth. 217.
[(h) This seems to be denied in The King against The Commissioners of Excise, 2 Term Rep. 385. where Ashurst J. said,
"An applica-

It is now an established remedy, and every day made use of, to oblige inferior courts and magistrates to do that justice, which they are in duty, and by virtue of their offices, obliged to do; and is a writ of right (h), which the superior court is obliged to issue in the ordinary form, without imposing any terms on him who demands it (h); and therefore where a *mandamus* was granted to oblige a corporation to proceed to the election of a capital burgess, and it was afterwards moved that a day should be fixed for the election, that all parties might have notice, — for that otherwise the person obtaining the *mandamus* might steal an election by surprise, — the court refused to grant the motion, and held,

held, that their power was only to command an election, but not to prescribe the manner of it, which was left to the law, and which must make it good or bad accordingly.

“discretion of the court; a *mandamus* is a prerogative writ, and is not a writ of right.” See also the *King v. Clear*, 4 Barn. & C. 899. || (h) *Pasch. 6 G. 2. in B. R.* The *King v. Mayor and Burgesses of Evesham*, 2 Barnard. K. B. 256. 265. 2 Str. 949.

But though it be a writ of right (a), yet the court seldom grants it without giving the party, to whom it is prayed, a day to shew cause against it (b); also such matter must be laid before the court, by which it may appear that the party is entitled to it (c), and therefore on a motion for a *mandamus*, to restore the registrar of the Blacksmiths’ Company, the court refused it, because they did not produce their charter, or a copy of it, with an *affidavit*; for this being a private corporation, they held they could not take notice thereof, as they will of a town, &c. without such previous information.

appear plain, grant the writ upon the first motion: but where it is to restore one who has been removed, they will first grant a rule to shew cause why such a writ should not issue. Bull. N. P. 199. — Where they grant a rule to shew cause, though upon shewing cause it appear doubtful, whether the party has a right or not, yet the court will issue a *mandamus*, in order that the right may be tried upon the return. *Rex v. Dr. Bland*, T. 1741. Bull. N. P. 200. || (c) *Rex v. Jotham*, 3 T. R. 575. *Rex v. West Looe*, 3 Barn. & C. 683. *Rex v. Clear*, *ubi sup.* ||

2 Kel. 245.
pl. 195.
Mich.
4 G. 2. in
B. R.
|| (a) See the
above note,
(b). ||
(b) Where it is
to swear, or
to admit, the
court will, in
case the right

(B) Of the Form thereof, and for what Irregularities it may be quashed or superseded.

A *MANDAMUS* is a signable writ, and must be signed by the proper officer of the court before it is sealed. There must be fifteen (d) days between the *teste* and the return of the first writ of *mandamus*, if the party, to whom it is sent, be above forty miles from *London*; but if but forty miles, or under, then eight days only.

be fourteen, and not fifteen days, and so is 1 Str. 407. And one of the days is to be taken inclusive, and the other exclusive, so that a writ tested the 14th may be returnable the 28th. *Ibid.*]

If there be any irregularity in the writ, it may be amended at any time before it is returnable (e); but it cannot be superseded after the return is out; neither can the party move to quash it before a return made and filed. (g)

been made to it, particularly if that return has been traversed. *Rex v. Mayor, &c. of Stafford*, 4 Term Rep. 689. (g) In *Rex v. Mayor of York*, the court held, that it was too late for a party to object to the writ after he had made a return to it. 5 Term Rep. 74. But in *Rex v. College of Physicians*, 3 Burr. 2740. the writ was quashed after the return made. And see acc. *Rex v. Ward*, 2 Str. 893. *Rex v. Mayor of Abingdon*, 1 Ld. Raym. 559. 2 Salk. 699.] || And see *Rex v. Margate Pier Company*, 3 Barn. & A. 220., where it was adjudged that an exception may be taken to the writ even after the return, and at any time before a peremptory *mandamus* issues. See also *Rex v. Bristol Dock Company*, 6 Barn. & C. 189.]

6 Mod. 153.
|| (e) For the
court will not
amend it after
a return has

If a *mandamus* be awarded to restore nine persons to the place and office of common councilmen, this is such an irregularity for which the writ will be quashed; for several persons cannot join in such writ, the amotion of one not being the amotion of another: besides, their interests are several (h), and they might have been

2 Salk. 456.
pl. 19. Comb.
507. S. C.
5 Mod. 11.
S. C. 2 Salk.
453. pl. 13.

S. P. and that several persons cannot join in an action on the case for a false return to a *mandamus* to restore. (*h*) A *mandamus* was granted to a jury of a court baron to do an act to perfect the rights of several. *Rex v. Ld. Montacute*, 1 Black. 60. [Bull. N. P. 200. S. C. So *Rex v. Borough of Midhurst*, 1 Wils. 233.]

Rex v. Mayor of Kingston-upon-Hull, 1 Str. 578. 8 Mod. 209. S. C., but the reason assigned in this last report for the writ's being superseded is, that "it was not warranted by the rule." And see *Rex v. Wildman*, 2 Str. 893. a *mandamus* superseded on that ground.

Rex v. The Bristol Dock Company, 6 Barn. & C. 181.

2 Salk. 433. pl. 12. Ld. Raym. 563. *The King v. Mayor, &c. of Rippon*; vide Carth. 500, 501.

2 Salk. 434. pl. 16. 2 Ld. Raym. 1233. *Serjeant Whitaker's case*.

Rex v. Smith, 2 Maul. & S. 583.

Hil. 9 G. 2. in *B. R. The King v. Doctor*

removed for several different causes, one for one fault, and one for another; which would make it impracticable for the court to grant a joint restitution to them.

[A motion was made for a *mandamus* to the mayor, to assemble and do the business of the corporation, and the writ was granted accordingly. In drawing up the writ, the officer made it out for an assembly, and to admit all persons having a right to their freedom, who should appear before them to demand it. It was moved to supersede the writ, because every person's right was distinct, and it would be hard to oblige the mayor to make a return that he had admitted all who had a right. *Et per Curiam*, It must be superseded, for we never intended such a complicated *mandamus* as this.]

And see *Rex v. Wildman*, 2 Str. 893. a *mandamus* superseded on that ground.

|| But where, in the *Bristol Dock Act*, the directors were, amongst other things, required "to make such other alterations and amendments in the sewers of the city as might be necessary in consequence of the floating of the harbour;" the court held, that a *mandamus* calling upon them "to make such alterations and amendments," &c. was in the proper form, and that it was neither requisite nor proper to call upon the company to make any *specific* alteration, the mode of remedying the evil being left to their discretion by the act of parliament.||

If the writ be directed to a corporation by a wrong name, this is such an irregularity for which it may be quashed; as, if to the mayor, aldermen, and commonalty of *Rippon*, where it should have been, mayor, burgesses, and commonalty: but in this case, the parties having made a good return, the court refused to grant a new writ; for by the return, if false, they subjected themselves to an action on the case, and therefore a new writ would be only vexatious.

So where, in a *mandamus* to the corporation of *Ipswich*, the direction was to the vill *de Gippo*, instead of *de Gippwico*; it was held, that the direction was wrong, *Gippus* and *Gipwicus* being different names; but that yet they should have returned the special matter accordingly, and relied upon it; but that, after the return, they admitted themselves the corporation to whom the writ was directed: besides, a corporation may have several names.

|| A direction of a *mandamus* to a corporation by its corporate name, notwithstanding the vacancy of the mayoralty, is good, since that is the legal description of the body, as long as it continues to have any corporate existence at all. But where the direction is not to the corporation by its corporate name, it seems to be bad, if it extends beyond the persons who are required by the charter to concur in the particular thing commanded by the *mandamus*.||

If a writ appears on the face of it to be *felo de se*, the court, *ex officio*, may quash it; as, where the Bishop of *Ely* procured a *mandamus*

damus to the vice-master for *Trinity College, Cambridge*, to compel him to execute a sentence (*a*) of deprivation, pronounced by the bishop against Doctor *Bentley*, master of the said college, which sentence the vice-master, by the statutes of the college, was obliged to execute; and it appearing on the face of the writ that the bishop himself was general visitor, and that therefore it belonged to him to enforce the execution of his own sentence, the court of *B. R.* quashed the writ, being a matter in which they had no right to intermeddle, there being a proper visitor.

whether the Court of King's Bench would not grant a *mandamus* to him for that purpose? See And. 176.]

Walker.

[Ca. temp. Hardw. 212. S. C.

(*a*) But if the bishop himself should refuse to compel the execution of the sentence, *qu.*

(C) In what Cases to be granted: And herein,

1. *Where it lies to restore or admit a Person to an Office, and what shall be said such a public Office for which a Mandamus will lie.*

HEREIN we must observe, that the cases in the books on this head are so unsettled and contradictory, that it is hardly possible to fix on any general rule, whereby to determine in what instances the Court of K. B., having a superintendency over all inferior courts and magistrates, will grant a *mandamus* or not; for though in general it be laid down as a rule (*a*), that where a man is refused to be admitted or wrongfully turned out of any office or franchise that concerns the public, or the administration of justice, he may be admitted or restored by *mandamus*, yet it being still matter of controversy, what shall be said a public office, or such as relates to the administration of justice, and as the court of late has rather extended than contracted this remedy, it will be necessary, for the better apprehending hereof, to insert the cases themselves in which a *mandamus* has been granted or denied.

It is clearly agreed that the Court of King's Bench, having a superintendency over all inferior courts and magistrates, may by the plenitude of its power correct, not only errors in judicial proceedings, but also extrajudicial errors and misdemeanors, tending to the breach of the peace, oppression of the subject, to the raising of faction, controversy, debate, or any manner of misgovernment; so that no retort or injury, whether public or private, can be committed but what may be reformed and punished according to the due course of law.

And on this foundation it has been adjudged, and admitted in a variety of cases, that if a mayor, alderman, burgess (*b*), common councilman, freeman, or other person, member of a corporation, having a franchise and freehold therein, be refused to be admitted, or being admitted, be turned out or disfranchised without just cause, he may have his remedy by writ of *mandamus*. || But if the office be already full by the possession of an officer *de facto* (*c*), no writ will be granted to proceed to a new election until the person in possession has been ousted, on proceedings *in quo warranto*. ||

him *ad libitum*, is good; but where a man is a freeman or alderman, &c. they cannot remove him from his freedom or place without cause; and a custom to the contrary is void, because

(*a*) 11 Co. 93. Bagg's case, 2 Sid. 112. same rule laid down by *Glyn* C. J.

11 Co. 98. 4 Inst. 71.

11 Co. 94. Bagg's case, 2 Bulst. 122. Style, 299. 457. Raym. 12. 431. 437. Vent. 302. (*b*) It is said, that a custom to elect one to be of the common council, and to remove the

the party hath a freehold therein; but that to be of council is a thing collateral to the corporation. Cro. Jac. 450. Warren's case. [(c) Rex v. Bankes, 5 Burr. 1454. Rex v. Cambridge, 4 Burr. 2011. Rex v. Bedford, 1 East, 80. Rex v. Truro, 5 Barn. & A. 592.]

2 Mod. 316.

And it must appear what the office is; and therefore a *mandamus* to swear one who was elected to be one of the eight men of *Ashburn Court* was denied, because it was not specially inserted what the nature of the office was, so as the court might be able to determine whether it were such a place for which a *mandamus* will lie or not.

Noy, 78.

Style, 457.

(a) Vent. 77.

Sid. 461. Lev.

291. Dighton

v. Mayor of

Stratford-

upon-Avon.

Raym. 188.

S. C. where it is said, that the court advised to repeal the patent because of this inconveniency.

(b) Style, 452.

Vent. 143. 155.

[4 Burr. 1999.]

(c) 4 Mod. 31.

Show. 282. 12 Mod. 15.

So, a *mandamus* lies for a (b) recorder and (c) clerk of the peace; for these are officers of a public nature, and relate to the administration of justice.

(d) 2 Sid. 112.

Raym. 12.

Sid. 40.

2 Lev. 18.

Vent. 153.

(e) Raym. 12.

Sid. 40.

Comb. 127.

(g) Fitzgib. 195.

(h) Vent. 153.

2 Lev. 18. S. P. expressly by *Hale C. J.*

It is admitted by all (d) the books which speak of this matter, that a *mandamus* lies to restore a steward of a court leet; but (e) some hold that a *mandamus* does not lie to restore a steward of a court (g) baron, because but a private office, and such as does not concern the administration of justice; but (h) others hold that it does, because he is judge of that part of the court which concerns copyholds, and is therefore an officer concerned in the administration of justice.

Lev. 75.

Sid. 152.

Keb. 549.

adjudged in

Hurst's case,

who was restored to an attorney's place of the court of *Canterbury*; and in one Collin's case, who was restored to an attorney's place of the liberty of *St. Martin's le Grand*.

Vent. 11.

Sid. 410.

Mod. 23.

So, a *mandamus* was granted to the mayor of *Reading*, for an attorney of *B. R.*, who was prohibited to practise in an inferior court in *Reading*.

Vent. 143. 153.

T. Raym. 211.

2 Lev. 18.

2 Keb. Rep. 802.

He's case,

7 Mod. 118.

It hath been adjudged, that a *mandamus* lies to restore a sexton; though as to this the court at first doubted, because he was rather a servant to the parish than an officer, or one that had a freehold in his place; but upon a certificate shewn from the minister and divers of the parish, that the custom was to choose a sexton, and that he held it for his life, and that he had 2d. a year of every house within the parish, they granted a *mandamus* directed to the churchwardens.

2 Sid. 112.

Vent. 143.

3 Mod. 335.

5 Mod. 325.

A *mandamus* lies to restore a churchwarden, being a temporal officer, and an office concerning the public; and therefore (i) where to a *mandamus* to swear a churchwarden, chosen according to

to the custom, the archdeacon returned, that the person presented was a poor dairy-man who had no estate, was *persona minus habilis et idonea* for that office, the court granted a peremptory *mandamus*. 8 Mod. 323. Style, 457. Comb. 417. [Ca. temp. Hardw. 150. 5 Burr. 1421.] (i) Carth. 393. Salk. 166. pl. 5. The King v. Rees, 12 Mod. 116. Ld. Raym. 138. ||Anon. 2 Chit. Rep. 254. 3 Term Rep. 209.||

So, a *mandamus* hath been granted to restore a parish clerk, chosen according to the custom, being a temporal officer. Style, 457. 2 Sid. 112. Vent. 143. 3 Mod. 335. Comb. 105. [It will equally be granted, though he be appointed by the parson, for the right to the office is a temporal right; and the clerk, though appointed by the parson, is a servant to the parishioners. Rex v. Ashton, Say. Rep. 159. And the office is *primâ facie* an office for life. *Id.* 175.] ||And see Anon. 2 Chit. Rep. 254.||

So, a *mandamus* was lately granted to admit one *Robert Trott* to the office of parish clerk of *Clerkenwell*, being elected by the parish, it being shewn that the official had usually admitted to this office. King v. Doctor Henchman, official of the consistory court of the Bishop of London. 2 Sid. 112. Sid. 40. Style, 457. Comb. 144. Stra. 58.

So, a *mandamus* lies for a schoolmaster or the usher of a school, if he be elected for life, although he be not a sworn officer; for this is a temporal and public office, in which the party hath a freehold. 2 Stra. 897. 1023. [2 Barnard. K. B. 365.]

[So lecturers, if they have fixed salaries, not depending upon voluntary contributions, it seems, may be admitted or restored to their stations, if wrongfully kept out, by a writ of *mandamus*.] Rex v. Bishop of London, 2 Str. 1192. 1 Wils. 11. S. C. Rex v. Bishop of London, 1 Term Rep. 331. Rex v. Field, 4 Term Rep. 125.

||Unless there be an immemorial custom in a parish to elect a lecturer, the court will not grant a *mandamus* to the bishop to license a lecturer so elected, without consent of the rector or vicar; and this notwithstanding the lectureship be endowed out of the impropriate rectory. Rex v. Bishop of London, 1 Term Rep. 331. Rex v. Field, 4 Term Rep. 125.

Rex v. Bishop of Exeter, 2 East, 462. and see Rex v. Bishop of Oxford, 7 East, 345.

And the act of uniformity, 13 & 14 Car. 2. c. 4. § 19., enacting, that no person shall preach as lecturer unless approved by the *archbishop or bishop*, &c. the court will not entertain a motion for a *mandamus* to the bishop to license, on the bishop's refusal for unfitness, unless a like application has been made to the archbishop. Rex v. Bishop of London, 15 East, 419.

And where the bishop, in answer to an application for a *mandamus* to license a lecturer, elected by inhabitants, made affidavit that the party had been before him with a view to his being "approved and licensed," and that after enquiry and hearing him he had conscientiously refused him, on the ground of unfitness, the court discharged the rule. Rex v. Archbishop of Canterbury and Bishop of London, 15 East, 117.

[This writ lies to restore a curate to a chapel which is a do-native, and endowed with lands. Rex v. Blower, 2 Burr. 1043.]

So, it lies to the bishop to grant a licence to a curate, if it be refused without just reason. 2 Ld. Raym. 1206. 2 Barnard.

K. B. 366. Rex v. Bishop of Carlisle, 2 Burn's E. L. 103. ||But where a *mandamus* was moved for

for to be directed to the Dean of *Hereford* to license a second curate, on an affidavit that one curate was not sufficient, the rule was refused. Anon. 2 Chit. Rep. 255.||

Rex v. Barker, 5 Burr. 1265. So, since the act of toleration, it will lie to admit or restore a dissenting minister where there is an endowment.]

1 Bl. Rep. 300. 352. S. C. Rex v. Jotham, 3 Term Rep. Qu. Whether the party applying should not shew his compliance with the requisitions of the toleration act.

Rex v. Lord of the Manor of Hendon, 2 Term Rep. 484. || And a *mandamus* lies to a lord of a manor to admit a copyholder, whether he claims by purchase or descent.||

Rex v. Coggan, 6 East, 451.; and see Rex v. the Brewers' Company, 3 Barn. & C. 172., overruling Rex v. Rennet, 2 Term Rep. 197.

2 Roll. Rep. 82. A *mandamus* lies to admit, restore, or discharge a constable; Roll. Abr. 535. for he is a public officer, and one whose office relates to the administration of justice. Salk. 175.

Carth. 169, 170. It hath been adjudged, that no *mandamus* lies to restore a proctor of Doctors' Commons, admitting that no appeal lay from the dean of the arches to the archbishop, as visitor; because this is an ecclesiastical office, and a matter properly and only cognizable in that court; and that the temporal courts are not to intermeddle or enquire into their sentence, or into the proceedings in any matters whereof they have a proper jurisdiction, but are to give credit thereunto; although it was urged, that if a *mandamus* did not lie in this case the party would be without remedy, for that no assise would lie of this office; and though an action on the case might lie, yet it may be defective, because a jury may not well compute the damages in proportion to the loss of a man's livelihood: besides, it was urged, that a *mandamus* ought to lie in this case, as well as for an attorney of an inferior court, because this is an (a) officer of a more public concern. 3 Mod. 335. 3 Salk. 230. pl. 4. Holt, 435. pl. 1. (a) A proctor is not an officer, properly speaking; it is only an employment in that court, which acts by different rules from the King's Bench. 3 Mod. 335. Per Cur.

Rex v. Archbishop of Canterbury, 8 East, 213. || Nor will a *mandamus* lie to the Archbishop of *Canterbury* to issue his fiat to the proper officer for the admission of a doctor of civil law, a graduate of *Cambridge*, as an advocate of the Court of Arches; for he has no specific legal right to such admission.||

Carth. 170. But it hath been held, that a *mandamus* lies for a registrar in an ecclesiastical court (b), upon an affidavit that he hath ecclesiastical jurisdiction. || And so also for the registrar of a corporation. (c)|| 6 Mod. 18. S. P. per Holt, but said to be against his consent. (b) Comb. 133. 3 Salk. 232. pl. 9. Ld. Raym. 357. And. 177. || (c) Rex v. Corporation of Bedford Level, 6 East, 536.||

Mich. 4 G. 2. So, upon a *mandamus* to the commissary of *York*, to admit Mr. The King v. Doctor Ward, 2 Stra. 895. Fitzgib. 123. pl. 8. 194. pl. 7. Barnard. K. B. 254, 294. 380. 411. *Dryden* a deputy registrar under Doctor *Sharp*, it was objected, that the writ did not lie for an ecclesiastical officer, because he is under the enquiry and censure of his proper judge; nor for a private officer, because he may have his action on the case for a disturbance, or an assise, in case the place be a freehold; and herein was cited the above case of *Lee*, and the express opinion of my Lord *Holt* therein, that a *mandamus* did not lie for a deputy registrar. In answer to which were cited the cases of *The King v. Doctor Bettesworth*, to admit Mr. *Foulkes* apparitor general

general to the Archbishop of *Canterbury*; Hil. 4 G. 1., *The King v. The Chapter of Norwich, to admit Doctor Sherlock to a (a) prebend*; Hil. 9 G. 1., to the university of *Cambridge*, to restore Doctor (b) *Bentley* to his degrees of master of arts and doctor of divinity; from the reason of which cases the court held, that this writ lay for a registrar, an officer much less spiritual than a prebendary or a doctor in divinity: also this *mandamus* is at the suit of Doctor *Sharp*, and sets forth his title to the office of registrar, *exercendum per se vel sufficient. deputatum suum*; and that the commissary had refused Mr. *Dryden*, whom he appointed his deputy; and that therefore the *mandamus* was well awarded, because he had no other way to get his deputy admitted.

So, where a *mandamus* was prayed to the lord president and council of the *Marches*, to admit *A.* to the exercise of the office of deputy secretary; it was objected, first, That a deputy could not pray a *mandamus*, because his authority was revocable. Second, That he being an officer belonging to the court, they are to judge of his sufficiency, and so have power to refuse. As to the first objection, it was adjudged, that the *mandamus* being at the suit of the principal, and setting forth that he had the office of secretary *exercendum per se vel sufficientem deput. suum*, the *mandamus* was well awarded, because he had no other remedy to have this deputy admitted; and as to the second objection, it was adjudged, that if they refused to admit him for inefficiency, they ought to have returned that he was insufficient.

(a) *Stra.* 159.
Andr. 21.
Barnard. K. B.
 40. See
 2 *Stra.* 1082.
Andr. 20.
 185. *S. P.*
 (b) *Fortesc.*
Rep. 202.
 2 *Ld. Raym.*
 1354.
Andr. 177.
Stra. 557.

Vent. 110.
Lev. 306.
 2 *Ke.* 738.
The King v.
Clapham.
 || *And see Rex*
v. Ward, 2 Str.
897. Rex v.
St. Alban's,
12 East, 559.n.
Rex v. Graves-
end, 2 Barn. &
C. 604. S. C.
4 Dow. & Ry.
117. Jones v.
Williams,
 5 *Dow. & Ry.* 660.||

A *mandamus* is said to have been denied to restore a clerk of a dean and chapter; because he hath nothing to do with the public, his office being only to enter leases granted, &c., and therefore he hath no more to do with the public than a bailiff of a manor.

It is said, that the court refused to grant a *mandamus* to restore a surgeon to an hospital, because it was not a public office.

Comb. 133.
Comb. 41.
 7 *Mod.* 118.
S. P. where,
 not be granted.

[A *mandamus* hath been refused to admit a vestry clerk, his office being merely of a private nature, and not being fixed and permanent, but depending entirely on the will of the inhabitants, who may choose a different clerk at each vestry.]

Rexv. Inhabit-
ants of Croy-
don, 5 Term
Rep. 715.

It hath been adjudged, that a *mandamus* lies to restore the treasurer of the New River Company; for though it be a private corporation, yet it was created by the king's letters patent, which being on record the judges are obliged to take notice of them, and see that they are duly executed.

Lev. 123.
Sid. 169.
Ke. 625.
Middleton's
case. 5 Mod.
354. S. C.
 cited; and said
 to have been granted *de bene esse*, to bring the matter before the court.

A *mandamus* was granted to the mayor of *Bristol*, to restore Mr. *Roe* to the office of sword-bearer.

Comb. 145.

It is said, that a *mandamus* was denied to one, who pretended to be (c) master of the lord mayor's water-house, because not an office, but a service.

Vent. 145.
 (c) Refused to
 restore the
 clerk of the
 Butchers' Company.

6 *Mod.* 18. 2 *Ld. Raym.* 959. 1004. So, to restore the approver of guns

guns to the Gunsmiths' Company. 6 Mod. 82. 2 Ld. Raym. 989. Comb. 347. But *qu.* of these cases; for they seem not to be law.

Case of Scri- [A *mandamus* was granted to the court of aldermen in *London*,
ven and to restore a person to the office of yeoman of the wood-wharf, on
Turner, an affidavit of its being an ancient office, and a freehold.]
2 Stra. 832.

Hil. 7 G. 2. A *mandamus* was granted to restore one *Smith* to the office of
in *B. R.* The clerk of the city works; it appearing by his *affidavit*, that the
King v. City of office was an ancient office, established time out of mind, to survey
London. the works and edifices of the city, and to see that all the city
2 Barnard.K.B. buildings were well done, and to sign the workmen's bills; and
298. S. P. & C. that he was admitted into this office, with the fees belonging to it,
[2 Term Rep. *quandiu se bene gesserit*; and that there was an oath of office taken
182. note.S.C.] by him, and the oaths to the government; for the court held, that
though there was something here that looked like service, by the
nature of the employment, yet there being an oath of office, and
oaths to the government to be taken, these import a public
office, for which a *mandamus* is proper.

Rex v. Mayor [So, it seems, a *mandamus* will lie to restore to the office of
of London, clerk of the bridge-house estates in *London*, such office being an
2 Term Rep. ancient office for life, the duty of which is to superintend certain
177. estates which are appropriated by the corporation for the support
of *London Bridge*.]

4 Mod. 281. If there be a dispute between the high steward of *Westminster*
Comb. 244. and the dean and chapter about appointing a bailiff, and the
Knipe and steward name one, and the dean and chapter appoint and swear
Edwin, Ld. in another, the appointee of the steward may have a *mandamus*,
Raym. 159. but without prejudice; for though the court will not regularly
163. 338. 561. grant a *mandamus* to try private titles, yet here the appointee of
958. 989. 1004. the steward having no seisin, so as to enable him to maintain an
10 Mod. 146. assise, and an action on the case only repairing him in damages,
12 Mod. 609. without putting him in possession of the office, a *mandamus* is a
666. Fitzgib. proper remedy.
123. 194.

2. *Where the Party's having another Remedy is a sufficient Foundation to deny it; and therein of granting Mandamuses to restore Members of Colleges, &c.*

(a) Andr. 184. It seems to be now agreed, that no *mandamus* lies to restore
Skin. 454. or admit a (a) fellow or member of any (b) college, because
4 Mod. 112. these being private eleemosynary societies, and governed by par-
124. in the ticular laws of the founders, they who would take the benefit of
case of Phil- them, must take it on such terms as the founder has thought
lips and Bury, proper to impose; and must therefore, in case of any grievance,
fully debated apply themselves by way of appeal to their (c) proper visitors.
and settled.

(b) That the law is the same in the case of an hospital or college of physic, said to have been adjudged in Merrick's case, who was one of the College of Physicians; and in Ayloff's case. Carth. 92. 3 Mod. 265. [But the law is not in these cases as here stated, for the Court of King's Bench have clearly a jurisdiction over hospitals and colleges of physic. Rex v. Dr. Askew, 4 Burr. 2186. Rex v. Mayor of Gloucester, Mich. 1 W. & M. cited in And. 184.] (c) That in lay-foundations, whether of hospitals or colleges, the visitatorial power is either in the founder or his heirs, or the visitors appointed by the founder, and they have the sole power to execute justice within that foundation; but where the corporation is spiritual, there the bishop of the diocese is visitor. Carth. 93. 10 Co. 31. Show. 74.

And

And this seems to have been the better opinion of the judges, not only in those (a) cases where application was made for a *mandamus* before the party had appealed to the visitor, but also where after such application the sentence had been confirmed by the visitor; as in (b) *Appleford's* case, where, to a *mandamus* to restore him to a fellowship of *New College*, the return was, that by the founder's laws they might expel any one who had committed an enormous crime, and that *Appleford* had committed an enormous crime, and therefore they expelled him; that he appealed to the visitor, who was the Bishop of *Winchester*, who confirmed the expulsion, and concluded to the jurisdiction of the court: and this was held a good return, though it did not mention what manner of crime *Appleford* had committed, so that it might appear whether he was lawfully expelled or not; for it was not necessary to mention the crime, because the court had no authority to intermeddle with it.

|| However, if visitors improperly decline to act, the court will compel them. Thus, where the founder of an eleemosynary corporation by deed, in pursuance of an act of parliament, described the objects of the charity, and by ordinances annexed directed that the members should be taken from certain specified places, in rotation, and appointed the bishop, dean, and archdeacon of *Worcester* visitors, who should see the ordinance truly executed; and an appointment of a member to a vacancy in the charity was made by the founder's heir not from the places specified, whereupon certain inhabitants of the places specified (being of the description in the foundation deed) appealed against the nomination to the visitors; the court held the appeal well lay, and granted a *mandamus* to the visitors to proceed and determine it, they having before declined to do so.||

A *mandamus* to restore one *Prohust* to the place of chaplain of *All Souls' college* in *Oxon*, being turned out by the warden of that college, was granted upon suggestion, that the Archbishop of *Canterbury* was visitor of the college, and the see was now vacant by the deprivation of the bishop, by virtue of the act of parliament which enjoins the oath of allegiance; and for that *Prohust* had no other remedy, because the dean and chapter of *Canterbury*, who are guardians of the spirituality *sede vacante*, have (c) refused to meddle with this visitatorial power by way of appeal. But at another day, it being shewn in behalf of the college, that the dean and chapter of *Canterbury*, and not the archbishop, are visitors of this college, because they were created, and stand instead of the prior and convent of *Canterbury*, who were visitors heretofore; and farther, that they were ready to hear the appeal; the court discharged the first rule, and ordered *Prohust* to apply himself by way of appeal.

that purpose to shew cause was made, 12 Ann.; and he seemed to think, that if this power of a visitor be a jurisdiction, yet it is *forum domesticum*, and not any public jurisdiction; or rather a decision of the founder, upon his own private charity, than any jurisdiction at all. 15 Vin. Abr. 205. pl. 4. [It has been since determined, that a *mandamus* for this purpose will lie to a visitor. *Rex v. Bishop of Lincoln*, 2 Term Rep. 538. note.]

(a) As Dr. Witherington's case, Sid. 71. Raym. 31. 68. Lev. 25. 2 Keb. 2. 50. Dr. Robert's case, 2 Keb. 102. Dr. Patrick's case, Raym. 101. Lev. 65. Sid. 546. 2 Keb. 164. 199. (b) Mod. 82. [So *Rex v. Bishop of Ely*, 5 Term Rep. 475.]

Rex v. Bishop of Worcester, 4 Maul. & S. 415. and see *Rex v. Bishop of Ely*, 5 Term Rep. 475.

Carth, 168. *Prohust's* case. Andr. 177. (c) Whether a *mandamus* will lie to a visitor to compel him to execute his jurisdiction, was said by my Lord *Hardwicke* in *Dr. Bentley's* case, Hil. 9 G. 2., not to have been determined, though a rule for

A *mandamus* was prayed to the mayor and jurats of *Sandwich*, 3 Keb. 360. governors

Wheeler's
case.

governors of the hospital of the brothers and sisters of *St. Bartholomew*, to restore one who was a sister of the said hospital; and it was urged, that a *mandamus* ought to be granted, because the party had a corody and freehold in the hospital. But *per Cur.*, The king is the founder, and so hath the visitation, and therefore application must be made to him.

Rex v.
Bishop of
Chester,
2 Stra. 797.

[A *mandamus* was granted, directed to the bishop of *Chester*, as warden of *Manchester* college, to admit a chaplain, upon the ground that the bishop being visitor of this college, which was of royal foundation, and having been also appointed warden, could not visit himself, and consequently the visitatorial power was suspended, and the remedy was in the Court of King's Bench to prevent a failure of justice. But the right of the Court of King's Bench to interfere in this case seems to be at least questionable: for where there is a defect of the visitatorial power in private eleemosynary lay-foundations, it hath been since solemnly determined, that the right of visitation devolves upon the king, in his personal, not in his politic capacity, and must be exercised by him in his Court of Chancery.

Rex v.
Master and
Fellows of
St. Catherine's
Hall,
4 Term Rep.
235.

It is, in general (*a*), a sufficient reason with the court to refuse a *mandamus*, that the party applying for it has another legal, specific remedy. (*b*) Therefore, they have refused it to the Bank (*c*), to compel them to transfer stock, because the party had a remedy by action on the case. So, to old churchwardens (*d*) to deliver over the parish books to the new ones; for they might have a right to keep them, and that right might be tried by an issue at law. So, to the benchers of an inn of court (*e*) to call a person to the bar; || or to admit a person a member of their inn (*f*); || for the proper remedy, in such case, is by appeal. So, to a mayor (*g*) to admit to the office of recorder; because there was a recorder *de facto*, and the party had another remedy by *quo warranto*. So, to a treasurer of a county (*h*) to reimburse constables monies expended by them for conveying rogues, &c. under 17 G. 2. c. 5.; for the quarter sessions have jurisdiction under the act over the constables' accounts. So, where there were two claimants of the same perpetual curacy (*i*), the court rejected an application for a *mandamus* to the bishop to license, because each had another specific remedy by *quare impedit*. And for the same reason, it should seem, notwithstanding some authorities to the contrary, that a *mandamus* ought not to be granted to admit to a prebend. (*k*) || And the court refused a *mandamus* where the question was whether a parishioner had a right to be buried in a churchyard in an iron coffin, which was a new and unusual mode; the mode of burying the dead being a matter of ecclesiastical cognizance. (*l*) ||

(*a*) Note, for an obsolete remedy, as by assise, is considered as an exception to the rule.
1 Term Rep. 404. 3 Term Rep. 652.
(*b*) See to this effect Rex v. Abp. of Canterbury, 8 East, 219. Rex v. Severn and Wye Comp., 2 Barn. & A. 646. Rex v. Margate Comp., 3 Barn. & A. 224.
Rex v. Haythorne, 5 Barn. & C. 422, 429.
Rex v. Stamford, &c. Canal Comp., 1 Maule & S. 32.
(*c*) Rex v. Bank of England, Dougl. 524.
(*d*) Rex v.

Street, 8 Mod. 98. || 2 Chit. Rep. 255. || (*e*) Rex v. Gray's Inn, Dougl. 555. (*f*) || Rex v. Lincoln's Inn, 4 Barn. & C. 855. || (*g*) Rex v. Mayor of Colchester, 2 Term. Rep. 259. (*h*) Rex v. Erle, 2 Burr. 1197. (*i*) Rex v. Bishop of Chester, 1 Term. Rep. 396. (*k*) The case of Clarke v. Bishop of Sarum, 2 Stra. 1082. Andr. 20. 185. where such a *mandamus* is granted, is held not to be law in Powell v. Millbank, 1 Term Rep. 401. note. The cases of the King v. Dean and Chapter of Armagh, Rex v. Dean and Chapter of Norwich, 1 Str. 159. and Rex v. Dean and Chapter of Dublin, *Id.* 556. are cited in the report in Andrews of Clarke v. Bishop of Sarum, in support of the rule. But in the case of the Dean and Chapter of Norwich, Dr. Sherlock

was

was prebendary by virtue of an act of parliament, and he had no means but a *mandamus* to get into his stall. In the case of the Dean and Chapter of Dublin, there was no determination on the point, but the majority of the judges inclined against the *mandamus*. That the court will not grant a *mandamus* where a *quare impedit* lies, appears also from *Rex v. Marquis of Stafford*, 5 Term Rep. 646. || (*l*) *Rex v. Coleridge*, 2 Barn. & A. 806. And see 5 Term Rep. 364. ||

|| And a *mandamus* will not be granted to (a) a mere trading corporation; *e. g.* the Bank, or to an assurance company to transfer stock, or to produce their accounts for the purpose of declaring a dividend of the profits, for the writ is confined to cases of a public nature. ||

(a) *Rex v. Bank of England*, 2 Barn. & A. 620. *Rex v. London Assurance Company*, 5 Barn. & A. 898.

Hence arises a difference between a *mandamus to admit* and a *mandamus to restore*. The former is granted merely to enable the party to try his right, without which he would have no legal remedy. But the court have always looked much more strictly to the right of the party applying for a *mandamus* to be restored. In these cases, he must shew a *prima facie* title; for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him.]

3. *What Removal or turning out an Officer will entitle him to a Mandamus.*

It seems by the better opinion, that a member of a corporation, being only suspended, and not (*b*) totally removed, may have a *mandamus*; because, were it otherwise, they might always suspend, and thereby not only effectually keep him out, but also deprive him of all remedy of redress.

Lev. 162.
Keb. 868.
Raym. 152.
The King v. Approved Men of Guildford. (*b*) A

mandamus to restore an alderman expelled from his priority and precedency of his place of alderman. 1 Lev. 119.

A *mandamus* was granted to the College of Physicians in London, to restore Dr. *Goddard* to all the privileges and pre-eminences that belonged to him. The president of the college returns that they were incorporate, &c. by virtue of the statute H. 8., and that they made a bye-law, that there should be a select number of thirty to attend in committees, and that Dr. *Goddard* was one of the thirty, and that they put him out for certain reasons, but that he remains fellow still. And all the court, except *Mallet*, held that this was a good return, for it was in the fellowship he had a franchise; but to be one of the thirty is no such thing as a man may sue to be restored to, for it is only a select number for the convenience of ordering their affairs.

Sid. 29.
Lev. 19.
Keb. 75. 84.
Dr. *Goddard v. College of Physicians*.

|| Where a corporator who was entitled to share in the profits of a fishery, which the corporators worked in partnership, was suspended from the perception of the profits until he paid a fine imposed by a bye-law; the court refused a *mandamus to restore him to office*, since he was not put out of his office, but only deprived

Rex v. Free-fishers of Whitstable, 7 East, R. 353. See S. C. not S. P. 2 Maul.

& S. 53.
17 Ves. 315.

prived of its profits, for which he might have a remedy by action, if unlawfully suspended, or, considering the corporators as partners, by a bill in equity.||

(D) Where it lies to inferior Courts, and Magistrates, to oblige them to do that Justice which the Public Good requires, and the Laws enjoin.

Styl. 7, 8.

Lev. 186.

Sid. 293.

Comb. 158.

450. [1 Str.

552. 1 Bl.

Rep. 640.]

(a) And there-
forewhere, to
a *mandamus*
to the judge
of the prero-

gative court, to grant the probate of a will to a person named executor therein, the ordinary returned, that he was an absconding person, and insolvent; and that he had refused to give caution to pay legacies bequeathed to some of the testator's infant relations, a peremptory *mandamus* was granted; for the ordinary has no authority to interpose and demand caution of the executor, when the testator himself required none. Carth. 457. Salk. 299. pl. 11. The King v. Sir Richard Raines.

Hil. 4 G. 2.

Smith's case
in *B. R.*

2 Stra. 892.

S. C. Andr. 24.

366. S. C.

Barnard. K. B.

370. 425. S. C.

But a *mandamus* will not lie to oblige the ordinary to grant administration *durante minori etate* of an infant to the next of kin, this being a matter out of the statutes, and therefore discretionary in the ordinary to whom to grant it; and if in such case he grants it to an improper person, or insists upon unreasonable security, the redress must be by appeal; or if in the last instance there be any remedy at common law, it must be by prohibition.

Mich. 7 G. 2.

in *B. R.* the

King v. Bet-

tesworth.

2 Stra. 956.

S. C. 2 Bar-

nard. K. B.

334. S. C. 2 Kel. 159. pl. 118. S. C.

So, if the testator make *J. S.* his residuary legatee, who by the ecclesiastical law is entitled to administration upon the executor's renunciation, yet, if the spiritual court refuse to admit him thereto, they cannot be compelled by *mandamus*; for this is a matter purely of ecclesiastical cognizance, and out of the statutes; and therefore the party's redress must be by appeal.

Rex v. John-

son and

others, East.

29 G. 3.

Archbishop of Canterbury v. House, Cowp. 140.

[A *mandamus* issues *ex debito justitiæ* to oblige the ordinary and his registrar to deliver up an administration bond, for the purpose of enabling the next of kin, or a creditor, to put it in suit.]

(b) The King

v. Shelley,

3 T. R. 141.

The King v.

Lucas,

10 East, 235.

(c) Rex v.

Jower,

4 Maul. & S.

161.

(e) Rex v.

|| And the court will grant a *mandamus* to inspect the court rolls and books of a manor, on the application of a tenant of the manor who has been refused that permission by the lord, because they are of a public nature, and the tenants have an interest therein. (b) And where the lord forbid the tenant to cut underwood on the copyhold, the court granted a *mandamus* to permit the tenant to inspect the court rolls, so far as related to the cutting of underwood, the lord having refused it (c); but they will not allow a party, though a tenant of the manor, to inspect the court

court rolls for the purpose of obtaining evidence in support of a prosecution against the lord. (d) The bishop's registry of presentations and institutions is kept for the use of all persons claiming livings in the diocese, and therefore a *mandamus* will be granted to allow inspection of it by a person claiming the right of patronage, though the bishop also claim the right. (e) ||

If by the custom of a corporation, &c. a person serving an apprenticeship there is at the end of his term entitled to his freedom, and the mayor, &c. refuse to admit him thereto, they may be compelled by *mandamus*; for this is an act of public justice, which the superior court will see executed.

pl. 138. Carth. 448. [1 Burr. 127. And now by 12 Geo. 3. c. 21. "Where any person shall be entitled to be admitted to his freedom, and shall apply to the mayor or other officer who hath authority to admit freemen to be admitted a freeman, and shall give notice specifying the nature of his claim to such mayor or other officer, that if such mayor or other officer do not admit such person within one month from the time of such notice, the Court of King's Bench will be applied to for a *mandamus* to compel his admission; if such mayor or other officer shall, after such notice, refuse or neglect to admit such person, a writ of *mandamus* shall issue to compel such mayor, &c. to admit such person, &c."]

[A *mandamus* has been granted to admit a quaker, having made his affirmation, into the *Turkey* Company, without taking the oath prescribed by 26 G. 2. c. 18.]

So, it hath been held, that a *mandamus* lies to the justices of the peace, to oblige them to admit a person to take the oath of allegiance, and to subscribe according to the act of toleration, in order to qualify him to teach a dissenting congregation: And herein it is said, that the party ought to suggest whatever is necessary to entitle him to be admitted; and if that be not done, or if it be done, and if the act be false, that will be a good matter to return.

[So, a *mandamus* lies to the registrar of a bishop, or the justices at sessions, to register the certificate of a place for the meeting of protestant dissenters according to the act of toleration. And as the registrar and justices, in recording the certificate, are merely ministerial, it does not seem to be necessary for the parties certifying to shew their having complied with the requisitions of the act.]

So, a *mandamus* lies to the (a) justices of the peace, churchwardens and overseers of the poor, to oblige them to make rates for the relief of the poor.

to make an equal rate, for the remedy is by appeal to the sessions. Rex v. the Guardians of the Poor in Canterbury, 1 Bl. Rep. 667. 4 Burr. 2200. Rex v. Churchwardens of Weobly, 2 Stra. 1259. Rex v. Churchwardens of Freshford, Andr. 24.] [Anon. 2 Chit. Rep. 254. But a rule nisi for a *mandamus* to pay a poor-rate was granted in a case where defendants had distrainable goods, it being sworn that the goods were fraudulently leased, and that the parish would be driven to try an action on the ground of the fraud. See Rex v. Company of Margate Harbour, 2 Chit. Rep. 256.] (a) To a justice of the peace to sign a poor-rate. 5 Mod. 275. 6 Mod. 229. Comb. 422. 478. Fol. 36, 37. 368. 2 Ses. Cas. 65. pl. 68. [1 Str. 393. 3 Dougl. on Elect. 142. note. So, to justices of the peace to make a warrant of distress to levy a rate. 1 Wils. 155.] [Anon. 2 Chit. Rep. 257.; and also to permit parties who contributed to the county rate to inspect and make copies of the previous rates. Rex v. Justices of Leicester, 4 Barn. & C. 891.]

So, *mandamuses* have been granted to oblige justices of the peace

Earl of Cado-
gan, 5 Barn.
& A. 903.

(e) Rex v.
Bishop of Ely,
8 Barn. & C.
112.

Lev. 91. Sid.
107. pl. 20.
5 Mod. 402.
12 Mod. 490.
Ld. Raym.
537. 2 Show.
Rep. 154.

Rex v. Turkey
Company,
2 Burr. 999.

6 Mod. 228.
510. Peat's
case, and vide
2 Salk. 572.

Green v.
Pope, 1 Ld.
Raym. 125.
Rex v. Jus-
tices of Der-
byshire, 1 Bl.
Rep. 606.

Comb. 422.
478. [But a
mandamus
does not lie

2 Show. 74.
peace

pl. 57. Comb. peace to discharge prisoners, pursuant to acts of parliament made
203. [So, to for the relief of insolvent debtors.
give judgment
in an excise case. Rex v. Tod, 1 Stra. 550. So, to take security on articles of the peace. Rex
v. Lewis, 2 Stra. 835. 1 Barnard. B. R. 166. S. C. Fitzg. 85. S. C.]

Rex v. Justices [So, a *mandamus* has been granted to county justices, to re-
of Wilts, ceive and proceed upon a general traverse to a presentment by a
5 Burr. 1530. justice of the peace upon view of a highway being out of repair.
1 Bl. Rep. So, to appoint overseers. So, it has been granted to compel two
467. S. C. justices to receive and proceed on a complaint against an over-
Rex v. Hor- seer for not paying over the balance of the parish money in his
ton, 1 Term hands, notwithstanding there has been an appeal to the sessions.]
Rep. 574.
Rex v. Carter,
4 Term Rep. 246.

(a) Rex v. || And a *mandamus* will lie to justices of the peace to nominate
Sparrow, Stra. overseers of the poor, although the time mentioned in the sta-
1123. (b) Rex tute 43 Eliz. has expired. (a) So, to appoint a surveyor of the
v. Justices of highways, where the justices had not appointed at the time men-
Denbighshire, tioned in the stat. 13 Geo. 3. c. 78. § 1. (b) But the court has
4 East, 152. no power to grant a *mandamus* to justices to compel them to
(c) Rex v. come to a particular decision, as to make an order of maintenance
Justices of on a particular parish (c); nor will they grant a *mandamus* to
Middlesex, compel them to act in any particular mode, unless they see
4 Barn. & A. clearly that the magistrates have neglected some duty imposed
298. (d) Rex upon them by law (d): much less to compel them to do that
v. Justices of which may subject them to an action of trespass. (e) The court
North Riding may compel the court of quarter sessions by *mandamus* to pro-
of Yorkshire, ceed to hear and decide an appeal; but when they have so de-
2 Barn. & C. termined it, the court cannot compel them to correct their judg-
290. (e) Rex ment if it appears to be erroneous (f), nor will they grant a
v. Justices of *mandamus* to the court of quarter sessions to dismiss an appeal. (g)
Buckingham- But though the court will not review a decision of justices on
shire, 1 Barn. the merits, if they have decided according to a discretion vested in
& C. 485. them by statute, yet if they refuse to hear an application on the
Rex v. Bro- ground of a conceived want of jurisdiction, and the court think
derip, 5 Barn. they have jurisdiction, they will grant a *mandamus* to hear
& C. 239. the application. (h) As the court have no jurisdiction to review
(f) Rex v. the judgment of the sessions, except on a case stated, they
Justices of will not grant a *mandamus* to rehear an appeal on the ground
Monmouth- that the sessions rejected evidence on one side as inadmissible
shire, 4 Barn. according to their practice, for they are the judges of their own
& C. 844.; practice. (i) ||
& see Rex. (j) ||
v. Justices of Wilts, 2 Chit. Rep. 257.; and as to *mandamus* to hear appeals where the question is whether
Worcester- the appeal is in time or not, see 1 East, 685. 686. 1 Maul. & S. 479. 4 Maul. & S. 327.
shire, 1 Chit. 1 Barn. & A. 210. 4 Barn. & C. 62. 7 Barn. & C. 691. (h) Rex v. Justices of Kent,
Rep. 649. 14 East, 395.; and see Rex v. Justices of Cumberland, 1 Maul. & S. 190. (i) Rex v. Justices
(g) Rex v. of Caernarvon, 4 Barn. & A. 86.; and see Rex v. Justices of Leicestershire, 1 Maul. & S. 442.
Justices of
Vice Chancel- [So, a *mandamus* has been granted (k) to the keepers of the com-
lor, &c. of mon seal of the university of Cambridge, commanding them to
Cambridge, affix it to the appointment of high steward: to the warden of a
3 Burr. 1647. college (l), to compel him to put the common seal to an answer
1 Bl. Rep. 547. of
S. C. (l) Rex

of the fellows in chancery, contrary to his own separate answer : to commissioners of the land-tax to elect a clerk. (d)]

v. Wyndham,
Cowp. 377.
(d) 1 Term
Rep. 146.

So, where by the statutes 19 Car. 2. c. 3. § 25. and 22 Car. 2. c. 11. § 61., for erecting *Newgate* market, power is given to the mayor and aldermen of *London* to impanel a jury, who shall assess and adjudge what satisfaction and recompense shall be given to the owners of the grounds; and that the verdict of such jury, on that behalf to be taken, and the judgment of the said mayor and court of aldermen thereupon, and the payment of the money so awarded or adjudged, &c. shall be binding and conclusive to and against the owners, &c. and there being 15,000 feet of the grounds of *J. S.* taken away for this purpose, for which a jury being impanelled assessed and awarded two shillings a foot, but the mayor and court of aldermen refused to give sentence or judgment thereupon; a *mandamus* was awarded to compel them to it.

Vent. 187.
Raym. 214.
Amherst's
case.

And this general jurisdiction and superintendency of the King's Bench over all inferior courts, to restrain them within their bounds, and to compel them to execute their jurisdiction, whether such jurisdiction arises from a modern charter, subsists by custom, or is created by (a) act of parliament, being *in subsidium justiciæ*, has of late been exercised in variety of instances; as, (b) a *mandamus* granted to the quarter sessions to give judgment for abating a nuisance.

Andr. 185.

(a) A *mandamus* to the president and fellows of St. John's College, Cambridge, to oblige them to turn out

certain fellows of the college, whose places became void for not taking the oaths of supremacy and allegiance, pursuant to the statute of 1 W. & M. c. 1. and c. 8. Skin. 559. pl. 1. 568. pl. 15. 593. pl. 30. 546. pl. 9. 4 Mod. 255. S. C. (b) Hil. 5 Geo. 1. Andr. 185. 2 Ld. Raym. 1354. Ses. Cas. 248. So, to receive an appeal. Ses. Cas. 248. [Doug]. 191. 3 Term Rep. 504.] [Rex v. Justices of Flintshire, 7 Term Rep. 200.]

So, a *mandamus* was granted to the court of *Sandwich*, to give judgment in an action of assault and battery.

Brooke v.
Ewers, Mich.
5 Geo. 2.

Stra. 115. Ses. Cas. 248. Andr. 185. Rex v. Day, Say. Rep. 202. S. P.

So, a *mandamus* was granted to the sheriff's court in *London*, to give final judgment upon a writ of inquiry. (c)

Mich. 7 Geo. 1.
Baily v.
Bourn, Stra.

592. Fortesc. Rep. 198. Ses. Cas. 249. Andr. 185, 184. [(c) But the Court of K. B. will not interfere by *mandamus* to regulate the practice of an inferior court, on the ground that an inferior court is the proper judge of its own practice. See *Ex parte Morgan*, 2 Chit. Rep. 250.]

So, a *mandamus* was granted to the bailiff of *Andover*, to give judgment in a cause there depending; but the court in this case required an affidavit of their refusal, else it should be presumed that the court would do right.

Trin. 2 G. 2.
Barnard. K.B.
59. Andr. 184.
Ses. Cas. 248.

Words of permission when tending to promote the public benefit are always held to be compulsory; thus, where the words of the charter of a manor court were that the steward and suitors "should have power" (d) to hold a court of record for the recovery of debts, a *mandamus* was granted to compel them to hold it, although it appeared that no such court had been holden for above thirty years.]

Rex v. Steward
of Havering
Atte Bower,
5 Barn. & A.
691. Rex v.
Mayor and
Jurats of
Hastings,
5 Barn. & A.

691. note. (d) But the words "shall and may" are only imperative when the clause is for the public good or benefit. Rex v. Com. of Flockwold Inclosure, 2 Chit. Rep. 251.

Mich. 8 Geo. 1.
Andr. 184.
Barnard.
K. B. 82.

So, a *mandamus* was granted to the corporation of *Liverpool*, to hold an assembly for doing the public business, which was making leases.

[(a) There-
fore, it will
not be granted
to compel obe-
dience to an
order of ses-
sions. Rex v.
Bristow,
6 Term Rep.
168.] Hil.
9 G. 2. in
B. R. The
King v. Dr.
Walker.
Ante.

But though these kind of writs are daily awarded to judges of courts to give judgment, or to proceed in the execution of their authority, yet are they never granted to aid a jurisdiction, but only to enforce the execution of it; nor are they ever granted where there is another proper remedy, and therefore will not lie to an officer of an inferior court (a); as, to a serjeant at mace, an apparitor, &c. to compel them to execute their duty; for these are servants to their respective courts, and punishable by the judges of them; and for the superior court to interpose in obliging such inferior officers, would be to usurp the authority of the court, which has a proper jurisdiction over its own officers, and which alone is answerable to the superior court for the execution of such authority; and therefore where a *mandamus* issued to the Vice-Master of *Trinity College, Cambridge*, commanding him to execute a sentence of deprivation, pronounced by the Bishop of *Ely*, as visitor of the college, against Dr. *Bentley*, the Master of that College; and it appeared on the face of the writ, and by the return, that the bishop himself or the king were visitors, the court held, that no *mandamus* would lie; for taking the bishop to be general visitor, as the writ supposes, he is the proper person to carry his own sentence into execution, having power *tam in capite quam in membris*; and if the vice-master refuses obedience to his mandate, he may pronounce sentence of deprivation against him, and he will be immediately ousted by the judgment; or, taking the crown to be visitor, the vice-master may be punished by commissioners appointed by the crown; one of which ways the court held to be the proper one to compel the vice-master to do his duty.

Sid. 31.
[Crawford v.
Powell,
5 Bur. 1013.
1 Bl. Rep.
229.]

A *mandamus* lies to deliver up the ensigns of an office, or the papers or records of a public nature, to a successor; as, (b) a *mandamus* to deliver the mace, and other ensigns of mayoralty, to the succeeding mayor: so, (c) a *mandamus* to a town-clerk, to deliver several books which belonged to the corporation.

||Rex v. Monday, Cowp. 539.|| (b) 5 Mod. 514. (c) Comb. 102. 2 Stra. 948. 2 Barnard. K. B. 235. S. P. Rex v. Ingram, 1 Bl. Rep. 50.

Vide tit.
Corporations.

A *mandamus* lies to oblige corporations to choose proper officers, which if they neglected to do, this by the common law was a forfeiture of their charter; and though by the common law, upon the death of a mayor within his year, which was the act of God, and an ordinary contingency, the Court of King's Bench was authorized to grant a *mandamus* immediately to fill up the vacancy; yet, upon an omission to elect at the charter-day, or upon the removal of an officer unduly chosen, there was no power to compel an election before the day came round again to supply those defects.

By the 11 G. 1. c. 4. it is enacted in the following words:
“Whereas in many cities, boroughs, and towns corporate,
“within

“ within that part of *Great Britain* called *England*, *Wales*, and
“ *Berwick-upon-Tweed*, the election of the mayor, bailiff or bailiffs,
“ or other chief officer or officers, is by charter, or ancient usage,
“ confined to a particular day or time, without any provision
“ how to act or proceed in case no election be then made; and
“ it frequently happens that by such charter, or usage, particular
“ acts are required to be done at certain times, in order to and
“ for the completing of such elections; and by the contrivance
“ or default of the person or persons who ought to hold the
“ court or preside in the assembly where such elections are to
“ be made or such acts to be done, or by accident, it hath some-
“ times happened, and may frequently do so, if not timely
“ prevented, that no courts or assemblies have been held, or
“ elections made, or such acts done within the time fixed for
“ that purpose; in which cases, if elections of such officers
“ could not afterwards be made, or in consequence of such
“ omission the corporation should be dissolved, great mischiefs
“ might ensue; for remedy and prevention whereof be it enacted,
“ That if in any city, borough, or town corporate, within that part
“ of *Great Britain* called *England*, *Wales*, and *Berwick-upon-*
“ *Tweed*, no election shall be made of the mayor, bailiff or
“ bailiffs, or other chief officer or officers of such city, borough,
“ or town corporate, upon the day or within the time appointed
“ by charter or usage for such election; or such election, being
“ made, shall afterwards become void, whether such omission or
“ avoidance shall happen through the default of the officer or
“ officers who ought to hold the court or preside where such
“ election is to be made, or by any accident, or other means
“ whatsoever; the corporation shall not thereby be deemed or
“ taken to be dissolved or disabled from electing such officer or
“ officers for the future; but in any case, where no election shall
“ be made as aforesaid, it shall and may be lawful for the
“ members or persons of such city, borough, or corporation,
“ who have right to vote, or be present at, or to do any other
“ act necessary to be done, in order to or for the completing of
“ such election; and they, and such of them, as shall be hindered
“ by any reasonable impediment or excuse, are hereby required
“ respectively to meet or assemble together in the town-hall, or
“ other usual place of meeting, for making such election within
“ such city, borough, or town corporate, upon the day next after
“ the expiration of the time within which such election ought to
“ have been made, unless such day shall happen to be *Sunday*,
“ and then upon the *Monday* following, between the hours of
“ ten in the morning and two of the afternoon of the same day;
“ and that the members or persons having right to vote at or
“ to do any other act necessary to be done in order to such
“ election, or such of them as shall be so assembled or met
“ together, shall forthwith proceed to the election of a mayor
“ or bailiff, or other chief officer or officers, for such city,
“ borough, or corporation, and to do every act necessary to be
“ done, in order to or for the completing of such election, in

“ such manner as was usual in or in order to the election of
 “ such officer or officers, upon the day or within the time
 “ appointed by charter or usage for such election; and in case
 “ upon such day of meeting hereby appointed for such election,
 “ the mayor, bailiff or bailiffs, or other proper officer or officers,
 “ who ought to have held the court or presided at the assembly
 “ for such election, or doing any other act necessary to be done
 “ in order to such election, if the same had been made or done
 “ on the day fixed, or within the time limited by charter or
 “ usage for that purpose, shall be absent; then such other person,
 “ having a right to vote, being the nearest then present in place
 “ or office to the person or persons so absenting himself or
 “ themselves, shall hold the court, or preside in the meeting or
 “ assembly hereby appointed, and shall have the same power
 “ and authority, in all respects therein, as belongs to the mayor,
 “ bailiff or bailiffs, or other chief officer or officers of the same
 “ city, borough, or town corporate, at any court or assembly
 “ for the election of officers for such place, or for doing any
 “ other act necessary to be done in order to such election.”

And by § 2. it is further enacted, “ That if it shall happen that
 “ in any city, borough, or town corporate, within that part of
 “ *Great Britain* called *England*, *Wales*, and *Berwick-upon-Tweed*,
 “ no election shall be made of the mayor, bailiff or bailiffs, or
 “ other chief officer or officers of such city, borough, or town
 “ corporate, upon the day or within the time appointed by charter
 “ or usage for that purpose; and that no election of such
 “ officer or officers shall be made pursuant to the directions
 “ hereinbefore prescribed; or such election, being made, shall
 “ afterwards become void as aforesaid; in every such case it shall
 “ and may be lawful for his Majesty’s court of King’s Bench,
 “ upon motion to be made in the said court, to award a writ or
 “ writs of *mandamus*, requiring the members or persons of such
 “ city, borough, or town corporate, having a right to vote at or
 “ to do any other act necessary to be done in order to such
 “ election, to assemble themselves upon a day and at a time to
 “ be prefixed in such writ or writs (a), and to proceed to the
 “ election of a mayor, bailiff or bailiffs, or other chief officer or
 “ officers, as the case shall require, and to do every act necessary
 “ to be done in order to such election, or to signify to the said
 “ court good cause to the contrary; and thereupon to cause such
 “ proceedings to be had and made, as in other cases of writs of
 “ *mandamus* granted by the said court for election of officers of
 “ corporations; and of the day and time appointed, in and by
 “ any such writ or writs of *mandamus*, for holding such assembly,
 “ public notice in writing shall, by such person as the court
 “ shall appoint, be affixed in the market-place, or some other
 “ public place within such city, borough, or town corporate, by
 “ the space of six days before the day so appointed; and such
 “ officer and other person respectively shall preside in such
 “ assembly as ought to have presided at the election of such
 “ mayor, bailiff or bailiffs, or other chief officer or officers, or
 “ at

||(a) The court
 will not fix
 any precise
 day for an
 election, but
 leave it to the
 proper officer
 to do. *Rex*
v. Mayor of
Bridgewater,
 2 Chit. Rep.
 256.||

“ at the doing any other act necessary to be done in order to
 “ such election, in case the same had been made or done upon
 “ the day hereinbefore prescribed for that purpose.”

§ 3. “ And whereas in certain boroughs and towns corporate
 “ within that part of *Great Britain* called *England, Wales,* and
 “ *Berwick-upon-Tweed,* the mayor, bailiff or bailiffs, or other
 “ chief officer or officers, is or are to be nominated, elected, or
 “ sworn at a court-leet, or view of frankpledge, or some other
 “ court; and by reason of the contrivance or default of the lord,
 “ or his steward, or such other officer, by or before whom such
 “ court ought to be held, in not holding the same, or by some
 “ accident it hath happened, and may hereafter happen, that no
 “ due nomination, election, or swearing of such mayor, bailiff
 “ or bailiffs, or other chief officer or officers, hath been or shall
 “ be had or made; be it further enacted by the authority aforesaid,
 “ That in every such case it shall and may be lawful to and for
 “ his Majesty’s Court of King’s Bench, upon motion to be made
 “ in the said court, to award a writ of *mandamus*, requiring the
 “ lord, or his steward, or other officer, by or before whom such
 “ court ought to be held, to hold, or cause to be holden, such
 “ court-leet, or other court, and to do every other act necessary
 “ to be done by him, in order to such nomination, election, or
 “ swearing, at such day and time as shall be for that purpose
 “ judged proper by the said Court of King’s Bench, and shall be
 “ appointed in such writ; or to signify to the said court good
 “ cause to the contrary; and thereupon to cause such proceed-
 “ ings to be had and made as in other cases of writs of *mandamus*,
 “ granted by the said court for holding of any court; and of the
 “ day and time appointed, in and by any such writ of *mandamus*,
 “ for holding such court, public notice in writing shall, by such
 “ person as the said Court of King’s Bench shall appoint,
 “ be affixed in the market-place, or some other public place
 “ within such borough or town corporate, by the space of six
 “ days before the day so appointed; and where a nomination of
 “ persons, in order to the election of any such mayor, bailiff or
 “ bailiffs, or other chief officer or officers, is to be made at
 “ such court-leet, or other court; in every such case, after such
 “ nomination made, all and every other act and acts necessary
 “ to be done, in order to such election, shall be had, made, and
 “ done at such assembly, and in such manner and form as the
 “ same ought to have been had, made, and done, in case such
 “ election had been made upon the day next after the expiration
 “ of the time prescribed for such election by the charter or
 “ usage of such borough or corporation, according to the direc-
 “ tions hereinbefore mentioned.”

§ 9. It is further enacted, “ That where any writ of *mandamus*
 “ shall issue out of the Court of King’s Bench in any of the cases
 “ aforesaid, the person or persons, to whom such writ shall be
 “ directed, shall make his or their return to the first writ of
 “ *mandamus*.”

[This being a beneficial law for the subject, the court have Bull. N.P.
 T 3 been 201.]

been very liberal in the construction of it, and therefore have granted a *mandamus* for the election of a mayor, though there had not been any legal mayor for four years preceding.

Bull. N.P. 201.

Case of the
Borough of
Tintagel,

infra, (E).

2 Stra. 1003.

Case of

Aberystwith,

2 Stra. 1157.

Case of the Corporation of Scarborough, 2 Str.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

1180. See Rex v. Woodrow, 2 Term Rep. 732.

Case of the Corporation of Scarborough, *id.* 1180. Rex v. Mayor, &c. of Cambridge, 4 Burr. 2008. Rex v. Newsham, Say, Rep. 211. But the mayor *de facto* must be made party to the rule to shew cause. Rex v. Bankes, 3 Burr. 1452. 1 Bl. Rep. 445. 452. || Rex v. St. Martin's, 1 Term Rep. 149. and see Rex v. Mayor of Truro, 3 Barn. & A. 592.||

So, they have granted it to go to the election, not only of the head officer, but of other annual officers (a) who were constituent parts of the corporation. (b)

1180. See Rex v. Woodrow, 2 Term Rep. 732. ||(a) They will not, however, grant a *mandamus* to compel a corporation to elect members of an indefinite body. Rex v. Pateman, 2 Term Rep. 777. Rex v. the Mayor of Fowey, 2 Barn. & C. 590. (b) The statute 11 Geo. 1. c. 4. is not confined to annual officers. See Rex v. the Mayor and Burgesses of Thetford, 8 East, 278.||

Rex v. Willis,

Andr. 279.

So, they have granted it to a steward of a court-leet, to hold a court-leet and swear a jury, that they may present a person duly elected mayor, that is, as duly elected mayor.]

Rex v.

Directors of

East India

Company,

4 Maul. & S.

279.

||A *mandamus* will be granted to the Directors of the *East India* Company, to despatch to their governments in *India* despatches altered and approved by the Board of Commissioners for *Indian* affairs, provided the alterations by the Board be such as by the 33 Geo. 3. c. 52. they are authorized to make: where however, one of the grounds for not transmitting the despatches was, that the alterations made did "not relate to the civil or "military government or revenues of the *British* territories in "*India*," and were consequently unauthorized by the act, it was held that the Directors were bound to apply for the decision of the Privy Council on that point, according to the 16th section of the act, and that the Court of King's Bench had no authority to decide that question; and the rule for a *mandamus* was accordingly enlarged in order to give time for such appeal.||

(E) Of the Authority by which it issues: And herein of the discretionary Power in the Court of granting or refusing it.

Vide tit.
Courts and
their Juris-
isdiction.

THIS general jurisdiction and superintendency is now only exercised by the Court of King's Bench, as the supreme court, for restraining and keeping all inferior courts and magistrates within their proper bounds, and obliging them to execute that justice with which they are invested.

Vern. 175.

And though a *mandamus* may issue out of Chancery, yet on a motion to the Lord Keeper to grant a mandatory writ to the Chief Justice of the King's Bench, to command him to sign a bill of exceptions, and a precedent produced, where in a like case

such

such a writ had issued out of Chancery to the judge of the sheriffs' court in *London*; the Lord Keeper denied the motion, for that the precedent produced was to an inferior court, and he would not presume but the Chief Justice of *England* would do what should be just in the case.

But though the Court of King's Bench be intrusted with this jurisdiction of issuing out *mandamuses*, yet they are not obliged to do so in all cases wherein it may seem proper, but herein may exercise a discretionary power, as well in refusing as granting such writ; as, where the end of it is merely a private right; where the granting it would be attended with manifest hardships and difficulties, &c.

[So, they will not grant it to restore a person, where it is confessed he was *rightly* removed, even though he had no notice at the time.]

So, ever since the statute 11 G. 1. c. 4. for obliging corporations to elect officers, it hath been held, that this court hath a discretionary power of refusing a writ for that purpose, but may first receive information about the election, and, if dissatisfied about the right, may send the parties to try it in an information.

2 Stra. 1003. 1157. Andr. 280.

Also, in a doubtful case, the Court of King's Bench may award a *mandamus* to be considered of further on the return, which may give more light, and discover more fully the justness of granting or refusing it, and on such return may either establish or quash the writ.

(F) To whom to be directed.

THE writ is to be directed to him who by law is obliged to execute it, or to do the thing thereby required; and therefore (a) where a *mandamus* was granted to the mayor, &c. of *Norwich*, it was moved, that the sense of the mayor differed from the majority of the corporation, and that he would execute the writ; whereas the corporation were for returning an excuse, &c. and they prayed, that the mayor might be ordered to deliver the writ to the rest of the corporation; *sed non allocatur*; for he is the head and principal, and (b) take your course against him.

2 Burr. 784. *Ibid.* 798.] (b) That if the mayor had made any return, contrary to the votes of the majority concerned, it was at his peril; and that the way to punish him was by information in *B. R.* Carth. 500.

[Where the *mandamus* was directed to the mayor, aldermen, and commonalty of *Ripon*, and they returned that they were incorporated by the name of the mayor, *burgesses*, and commonalty of *Ripon*, the court held the writ bad, because directed to the corporation by a wrong name.

The writ must be directed either to that part of the corporation who are to do the act, or to the corporation at large; for if it be directed to a part of the corporation who are not to do the

||SecRex v. the Com. of Ex-cise, 2 Term Rep. 385. Rex v. Clear, 4 Barn. & C. 899. and see *ante*, (A.)||

Rex v. Mayor, &c. of Ax-bridge, Cowp. 523.

Hil. 8 G. 2. The King v. Mayor and Burgesses of Tintagel in Cornwall,

Sid. 169. Lev. 23. 2 Lev. 14. 2 Show. 74. Carth. 169. 10 Mod. 49.

(a) Salk. 432. pl. 10. 701. pl. 6. 2 Ld. Raym. 1244. [The court will not specify to whom, by name, a *mandamus* shall be directed.

Rex v. Mayor, &c. of *Ripon*, 2 Salk. 435.

Rex v. Mayor, &c. of Abingdon, 2 Salk. 699. Reg. v.

Mayor, &c. of Hereford, *Id.* 701. || *Rex v. Smith*, 2 Maul. & S. 598. ||

Rex v. Mayor, &c. of Norwich, 1 Stra. 55.

Pees v. Mayor, &c. of Leeds, 1 Stra. 640.

Papillon and Dubois, Skin. 64. *Rex v. Westlove*, 3 Barn. & C. 685. S. C. 5 Dow. & Ry. 599.

Mod. 153. *The Queen v. the Town of Clitheroe*.

Trin. 5 Geo. 2. in B. R. The King v. Churchwardens of Wrexham, 15 Vin. Abr. 214. pl. 6.

2 Salk. 456. pl. 18. *The Queen v. the Mayor, &c. of Derby*.

Rex v. Ward, 2 Stra. 895.

act, it shall be quashed. Therefore, where a *mandamus*, to admit a person to the office of town-clerk, was directed to the mayor and aldermen of *Hereford*, and in fact the mayor only was to admit, the writ was quashed.

So, where the *mandamus* was directed to the mayor, aldermen, and common council of *Norwich*, to proceed to the election of a town-clerk, the court granted a *supersedeas*, it appearing, that the right of election was in the mayor and aldermen, and the writ was not directed to them, neither was it directed to the corporation by their corporate name.

But, where the power of amotion was in the mayor, aldermen, and others of the common council, the mayor and aldermen being part of the common council, and the writ was directed to the mayor, aldermen, and common council, it was moved to quash it for this direction, because it seemed to infer that the mayor and aldermen were no part of the common council: the court said, Here is nobody in this direction who must not join in the act: this is only repeating the several constituent parts of the corporation; and the mentioning the entire common council after the mayor and corporation, is but a repetition *quoad* the mayor and aldermen.

|| And the *mandamus* must not only be directed to the corporation, or select body, in their proper name, but also in their proper capacity; and the application for it must state plainly in what capacity it is intended that the writ should be directed to them. ||

If a *mandamus* be directed to the two bailiffs of a town, to swear in other bailiffs, and they object, that having sworn in others, and being now no longer bailiffs, and the writ not being directed to them in their natural capacities, they are not obliged to pay any obedience thereto; the court will notwithstanding oblige them to return the writ; for if the persons sworn in by them had no right to be chosen, they still continue bailiffs, and ought to obey the king's writ.

But where a *mandamus* was directed to the churchwardens of *W.* to restore *A.* to the office of sexton, and served upon the late churchwardens, after their office was expired; and a rule was made to shew cause why an attachment should not go, for not obeying the *mandamus*; upon the whole matter being disclosed by affidavit, the court allowed as a good reason for their not returning the writ, that they, at the time of the writ delivered to them, were not churchwardens.

A *mandamus* to the mayor, aldermen, and capital burgesses of *D.*, viz. whereas *A.* and *B.*, &c. removed the party complaining from his office of burgess, commanding them to command *A.* and *B.* to restore him was quashed, for that it is absurd, that the writ should be directed to one person to command another.

[The writ need not set out that the person to whom it is directed is the person to do the act for which the *mandamus* is granted; for if it is misdirected, it should be so returned.]

(G) By

(G) By whom to be returned.

THE writ is to be returned by him to whom it is directed; and if any other return it in his name, without his privity and consent, an action on the case lies against him: also, it is an offence for which the court will grant an attachment.

If a *mandamus* be directed to the mayor, &c., and the mayor, who is the most principal and proper person, return and bring in the writ; the court, upon affidavits, will not examine whether there was the sense of the majority, but will receive it, and leave the parties to punish the mayor for the misdemeanor, if he be guilty; but a peremptory *mandamus* will be granted if the return be falsified.

by the court to file an information against the mayor.

(H) *Of the Manner of enforcing Obedience to the Writ, and compelling a Return.*

ON every *mandamus* there regularly issues an *alias* and *pluries*, to oblige the party to return the writ; but the Court of King's Bench may make a peremptory rule to return the first writ, and, in case of disobedience, grant an attachment: also, by the statute 9 Ann. c. 20. and 11 G. 1. c. 4. persons who are by law required to make returns to *mandamuses*, in such cases as are within these statutes, must make their return to the first writ of *mandamus*.

If an attachment issues for not returning a *mandamus*, and the sheriff, who is to serve the process, takes bail thereupon, this is such a misdemeanor for which an attachment will be granted against him; for these are not like attachments in Chancery, for want of an answer, which are only as attachments of process, but are writs on contempt, in nature of executions, and so not bailable by the sheriff.

If a *mandamus* is awarded for electing an officer, and there is an equality of votes, so that the electors cannot agree, it is said, that they shall be all brought up as in contempt, and laid by the heels, till they do agree.

[A *mandamus* was directed to the two bailiffs, one of whom was for obeying the writ, but the other would not, nor join in the return. The court granted an attachment against both; for they said, it would be endless to try in all cases which was in the right, and it would be always used for a handle of delay.]

Where a writ was directed to the mayor and jurats of Rye to admit and swear a jurat; and the mayor claimed an exclusive right to the nomination of him, and the jurats denied any such right in the mayor, so that they could never join in a return, it was consented to try the right in a feigned issue. *Rex v. Mayor, &c. of Rye*, 2 Burr. 798.

(I) What shall be said a good Return.

2 Salk. 432.
pl. 11. Ld.
Raym. 559.
Vent. 111.
[(a) But certainty to a certain intent in general is all that is requisite here,

AS every *mandamus* issues upon a supposal of some breach and disobedience of the law, or neglect of duty in the person to whom it is directed, the return thereto must be certain to every respect (a); and therefore it is said not to be sufficient to offer such matter as the party may falsify in an action, but also such matter must be alleged, that the court may be able to judge of it, and determine, whether the party's conduct be agreeable to law or not.

which means what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts, which do not appear. If the return be certain upon the face of it, that is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad. If presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return. Besides, presumption and intendment, as far as they go, must be in favour of returns, not against them. *Per Buller J. Dougl. 159.*] ¶ See *Rex v. Mayor of Monmouth*, 4 Barn. & A. 497. *Rex v. Mayor of Carmarthen*, 1 Maul. & S. 697.¶

Vent. 110.
The King v.
Clapham.

Therefore, if to a *mandamus* to the Lord President and Council of the *Marches*, to admit a person to the exercise of office of deputy secretary, the return is, that *non fuit tempore receptionis brevis deputatus constitutus*; this is naught; for if he were made his deputy before, the return was true, unless he made him his deputy at the very instant of the receipt of the writ.

2 Salk. 436.
pl. 10. 2 Ld.
Raym. 1244.
The Queen v.
Mayor, &c. of
Norwich.
[(b) See acc.

To a *mandamus* to admit a person alderman, the party may return, that he was not qualified, or that he was not elected: also, several causes may be returned, but they must be consistent (b); and therefore if the return admits a good election, and afterwards avoids it by the matter repugnant, this is naught.

Wright v. Fawcett, 4 Burr. 2041. *Rex v. Churchwardens of Taunton St. James's, Cowp. 413.* Where several causes returned to a *mandamus* are inconsistent, the whole must be quashed, because the court cannot know which to believe, and it is an objection to the whole return. It is like a declaration in which two inconsistent counts are joined; there, the plaintiff cannot have judgment. But where a return consists of several independent matters not inconsistent with each other, some of which are good at law, and some bad, the court may quash the return as to such as are bad, and put the prosecutor to plead to or traverse the rest. *Rex v. Mayor, &c. of Cambridge*, 2 Term Rep. 456. *Rex v. Mayor, &c. of York*, 5 Term Rep. 66. *Rex v. Archbishop of York*, 6 Term Rep. 493.]

6 Mod. 309.
See Ld. Raym.
225. 559.
¶ *Rex v. Ilchester*, 4 Dow. &
Ry. 350.¶
Raym. 153.

A *mandamus* to swear one into the place of town-clerk; the return was, that upon the election B. had eighteen voices, and the party who sued the *mandamus* but seventeen; and that they swore in B.: it was held a bad return, being argumentative, when it should be express and direct, that he was not chosen.

A *mandamus* was granted to restore the recorder of *Barnstaple*, directed to the mayor of the corporation; and he returned, *quod non constat nobis* that he was ever elected; and the return was adjudged insufficient, and restitution awarded.

Sid. 209.
Keb. 655. 716.
733.

So, where to a *mandamus* to restore a town-clerk, it was returned, that he *nunquam debito modo admissus fuit*; it was held a bad return, being a negative pregnant, and involving matter of law, when the plain fact only should be returned, so as to enable the court to adjudge upon it, and the party to bring his action, in case it were false.

¶ A return

|| A return to a *mandamus* to restore a parish clerk was held bad, because, though it appeared that the offences charged were sufficient grounds of removal, it was not stated that he had been summoned to answer the charge before his removal.||

Rex v. Gaskin,
8 Term Rep.
209.; and see
1 Bing. 357.

[So, where a writ of *mandamus*, to certify the election of a recorder, stated, that the corporation, being duly assembled, proceeded to the election of a recorder; a return, that they were not duly assembled to proceed to the election of a recorder, was holden bad, as being a negative pregnant.]

Rex v. Mayor,
&c. of York,
5 Term Rep.
66.

But if the *mandamus* suggest that he was *debite electus*, a return *quod non fuit debite electus* is good, because it answers the suggestion in the writ.

Carth. 170.
Lambert's
case, 2 Salk.
433. pl. 13.

5 Mod. 11. S. P. [2 Stra. 1235. S. P. 1 Show. 253. S. P. Andr. 103. S. P. on a *mandamus* to restore. But see 2 Stra. 895. and Dougl. 82. A return to a *mandamus* stating in the words of the writ, that the prosecutor was not DULY ELECTED, admitted, and sworn, was holden to be bad. *Secus*, perhaps, if it had been not duly elected, or admitted, or sworn. Rex v. Lyme Regis, Dougl. 79.]

[If a writ set forth all the proceedings of the election, and conclude, "by reason whereof *A.* was elected;" it is a bad return to say "that he was not elected:" the defendant should traverse one of the facts alleged.]

Rex v. Mayor,
&c. of York,
5 Term Rep.
66.

Where an amotion is returned, the return must set out all the necessary facts precisely, to shew that the person is removed in a legal and proper manner, and for a legal cause. It is not sufficient to set out conclusions only; the facts themselves must be set out precisely, that the court may be able to judge of the matter. And so it is as to the *cause* of amotion; *that* must be set out in the same manner, that the court may judge of it.

Per Lord
Mansfield,
2 Burr. 731.

Therefore, where to a *mandamus* to restore *J. S.* to the place of common councilman of *L.*, the defendants returned generally the cause of the amotion by the common council, who were in due manner met and assembled, the court held the return to be bad; for that they were so duly assembled was a conclusion of law; that they should have set out the facts, *viz.* that they had as a select body the power of amotion: that all the members were summoned by regular and proper notice: and that *J. S.* himself was also regularly summoned and heard in his defence.

Ibid.

So, if the amotion were by a part of a corporation, the return should shew how they have such authority, whether by charter or prescription; for as the power of amotion is by the general law in the whole corporation at large, it should appear how the select part is entitled to it.

Rex v. Mayor,
&c. of Don-
caster, Say.
Rep. 37.
|| Rex v. Fe-
versham,
8 Term Rep. 356. ||

But the power of amotion being generally in the whole corporation, it is obvious, that if it is stated, that the party was removed by the corporate body at large, it is unnecessary to aver that the power was vested in them.

Rex v. Lyme
Regis, Dougl.
149.

A return in general terms is bad; as, that the party had obstinately refused to obey the rules and orders of the corporation, contrary to the duty of his office, without stating what the rules and orders were.

Rex v. Mayor,
&c. of Don-
caster, 2 Ld.
Raym. 1564.

So,

Say. Rep. 57.

So, a return of removal for neglect of duty, without stating the particular instances of neglect, has been holden to be bad.

Rex v. Lyme
Regis, Dougl.
177.

On a *mandamus* to restore to the office of a capital burgess, if the return state the ground of disfranchisement to have been, the non-attendance of the prosecutor at a meeting to which he was summoned for the election of a capital burgess, an averment, that the right of such election is in the capital burgesses being the common council, does not assert with sufficient certainty, that he had a right to concur in the election, and ought to have obeyed the summons, because, consistently with such an averment, he might not have that right, it not appearing thereby that all the capital burgesses are members of the common council.

2 Salk. 434,
435.

If a writ be directed to a corporation by a wrong name, they may return this special matter, and rely upon it; but if they answer the exigency of the writ, they cannot take advantage of the misnomer.

2 Salk. 431.

If the supposal of the writ be false in not truly stating the constitution of the corporation, it will not be sufficient for the return to state it truly; the defendants must also deny the supposal of the writ.]

Rex v. Bower,
1 Barn. & C.
585.

¶ Where a *mandamus* commanded defendant to take upon himself the office of common councilman in a borough, and the defendant returned, that by a bye-law persons refusing to fill the office were subject to a fine, and that defendant had paid the fine, the return was held bad; since it did not shew that the fine was in lieu of service, and a peremptory *mandamus* was awarded.

Rex v. Wil-
liams, 8 Barn.
& C. 681.

To a *mandamus* to a commissary to admit *A. B.* into the office of churchwarden, reciting that he had been duly elected, it is a good return that *A. B.* was not duly elected.¶

(K) Of traversing the Return, and taking Issue thereon.

Vent. 111.

2 Salk. 432.

pl. 8. 1 Str. 58.

1 Show. 335.

Ld. Raym. 481.

THE party to the return of a *mandamus* could not traverse nor interplead, which is one reason why the utmost certainty was required in such return.

But now by the 9 Ann. c. 20., reciting that divers persons had illegally intruded themselves into and taken upon them to execute the office of mayors, bailiffs, port-reeves, and other offices within cities, towns corporate, boroughs, and places; and the great difficulty of determining, where the office was annual, the right to the same, within the compass of the year, or where it was not annual, the difficulty of determining the right, before the persons had done divers acts prejudicial to the peace and order of such city, &c. and reciting the great difficulty persons illegally turned out, or refused to be admitted, lay under, and the dilatoriness and expense attending the proceedings on writs of *mandamus*; it is therefore enacted, "That as often as, in any of the cases afore-
" said, any writ of *mandamus* shall issue out of the King's Bench,
" the courts of sessions of counties palatine, or out of any the
" courts of the grand sessions in *Wales*, and a return shall be made
" thereunto,

“thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of *mandamus* to plead to or traverse all or any the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place as an issue joined in such action on the case should or might have been tried; and in case a verdict shall be found for the person or persons suing (a) such writ, or judgment given for him or them on demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his and their damages and costs, in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum*, *feri facias*, or *elegit*, and a peremptory writ of *mandamus* shall be granted without delay, for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid.” (b)

(a) Where defendants shall recover costs, vide § 5. of this statute. || And as to costs where the writ of *mandamus* is obeyed, see 12 Geo. 3. c. 21. and Tidd's Pract. 985. 8th edit. || (b) By § 7. of this statute, the statutes of amendment and jeofails are extended to proceedings on writs of *mandamus*.—If in a proceeding under the statute no damages are given by the jury, the want of it cannot be supplied by a writ of enquiry; but in such case the party may bring an action for a false return; for the act does not take away the party's right to bring such action, but only provides that in case damages are recovered, by virtue of that act, against the persons making the return, they shall not be liable to be sued in any other action, for making such return. Stra. 1051.—There are many cases to which the statutes do not extend.—In all those cases the proceedings must be according to the course of the common law.

(L) Of the Party's Remedy for a false Return.

IT is clearly agreed, that for a false return to a *mandamus* an action on the case lies; as, if upon a *mandamus* to restore T. S. to his place of burgess of P. the mayor, &c. return a good cause, the matter of which is false, an action lies for the false return.

11 Co. 99. Bagg's case. [An action will lie for a *suppressio veri* in a return, as well as for an *allegatio falsi*. Dougl. 149.]

Also, it hath been adjudged, that where the return is made by several persons, the action may be either joint against all, or several, being founded on a tort or injury; as, if made by the mayor and aldermen, the action may be brought against the mayor only; and if upon evidence it appears that he voted against the return, but was over-ruled by the majority, the plaintiff will be nonsuited. (c)

Carth. 171, 172. Sir Peter Rich v. Pilkington, Lord Mayor of London, 6 Mod. 152. S. P. (c) Where several join in an application for a *mandamus*, they must all join in the action for a false return. 1 Ld. Raym. 125.

[The

Rex v. Mayor
of Exeter,
1 Ld. Raym.
223. Bull.
N.P. 209.

[The return need not be under the seal of the corporation, nor need the mayor sign it; and if an action be brought against the mayor for a false return, it will be a sufficient evidence against him, that the *mandamus* was delivered to him, and has such a return, unless he can shew the contrary.]

Vaughan v.
Lewis, Carth.
228.

In an action for a false return the plaintiff set out, that he was chosen upon the first of *October*, according to the custom. Upon evidence it appeared, that the custom was to choose upon the 29th of *September*, and that the plaintiff was then chosen; and this was holden sufficient to support the declaration, for the day in the declaration is but form.

Green v. Pope,
1 Ld. Raym.
126.

In an action for a false return, it is not material whether the writ issued properly or not.]

Salk. 374.

Also, if the matter concerns public government, and no particular person is so far interested as to maintain an action, the court will grant an information against the particular persons that made the return. (a)

pl. 16.
Ld. Raym. 584.
(a) The return
must be filed

and allowed before the information can be moved for. || Rex v. Lancaster, 1 Dow. & Ry. 485-||

Rex v. Lyme
Regis, Dougl.
135.; ||and see

[Clerical mistakes in returns may be amended after they are filed.]

Willcock on Corporations, part 2. pl. 272. *et seq.*||

(M) Of awarding a peremptory *Mandamus*.

11 Co. 99.
1 Str. 145. 609.
(b) That on
falsifying the
return, in an

IF the return be insufficient, or falsified in an (b) action on the case, the court regularly grants a (c) peremptory *mandamus*, either to admit (d), restore, or discharge, &c. the party, as the case requires.

action on the case, no motion can be made for a peremptory *mandamus* till four days are past after the return of the *postea*; because the defendant has so long to move an arrest of judgment. 2 Salk. 430, 431. (c) Not to be granted in the first instance. Skin. 669. pl. 7. (d) But it is said, that if the court does not see cause of restitution, though there be no good return to the writ, yet they will not grant a peremptory *mandamus*. 7 Mod. 83, 84. ||And if the court have given their opinion against a return, but are inclined to re-consider the matter, they will, it seems, award a peremptory *mandamus nisi*, which issues of course, unless they make known their opinion to the court before the expiration of the same term. Rex v. Tappenden, 3 East, 192.||

Rex v. Grif-
fiths, 5 Barn.
& A. 731.

||But where a return to a *mandamus* to restore a party to a corporate office was defective in form, but on the whole it appeared that there was good ground for the removal, the court refused to award a peremptory *mandamus*; the only effect of which would be to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner.||

2 Salk. 428.
pl. 1. 1 Ld.
Raym. 216.
Skin. 670.
pl. 8. S.C.

The action which falsifies the return is to be brought in that court out of which the *mandamus* issued; and therefore where in an action on the case in *C. B.* for a false return to a *mandamus*, judgment was given for the plaintiff on demurrer, yet the Court of *B. R.* refused to grant a peremptory *mandamus*; because every *mandamus* recites the fact *prout nobis constat per recordum*, which cannot

cannot be said in this case, as the court cannot take notice of the records of the Common Pleas.

[The judgment of the Exchequer Chamber, whereby the judgment of *B. R. pro defendente* was reversed, being affirmed in parliament, the plaintiff moved for a peremptory *mandamus*, insisting that he had now falsified the return, and, consequently, set aside the defendant's excuse. But it was objected, that no peremptory *mandamus* ought to go, unless, besides the reversal of the judgment given for the defendant, there had been also a new judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and must be founded upon some judgment establishing the right of the party who applies for it. *P. C. Philips v. Bury*, 2 Salk. 431. Cro. Jac. 206. Yelv. 74. 2 Vent. 295. P. 10 Ann. *Lidd v. Rod*, Tr. 7 Ann. *Hicks v. Sherburn*, 1 Br. P. C. 328. But *per Curiam*,—A peremptory *mandamus* ought to go; for this is not a judicial writ founded upon the record, but is a mandatory writ, which the court always grant, when they are satisfied of the party's right. The reversal of our judgment is a declaration by the superior court that the plaintiff had a right; and there is no occasion for any new judgment. We every day grant peremptory *mandamuses* on producing the *postea*, which shews a formal judgment is not necessary. A peremptory *mandamus* was awarded.

But a peremptory *mandamus* is not grantable pending a writ of error.

Foot v. Prowse, 2 Str. 697.

Ruding v. Newel, 2 Str. 983.

It is enacted by stat. 9 Ann. c. 20. § 2. that “where any *mandamus* shall issue to admit or restore any burgesses, &c., and a return shall be made, and a verdict be found for the persons suing such *mandamus*, or judgment be given for them, a peremptory *mandamus* shall be granted without delay, as if such return had been adjudged insufficient.”

Since this statute a *mandamus* is in nature of an action, special replications and pleadings therein being admitted, and costs given to either side that prevails, and error lies upon a judgment given therein. Yet it hath been solemnly determined, that no writ of error will lie on a peremptory *mandamus*; for such a construction would entirely defeat the end of the statute, and prevent the officer, who was chosen annually, from having any fruit of the *mandamus*.]

Dean, &c. of Dublin, v. Dowgatt, 1 P. Wms. 348. 8 Mod. 27. S. C. 1 Stra. 536. S. C. 2 Br. P. C. 554. S. C. Pender v.

Herle, 5 Br. P. C. 178. S. P. upon the authority of the above case of Dean, &c. of Dublin v. Dowgatt.

MARRIAGE AND DIVORCE.

¶For some useful information on this head of law, see Poynter on the Law of Marriage and Divorce. And see Sir William Scott's learned and luminous judgments, 1 Hagg. C. Rep. 230. 2 *Id.* 62. 417. 300. and Burn's Eccl. Law, tit. Marriage. (a) This principle, which had been departed from as to marriages of minors, without consent, by the old marriage act, 26 Geo. 2. c. 33. § 11. 1 Addams, R. 475. 3 Phill. R. 256., has been restored by the new act 4 G. 4. c. 76. § 16.; and see 8 Barn. & C. 35.¶

MARRIAGE is a compact between a man and a woman for the procreation and education of children; and seems to have been instituted as necessary to the very being of society; for, without the distinction of families, there can be no encouragement to industry, or any foundation for the care of acquiring riches. All well-ordered societies have therefore guarded the marriage rite with religious solemnities, and ordained that the contract should be indissoluble (a) during the joint lives of the parties. And the reason of this latter provision is, because children gradually succeeding one another, the parents have hardly done with the care of their education before they are themselves unfit for a second marriage. It is also fit that marriages should continue during life, that the mutual care of the parents may be employed in making provision for their children; and that the love and respect of the children may be returned to both parents without distraction or confusion. Besides, the common interest could not be so well provided for, if there were a prospect that the marriage was any otherwise to be determined but by death only; for each person would be injuriously drawing out of the common stock, to the injury of their joint concern, and to the prejudice of the education of their offspring: nor can such a joint interest be well and commodiously carried on without a mutual friendship and endearment, which must be lessened and destroyed by the prospect that the contract may be determined by the humour of either party. Hence it is, that fornication and all other lusts are unlawful, because children are begotten without any care or preparation for their education; and the crime of adultery receives this further aggravation, that it not only entails a spurious race on the husband, for whom he is under no obligation to provide, but likewise destroys that peace and mutual endearment which ought always to subsist in the marriage state.

[Some ancient nations appear to have been more sensible of the importance of marriage institutions than we are. The *Spartans* obliged their citizens to marry by penalties, and the *Romans* encouraged theirs by the *jus trium liberorum*. A man who had no child was entitled by the *Roman* law only to one half of any legacy that should be left him, that is, at the most, could only receive one half of the testator's fortune. With us, the laws hold out no temptation to marriage, and prudence will, in general, recommend celibacy.]

We shall consider what is enjoyed or forbidden with respect to marriage under the following heads:—

(A) What Persons may marry, and particularly within the Levitical Degrees.

(B) Of

(B) Of Espousals and Marriage Contracts: And herein of the Difference between Contracts *in præsenti* and *futuro*, and the Remedies for the Violation thereof.

(C) Of the Solemnization and Ceremonies requisite to a complete Marriage: And herein of the Offence of performing the Ceremony without due Authority or Licence.

||(D) Of Foreign Marriages.||

(E) Of Offences against the Rights of Marriage: And herein,

1. *Of the Offence of a forcible Marriage.*
2. *Of the unlawful Abduction of an unmarried Girl under the Age of Sixteen from her Parents or Guardians.*
3. *Of the Offence of procuring an improvident Marriage; and therein of Marriage-Brokerage Contracts and Agreements.*

(F) Marriage how long to continue: And herein of the several Kinds of Divorces; and herein,

1. *Of Elopement.*
2. *Of the Offence of taking away a Wife, and of criminal Conversation.*
3. *Of the several Kinds of Divorces.*

(A) What (a) Persons may marry, and particularly within the Levitical Degrees.

(a) At what age persons may contract

and intermarry, *vide* head of *Infancy and Age*. — Of marriages by idiots and lunatics, *vide* head of *Idiots and Lunatics*. || And see stat. 15 G. 2. c. 30. 51 G. 3. c. 37. 1 Ves. & B. 140. 1 Hagg. C. Rep. 414.||

|| It is enacted by 4 G. 4. c. 26. § 16. "That the father, if living, of any party under twenty-one years of age, such parties not being a widower or widow; or if the father shall be dead, the guardian or guardians of the person of the party so under age lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent." (b) But by sect. 17. "In case the father or fathers of the parties to be married or of one of them so under age as aforesaid shall be *non compos mentis*,

Bastards, it is presumed, are within this clause of the statute. See *Rex v. Hodnett*, 1 T. R. 96. *Priestly v. Hughes*, 11 East, 1. (b) *Per Lord Tenterden C.J.* in *Rex v. Birmingham*, 8 Barn. & C. 35. "The language of this section is merely to

“ require con-
 “ sent, it does
 “ not proceed
 “ to make the
 “ marriage
 “ void if
 “ solemnized
 “ without
 “ consent.”
 Under the
 former mar-
 riage act,
 26 G. 2. c. 55.
 § 11. the
 marriage
 was null and
 void.

“ *mentis*, or the guardian or guardians, mother or mothers, or
 “ any of them whose consent is made necessary as aforesaid to
 “ the marriage of such party or parties shall be *non compos*
 “ *mentis*, or in parts beyond the seas, or shall unreasonably or
 “ from undue motives refuse or withhold his, her, or their con-
 “ sent to a proper marriage, then it shall and may be lawful for
 “ any person desirous of marrying in any of the before-men-
 “ tioned cases to apply by petition to the Lord Chancellor,
 “ Lord Keeper, or the Lords Commissioners of the Great Seal
 “ of *Great Britain* for the time being, Master of the Rolls,
 “ or Vice-Chancellor of *England*, who is and are respectively
 “ hereby empowered to proceed upon such petition in a sum-
 “ mary way; and in case the marriage proposed shall, upon
 “ examination, appear to be proper, the said Lord Chancellor,
 “ Lord Keeper, or Lords Commissioners of the Great Seal for
 “ the time being, Master of the Rolls, or Vice-Chancellor, shall
 “ judicially declare the same to be so; and such judicial declar-
 “ ation shall be deemed and taken to be as good and as
 “ effectual, to all intents and purposes, as if the father, guardian
 “ or guardians, or mother of the person so petitioning had con-
 “ sented to such marriage.”

(a) See § 30.

[The marriages of the royal family being regulated by 12 G. 3. c. 11. are excepted from the restraints of this act. (a) By the 12 G. 3. c. 11. it is enacted, “ that no descendant of the body of
 “ King *George* the second, male or female, (other than the issue
 “ of princesses who have married, or may hereafter marry, into
 “ foreign families,) shall be capable of contracting matrimony
 “ without the previous consent of his majesty, his heirs or
 “ successors, signified under the great seal, and declared in
 “ council (which consent, to preserve the memory thereof, is
 “ hereby directed to be set out in the licence and register of
 “ such marriage, and to be entered in the books of the privy
 “ council); and that every marriage or matrimonial contract of
 “ any such descendant, without such consent first had and
 “ obtained, shall be null and void, to all intents and purposes
 “ whatsoever.”

§ 2.

“ Provided, that in case any such descendant, being above the
 “ age of twenty-five years, shall persist in his or her resolution
 “ to contract a marriage disapproved of or dissented from by
 “ the king, his heirs or successors, that then such descendant,
 “ giving notice to the king’s privy council, which notice is
 “ hereby directed to be entered in the books thereof, may, at
 “ any time from the expiration of twelve calendar months after
 “ such notice given to the privy council as aforesaid, contract
 “ such marriage; and his or her marriage with the person before
 “ proposed, and rejected, may be duly solemnized without the
 “ previous consent of his majesty, his heirs or successors; and
 “ such marriage shall be good, as if this act had never been
 “ made, unless both houses of parliament shall, before the ex-
 “ piration of the said twelve months, expressly declare their
 “ disapprobation of such intended marriage.”]

By

By the statute of (a) 32 H. 8. c. 38. it is enacted, "That no reservation or prohibition (*God's law except*) shall trouble or impeach any marriage without the (b) Levitical degrees; and that no person, of what estate, degree, or condition soever he be, shall be admitted to any of the spiritual courts within the king's realm, or any of his grace's other lands and dominions, to any process, plea, or allegation contrary to the statute." Com. 435. || (b) But the statute does not restrain the ecclesiastical courts from other accounts; as, upon the account of insufficiency, adultery, pre-contract, &c. Vaugh. 206. &c.

(a) For the general exposition of this statute, vide Co. Litt. 24. 235. 2 Inst. 683. 4 Hob. 181. || 1 Black.

Since this statute it hath been clearly agreed, that if the spiritual courts proceed to impeach or dissolve a marriage out of the Levitical degrees, that then the temporal courts are to prohibit them, for by that statute, all marriages that are out of those degrees are declared to be good and lawful; and therefore, if the spiritual court molest persons in doing that which is declared lawful to be done by the statutes of the realm, they are by the temporal courts to be prohibited, because they exceed their jurisdiction, thus bounded by the temporal law; but where the law has not bounded them, their jurisdiction still continues; and therefore within the Levitical degrees they are still judges of incest.

Vaugh. 206. &c.

We must likewise observe, that if a person marries his cousin within the Levitical degrees, yet they continue husband and wife till a sentence of divorce be pronounced.

Roll. Abr. 340. 357. Vaugh. 208. 220.

The degrees prohibited by the Levitical law are such as are said to be against the law of nature, and such as are against the divine positive law.

Those against the law of nature are all marriages between the ascending and descending line *in infinitum*; and this is said to be contrary to the law of nature, because it tends to the destruction of the natural will of the Creator, which designed the preservation and continuance of such inhabitants of the world as he originally created; and all acts of men that tend to the destruction of such *species*, as murder of an innocent person, are said to be against the law of nature; and therefore incest between the ascending and descending line is contrary to the law of nature; for the mother would never have preserved and educated the female issue, if it had been admitted to the father to have had access to them; and fathers would never have educated and preserved their male issue, if they might have ascended the bed of their mothers. There is also another reason why this is called unnatural, and that is, because it destroys the natural duties between parents and children; for the parent could never preserve or maintain that authority that is necessary for the education and government of his child, nor the child that reverence that is due to the parent in order to be educated and governed, if such indecent familiarities were admitted. There likewise seems to be a natural reason against this or any near intercourse between collaterals, which is drawn from that which is observed in brute creatures; *viz.* that it is necessary to cross the strain, in order to

Grot. de Jure, lib. 2. c. 5. Vaugh. 221. 242. &c.

continue the *species*. It may be, that there being the same tone and figure in the blood, and a similar conformation of vessels, the circulation of it becomes torpid and inactive: whereas a new mixture of others of the same kind, where there is a different figure and motion of the blood and spirits, may add a new vigour and ability to the animal economy.

Vaugh. 222. Those prohibited by the positive divine law are all collaterals to the third degree; and though this be not contrary to the law of nature, yet it seems established on very strong reasons; for if a concourse between brothers and sisters might be allowed, or their marriages be tolerated, the necessity there is that they should be educated together, and the frequent opportunities they have with each other would fill every family with lewdness, and create heart-burnings and unextinguishable jealousies between brothers and sisters, where the family was numerous; and it would confine every family to itself, and hinder the propagating common love and charity among mankind, because there would be a danger of taking a wife out of any family, if women were liable to be corrupted by such vicious freedoms. This prohibition is likewise carried to uncles and aunts, nephews and nieces; because, upon the death of the father and mother, they come into the education of children *loco parentum*; and, by consequence, it was necessary to propagate the same reverence of blood in such near degrees, that the uncle might have the same regard and command as a father, and a niece the same duty as a daughter: it was also necessary, in order to perfect the union of marriage, that the husband should take the wife's relations in the same degree to be the same as his own without distinction, and so *vice versâ*; for if they are to be the same person as was intended by the law of God, they can have no difference in relations; and, by consequence, the prohibition touching (a) affinity must be carried as far as the prohibition touching consanguinity.

mate conversation, especially during early youth, would introduce an universal dissoluteness and corruption. But as the customs of countries vary considerably, and open an intercourse, more or less restrained, between different families, or between the several members of the same family, so we find that the moral precept, varying with its cause, is susceptible, without any inconvenience, of very different latitude in the several ages and nations of the world. The extreme delicacy of the Greeks permitted no converse between persons of the two sexes, except where they lived under the same roof; and even the apartments of a step-mother, and her daughters, were almost as much shut up against visits from the husband's sons, as against those from any strangers or more remote relations. Hence, in that nation, it was lawful for a man to marry, not only his niece, but his half-sister; a liberty unknown to the Romans, and other nations, where a more open intercourse was authorized between the sexes." Hist. vol. iv. 110.] (a) According to the text, xviii. Levit. ver. 16. *The nakedness of thy brother's wife shalt thou not uncover, it is thy brother's nakedness.*" ||And see Blackmore v. Brider, 2 Phill. R. 559. Elliott v. Gurr, ed. 18.]

The law in *Leviticus*, cap. xviii. ver. 6. is, *That none of you shall approach to any that is near of kin, to uncover their nakedness*; which words, being general, must be understood and expounded by the examples from the 6th to the 20th verse; among which we find many prohibitions to collaterals in the third degree, both in affinity and consanguinity; but there is no example of collaterals in the fourth degree, either in affinity or consanguinity,

guinity, and therefore the law of marriage opens to relations in the fourth degree; and the *Jewish* lawyers, in computing their degrees, computed them according to the natural order of things; that is, from the *propositus* up to the common stock, and so down to the other relations; which is the fair and natural order of computing proximity; and in this order of computation, cousins-germans are held to be of the fourth degree, and to have liberty to marry.

Selden, Ux.
Hebraica,
lib. i. c. 4.

This likewise was the ancient sense of the *Christian* church, Vaugh. 210. and even of the church of *Rome* in the time of Pope Gregory; for in writing to *Austin*, bishop of *Canterbury*, he says, *In quartâ generatione contracta matrimonia minime solverentur*; but afterwards, when they found that dispensations for incestuous marriages brought great profit to the church of *Rome*, and knowing it had obtained universally in the *Christian* church, that it was lawful to marry in the fourth degree, Pope *Alexander II.* began a new computation of degrees; and he said, that the secular computation, which was the computation of the civil law, was not properly adapted to the decisions touching incestuous marriages, but they ought to compute up to the common stock, where the relation joined, because there the blood was connected; and therefore they computed the degrees according to the distance of the person remotest from the common stock; for according as the remotest was distant from the common stock, so they computed the relation between the parties; so that the first cousins, that are in the fourth degree by the received computation in the *Mosaic* and civil law, were now by the canonical computation thrown into the second degree; and by this alteration of the computation of degrees, they forbade not only first cousins but second and third cousins to marry, unless they obtained dispensations.

The intention of the statute above mentioned was to restore every thing according to the prohibition expressed in the law of *God*; and plainly, the Levitical computation of degrees was in the manner they computed in the civil law; and agreeably hereto hath been the resolution in our law.

Hence it hath been adjudged, that the marriage of two sisters, one after the other, was incestuous, being in the second degree; although it was objected, that the verse in xviii. *Levit.* being, *Thou shalt not take a wife to her sister to vex her*, &c. the prohibition relating to polygamy, to jealousy and vexing, the reason thereof ceased with the death of the first wife; in the same manner as if *Moses* had said, *Thou shalt not take a wife to her sister to vex her*, besides the other in her lifetime. But herein the court held, that though the vexing, in one part of the text, related to the life of the wife, yet by another part it is made unlawful for ever; and that from these words, *None of you shall approach to any that is near of kin to him, to uncover their nakedness*; which makes the nearness of kin the chief cause of the prohibition, and is the reason that runs through the whole chapter; and that therefore the vexing refers only to the life of the wife, but the incestuous copulation is the same after her death, the nearness of kin still continuing.

Vaugh. 302.
Hill v. Good,
Carth. 271.
S.P. admitted.

Raym. 464. So, it hath been resolved, that marrying the sister's daughter
Watkinson v. is incestuous, being in the third degree.
Mergatron,
2 Jon. 191. S. C. || And see Burgess v. Burgess, 1 Hagg. C. Rep. 384. ||

Moor, 907. So, it hath been resolved in variety of books and cases, that
Cro. Eliz. 228. the marriage with the wife's sister's daughter was incestuous,
4 Leon. 16. being likewise in the third degree; and the degree of affinity
S. C. Man's being the same with that of consanguinity.
case, 2 Lev.
254. 3 Keb. 660. Hob. 181. Noy, 29. Sid. 454. 2 Jon. 118. 2 Show. 70. 5 Mod. 448. 3 Lev.
364. 2 Lutw. 1075. || This was determined otherwise in Richard Parson's case, Tr. 2 Jac. in
Com. Pleas, Co. Lit. 235. a.; but a consultation was granted two years afterwards, and the case
is said to have been expunged from the first institute by order of the king in council. Burn's
Eccl. Law, iii. 402. 3d edit. And see Co. Lit. 235. a. note (1). ||

Vaugh. 206. But upon a prohibition, for proceeding against a person in the
2 Vent. 9. ecclesiastical court who had married the widow and relict of his
Harrison & great uncle, it was adjudged, that such marriage, being in the
ux. v. Dr. fourth degree, was out of the Levitical law, and therefore lawful.
Burwell. || And accordingly, after the opinion of all the judges taken by
|| Gibbs. 415. || the king's special command, a prohibition was granted. ||
Co. Lit. 235. a. note (1). ||

M. 30 Car. 2. On a motion for a prohibition to the court of the Bishop of
in C. B. Oxon, for presenting J. S. for incest, who had married the
Ox-henham & daughter of his brother of the half blood, it was resolved that
ux. v. Gayre. no prohibition should go; for the court said, though the brothers
were not of the whole blood, yet were they brothers, and there-
fore the marriage incestuous: they agreed, that if the father
marries the mother, and the son the daughter, this was lawful
enough; and North cited the case of the Earl of Manchester,
who had married his great aunt's husband's second wife; and
this was held by divines and civilians a good marriage, for *affinis
mei affinis non est mihi affinis*.

5 Mod. 161. On a motion for a prohibition, for proceeding against a person
Hains v. Jes- in the ecclesiastical court, who had married his sister's bastard
cott, Comb. daughter; it was urged for the prohibition, that though the Levi-
356. S. C. tical law forbids a man to approach to any near of kin to uncover
[Com. Rep. 2. their nakedness, yet that this cannot be intended of a bastard,
S. C. 1 Ld. because he is of kin to no person whatsoever (*a*), &c. but the
Raym. 68. court inclined not to grant a prohibition.
S. C. (*a*) This
objection of
being *nullius filius*, and therefore having no consanguinity, must be understood only as to civil
purposes, and is to be confined chiefly to inheritances, 1 Term Rep. 101. for there is a relation
as to moral purposes; and hence a bastard cannot marry his own mother or bastard sister.
3 Salk. 66.]

(B) Of Espousals and Marriage Contracts: And herein
of the Difference between Contracts *in præsenti*
and *futuro*, and the Remedies for the Violation
thereof.

Swinb. of Es-
pousals, § 11.

SWINBURNE defines espousals in this manner, *sponsalia sunt
mutua repromissio nuptiarum ritè inter eos, quibus jure licet,
facta*; which comprehends, 1st, That this promise must be
mutual; 2d, That it must be done *ritè*, or duly; 3d, That it
must be entered into by them who may lawfully marry.

Such

Such contracts are divided into contracts *in præsenti* and contracts *in futuro*.

A contract *in præsenti*, or *per verba in præsenti*, — as, *I marry you, you and I are man and wife*, &c. — is by the civil law esteemed *ipsum matrimonium*, and amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement; it being as much a marriage in the sight of God as if it had been *in facie ecclesiæ*, with this difference, that if they cohabit before marriage *in facie ecclesiæ*, they are for that punishable by ecclesiastical censures (a), and if after such contract either of them lies with another, such offender shall be punished as an adulterer.

be tried in the spiritual courts, and not by verdict, *vide tit. Bastardy*. In debt on a bond, the defendant pleaded *ne unques accouple* in loyal matrimony; plaintiff demurred, and had judgment; for it alters the trial; for instead of trying *per pais*, it puts the trial on a certificate from the ordinary. Secondly, It admits a marriage, but denies the legality of it: whereas a marriage *de facto* is sufficient, and whether loyal or not loyal, is no ways material. 2 Salk. 437. pl. 2. So, in an assault and battery by baron and feme, the defendant pleaded *ne unques accouple* in loyal matrimony; and on demurrer the plea was held naught. Comb. 473. So, in trespass for taking his wife, and the like plea, which was held naught. Comb. 151. [In general, common reputation, and cohabitation as man and wife, or the acknowledgment of the parties, may be admitted as evidence of marriage in the temporal courts. Comb. 202. Cowp. 252. 2 Bl. Rep. 877. Espin. N. P. Cas. 213. A jury also are the proper judges of the fact of a marriage denied by an answer in Chancery, and always lean to support the proof of it in favour of a just creditor, suing for a debt contracted during cohabitation. 2 Ves. 270. And it is for the most part incumbent on those who would impeach a reputed marriage, to shew wherein its irregularity consists. Burr. Set. Ca. 252. 1 Salk. 119.]

A contract *in futuro*, as, *I will marry you*, &c. may be enforced in the spiritual court (b), but such contract either party may release: also, if either party marry another person, such second marriage dissolves the contract.

verba de præsenti, and contracts *per verba de futuro*, is taken away by 4 G. 4. c. 76. § 27. as it was by the former marriage act. ||

But it hath been resolved, that an action will lie at common law for the violation of such an executory contract *per verba de futuro*, for the temporal loss to the party; and though the party hath a remedy in the spiritual court. But it seems, that by bringing an action at common law, and that appearing on record, the remedy in the spiritual court is actually released; for now in lieu of a performance of the contract he shall recover damages: also, the defendant shewing that he hath been sued for the same matter in the spiritual court, and producing a sentence against the plaintiff, the plaintiff, notwithstanding any proof of his, will be nonsuit; because the spiritual court were the proper judges, whether it were a precontract or not.

Such promises are good, though the time of marriage be not agreed on; but in such case it is necessary, to entitle the party to his action, to allege that he offered to marry her, and that she refused.

In an action against husband and wife, the plaintiff declared, that he promised to marry the defendant's wife, while sole, and that she the same time promised to take him for her husband; and averred, that he tendered himself, and that she refused, &c. It

Swinb. 74.
2 Salk. 458.
pl. 3. 6 Mod.
155. (a) Also
a marriage in
fact or reput-
ation is held
good in the
temporal
courts; but
when the vali-
dity of the
marriage shall

Swinn. §10, 11.
|| (b) This re-
medy, both in
the case of
contracts *per*
verba de præsenti,
and contracts *per*
verba de futuro,
is taken away by 4 G. 4. c. 76. § 27. as it
was by the former marriage act. ||

Leon. 147.
Roll. Abr. 22.
Cro. Eliz. 79.
Styl. 295.
Carter, 235.
Dickinson v.
Holecroft,
Salk. 24.
pl. 6. 5 Mod.
411. 6 Mod.
172. Salk.
120. pl. 1. 121.
2 Stra. 938.

Carth. 467.

Carth. 467.
Salk. 24. pl. 6.
S. C. Harrison
v. Cage & ux.
5 Mod. 411.

2 Salk. 457.
pl. 2. S. P.
and the dis-
tinction as to
whether a man
or a woman exploded.

was objected, that marriage was no advancement to a man, though it was to a woman; also, that no time was laid when this agreement was to have been executed: but the court over-ruled both objections.

Salk. 24.
pl. 6.

This action must be founded on reciprocal promises; and, therefore, if the promise be on one side only it does not bind, being only *nudum pactum*.

Trin. 5 &
6 Geo. 2.
Holt v. Ward.
2 Stra. 850.
937.
Barnard.
K. B. 209.
Fitzgib. 175.
3 Atk. 306.

But if a man of full age and a female of fifteen promise to intermarry, and afterwards the man marries another, an action lies against him; for though such promise may be said to be voidable as to the infant, yet it shall be binding on the person of full age, who shall be presumed to have acted with sufficient caution: otherwise this privilege allowed infants, of rescinding and breaking through their contracts, which was intended as an advantage to them, might turn greatly to their prejudice.

Moor, 169.
4 Co. 29.
S. C. Sid. 15.
S. C.
cited and
denied by
Twisden; and
vide Salk.

If *A.* contracts himself to *B.*, and after marries *C.*, and *B.* sues *A.* upon this contract in the spiritual court (*a*), and there sentence is given that *A.* shall marry and cohabit with *B.*, which he does accordingly; they are baron and feme (*b*), without any divorce between *A.* and *C.*, for the marriage of *A.* and *C.* was a mere nullity. (*c*)

120. pl. 1. 121.
4 Co. 29.
S. C. Sid. 15.
S. C.
cited and
denied by
Twisden; and
vide Salk.

120. pl. 1. 121. ||(*a*) The spiritual court has no jurisdiction since 4 G. 4. c. 76. § 27. || (*b*) But if a woman maketh a contract of matrimony with *J. S.*, and then marieth with *J. D.*, who is seised of lands, and dieth, she shall have dower of his lands; because such marriage was not void, but voidable only by reason of the precontract. Moor, 226. Perk. 34. (*c*) But now *vide* 26 Geo. 2. c. 35.

2 Lev. 65.
but Skin.
196. pl. 10.
seems *cont.*
and Stra. 34.

It hath been held, that the clause in the statute of frauds and perjuries, 29 Car. 2. c. 3. § 4. relating to marriage agreements, extends as well to a promise to marry, as to the payment of marriage portions.

Ld. Raym. 387. 2 Eq. Cas. Abr. 248. are expressly so. A promise to marry another, if broken, where the promises are mutual, and the parties might legally contract, subjects the person breaking such promise to an action for damages, notwithstanding the statute: for such actions are every day maintained.

(C) Of the Solemnization and Ceremonies requisite to a complete Marriage: And herein of the Offence of performing the Ceremony without due Authority or Licence.

Roll. Abr.
357. Moor,
169. As to
the loyalty
of marriage,
and of the
different kinds

IN order to make the marriage complete, so as to entitle the wife to dower, the issue to inherit, &c., the same must be celebrated in (*d*) *facie ecclesiæ*; and therefore the private contract, without the priest's blessing, makes no marriage, though such contract may be enforced in the spiritual court.

of trial, *vide* tit. *Bastard*. (*d*) Before the time of Pope Innocent the third there was no solemnization of marriage in the church; but the man came to the house where the woman inhabited, and led her home to his own house, which was all the ceremony then used. Moor, 170. *Per Goldingham*, doctor of the civil law, *arguendo*. [Marriages in England during the usurpation were solemnized before justices of the peace, but for what purpose this novelty was introduced, except to degrade the clergy, does not appear.]

Also,

Also, though the marriage be solemnized *in facie ecclesiæ*, yet if it were without consent, it is void; and therefore if a man takes *E. S.* to wife by *duress*, the same is void, though solemnized *in facie ecclesiæ*.

Dyer, 13. Cro. Car. 488. 493. Sid. 65. [It is only mentioned as a doubt in Roll's Abridgment, whether marriages by duress are not merely void; surely they are not so before sentence. They are marriages *de facto*. Cro. Car. 493. And Mr. Noy held them good, Dy. 13. in marg.

A. and *B.*, being sabbatarians, were married by one in their own way, who used the form of the Common Prayer, except the ring, but was a mere layman; the wife dying, the husband took out administration to her; but upon application of her sister the letters of administration were repealed, and the sentence of appeal affirmed by the delegates; for the husband, demanding a right due to him as husband, must bring himself within the rules prescribed by that jurisdiction to whom he applies: also, the constant form of pleading marriage is, that it was *per presbyterum sacris ordinibus constitutum*; and an act of parliament was made confirming the marriages contracted during the usurpation.

A marriage solemnized by a person in priest's orders is good and binding, though there was no publication of banns or licence to dispense therewith: but herein it seems agreed, that not only the party performing the ceremony, but also the parties married, being lay persons, are punishable by ecclesiastical censures, and for acting contrary to such ancient canons as have been received and allowed in this kingdom; but it seems agreed, that the canons of 21 Jac. 1. bind not the laity, not having been universally received, and being made only in convocation, where the laity are not represented.

¶ By 4 Geo. 4. c. 76. § 7. No minister shall be obliged to publish the banns of matrimony between any persons whatsoever, unless they shall, seven days at the least before the time required for the first publication, deliver or cause to be delivered to him a notice in writing of their true christian (*a*) and surnames (*b*), and of the houses of their respective abodes within such parish, chapelry, or extra-parochial place, where the banns are to be published, and of the time during which they have inhabited or lodged in such houses respectively.

The use of matrimonial banns is said to have been first introduced in the Gallican church, though something like it obtained even

in the primitive times, and it is this Tertullian is supposed to mean by *trinundina promulgatio*.
 ¶ (*a*) The suppression of one of two christian names in the publication of banns, for the purpose of imposition, has been held to nullify the marriage. Pouget v. Tomkins, 1 Phill. (Cons.) 419. and see Fellowes v. Stewart, 2 Phill. (Ar.) 257. Meddowcroft v. Gregory, 2 Phill. (Cons.) 365. Stanhope v. Baldwin, 1 Add. (Cons.) 193.; *sed vide* Diddear v. Faucit, 3 Phill. (Ar.) 580.
 (*b*) Publication of banns in case of an illegitimate child in the name of her mother, as well as that of her father, held valid. Sullivan v. Sullivan, 3 Phill. (Ar.) 45. 2 Hagg. 238., and publication in the man's reputed name has been held sufficient. Rex v. Billingham, 3 Maul. & S. 250. *id.* 537.]]

All banns of matrimony shall be published in the parish church, or in some public chapel, wherein banns of matrimony have been usually published, of the parish or chapelry wherein the persons to be married shall dwell. § 2.

And where the persons to be married shall dwell in divers parishes or chapelries, the banns shall be published in the church

or

Ibid.

or chapel belonging to such parish or chapelry wherein each of the said persons shall dwell.

§ 12. And where both or either of the persons to be married shall dwell in any extra-parochial place (having no church or chapel wherein banns have been usually published), then the banns shall be published in the parish church or chapel belonging to some parish or chapelry adjoining to such extra-parochial place.

Same sect.

All parishes, where there shall be no parish church or chapel thereto, or none wherein divine service shall be usually celebrated every *Sunday*, may be deemed extra-parochial places for the purposes of this act, but for no other purpose.

§ 26. Provided, that after the solemnization of any marriage under a publication of banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published, nor shall any evidence in such case be received to prove the contrary in any suit touching the validity of such marriage.

By 4 Geo. 4. c. 76. § 13. amended by 5 Geo. 4. c. 92. if the church or chapel in which banns have been usually proclaimed and marriages solemnized be under repair or rebuilding, then it shall be lawful for banns to be proclaimed and marriages solemnized in any place within the limits of such parish or chapelry which shall be licensed by the bishop of the diocese for the performance of divine service during such repair; or if no such place shall be so licensed, then in the church or chapel of any adjoining parish or chapelry wherein marriages have been usually solemnized; and all banns of marriage proclaimed and marriages solemnized in any place so licensed within the limits of any parish or chapelry shall, during the repair or rebuilding of the church or chapel of such parish or chapelry, be considered as proclaimed and solemnized in the church or chapel of such parish or chapelry, and shall be so registered accordingly.

5 G. 4. c. 92.

§ 5.
See Stallwood
v. Tredger,
2 Phill. (Ar.)
287.

4 G. 4. c. 76.
§ 2.

And the banns shall be published upon three *Sundays* preceding the solemnization of marriage, during the time of morning service, or of the evening service, if there be no morning service, in such church or chapel, on any of those *Sundays*, immediately after the second lesson. And by § 6. of the same act a book shall be provided for the registration of such banns.

Lindw. 271.
See 4 G. 4.
c. 76. § 21.

Whilst the marriage is contracting, the minister shall enquire of the people by three public banns concerning the freedom of the parties from all lawful impediments. And if any minister do otherwise, he shall be suspended for three years.

4 G. 4. c. 76.
§ 8.

And in case the parents or guardians, or one of them, of either of the parties, who shall be under the age of twenty-one years, shall openly and publicly declare, or cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication, his dissent to such marriage, such publication shall be void.

§ 9. And wherever a marriage shall not be had within three months after the complete publication of banns, no minister shall proceed

proceed to the solemnization of the same until the banns shall have been republished on three several *Sundays*, in the form and manner prescribed in the act, unless by licence duly obtained according to the provisions of the act.||

And where the parties dwell in divers parishes, the curate of the one parish shall not solemnize matrimony betwixt them without a certificate of the banns being thrice asked from the curate of the other parish. Rubr.

|| And by the 4 Geo. 4. c. 76. § 12. Where the banns shall be published in any church or chapel belonging to any parish adjoining to any extra-parochial place as aforesaid, the minister publishing such banns shall in writing, under his hand, certify the publication thereof, in such manner as if either of the parties to be married dwelt in such adjoining parish.

And by § 3. of the same statute, the bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel having a chapelry thereunto annexed may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize, by writing under his hand and seal, the publication of banns and the solemnization of marriages in such chapel for persons residing within such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese.

And notice of the right to publish banns and solemnize marriages must by § 4. be placed in some conspicuous part of the same chapel.

And by § 5. it is further provided, that all the provisions then or thereafter in force, relative to marriage registers, shall be extended to chapels authorized as aforesaid.||

As to licences, some have questioned the bishop's power to grant licences for marrying without banns first published; because this is dispensing with an act of parliament: for the marriage office, which requires banns, is part of the statute law. But this power of dispensing is granted to the bishop by statute law, too, *viz.* by the 25 H. 8. c. 21. by which all bishops are allowed to dispense, as they were wont to do; and such dispensations have been granted by bishops ever since Archbishop *Mephams*'s time at least. Johns. 194.

By Can. 101. no faculty or licence shall be granted for solemnization of matrimony, without publication of banns, by any person exercising any ecclesiastical jurisdiction, or claiming any privileges in the right of their churches; but only by such as have episcopal authority, or the commissary for faculties, vicars-general of the archbishops and bishops, *sede plenâ*; or, *sede vacante*, the guardian of the spiritualties, or ordinaries exercising of right episcopal jurisdiction in the several jurisdictions respectively.

|| And by the 4 Geo. 4. c. 76. § 18. No surrogate deputed by any ecclesiastical judge, who hath power to grant licences of marriage, shall grant any such licence before he hath taken an oath before the said judge, faithfully to execute his office according to law to the

the best of his knowledge ; and hath given security by his bond in the sum of 100*l.* to the bishop of the diocese, for the due and faithful execution of the said office.||

Can. 101. And no licence shall be granted but to such persons only as be of good quality.

Ibid. And no licence shall be granted but upon good caution and security taken.

Can. 102. Which security shall contain these conditions : 1st, That at the time of granting such licence there is not any impediment of pre-contract, consanguinity, affinity, or other lawful cause to hinder the said marriage. 2d, That there is not any controversy or suit depending in any court before any ecclesiastical judge touching any contract or marriage of either of the said parties with any other. 3d, That they have obtained thereto the express consent of their parents (if they be living); or otherwise, of their guardians or governors. Lastly, That they shall celebrate the said matrimony publicly in the parish church or chapel where one of them dwelleth, and in no other place, and that between the hours of eight and twelve in the forenoon.

Can. 103. And for the avoiding of all fraud and collusion in the obtaining of such licences and dispensations ; before such licence shall be granted, it shall appear to the judge by the oaths of two sufficient witnesses, (one of them to be known either to the judge himself or to some other person of good reputation then present, and known likewise to the said judge,) that the express consent of the parents or parent (if one of them be dead), or guardians or guardian of the parties is thereunto had and obtained ; and furthermore, that one of the parties shall personally swear that he believeth that there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the aforesaid licence.

Can. 104. But if both parties who are to marry, being in widowhood, do seek a faculty for the forbearing of banns, then the clauses before mentioned requiring the parents' consents may be omitted ; but the parishes where they dwell shall both be expressed in the licence, as also the parish named where the marriage shall be celebrated. And if any commissary for faculties, vicars-general, or other the said ordinaries, shall offend in the premises, or any part thereof, he shall, for every time so offending, be suspended from the execution of his office for the space of six months ; and every such licence or dispensation shall be held void to all effects and purposes, as if there had never been any such granted ; and the parties marrying by virtue thereof shall be subject to the punishments which are appointed for clandestine marriages.

This clause, saith Dr. *Burn*, declaring the licence void to all effects and purposes, as if there had never been any such granted, seemeth to render it a matter of great importance that the aforesaid pre-requisites be strictly observed ; for although before the statute of 26 G. 2. only the licence in such case was void, and the parties marrying by virtue thereof were liable to be punished, as
for

2 Burn's
E. L. 427.
||The penal
clauses of
26 G. 2. c. 35.
are embodied
in the 4 G. 4.

for a clandestine marriage, yet now by that statute the marriage also will be void (a), and the other consequences of clandestine marriages will ensue.

c. 76. See the next and following sections; (a) but

not by the new act, 4 Geo. 4. c. 76. ||

By the 5 W. c. 21. § 3. for every skin or piece of vellum or parchment, or sheet or piece of paper, upon which any licence for marriage shall be engrossed or written, shall be paid a stamp duty of 5s. (a)

|| (a) Increased by 55 G. 4. c. 184. to 10s.; and in the case of special licences to 5l. ||

|| By the 4 Geo. 4. c. 76. § 10. No licence of marriage shall be granted by any archbishop, bishop, or other ordinary, or person having authority to grant such licences, to solemnize any marriage in any other church or chapel than in the parish church, or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such licence.

And if a *caveat* be entered against the grant of any licence for a marriage, no licence shall issue until the matter of the *caveat* has been examined by the judge out of whose office the *caveat* is to issue, and he is satisfied he ought not to obstruct the grant of the licence. § 11.

And in pursuance of Can. 102. it is enacted by 4 Geo. 4. c. 76. § 14. "for avoiding all fraud and collusion in obtaining of licences for marriage, that before any such licence be granted, "one of the parties shall personally swear before the surrogate, or "other person having authority to grant the same, that he or she "believeth that there is no impediment of kindred or alliance, or "of any other lawful cause, nor any suit commenced in any ecclesiastical court to bar or hinder the proceeding of the said matrimony, according to the tenor of the said licence; and that one "of the said parties hath, for the space of fifteen days immediately preceding such licence, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties, not "being a widower or widow, shall be under the age of twenty-one "years, that the consent of the person or persons whose consent "to such marriage is required under the provisions of this act "has been obtained thereto: Provided always, that if there shall "be no such person or persons having authority to give such "consent, then upon oath made to that effect by the party requiring such licence, it shall be lawful to grant such licence, "notwithstanding the want of any such consent."

Proviso, "That it shall not be required of any person applying for any such licence to give any caution or security, by bond "or otherwise, before such licence is granted; any thing in any "act or canon to the contrary thereof notwithstanding."

By § 19. of this act, whenever a marriage shall not be had within three months after the grant of a licence by any archbishop, bishop, or any ordinary or person having authority to grant such licence, no minister shall proceed to the solemnization of

of such marriage until a new licence shall have been obtained, unless by banns duly published according to the provisions of the act.

¶(a) Re-enacting § 10. of 26 G. 2. c. 33. except as to the length of residence.¶

2 Burn's Eccl. Law, 428.

4 G. 4. c. 76. § 20.

And it is provided, by § 26. of the same statute (a), that where the marriage is by licence, it shall not be necessary, in support of such marriage, to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in such case be received to prove the contrary in any suit touching the validity of such marriage. ¶ That is to say, adds Dr. *Burn*, speaking of the old act, this shall not avail so as to render the marriage null and void; but nevertheless the surrogate, who granteth such licence contrary to the tenor of this act, seemeth to incur the violation of his oath and forfeiture of his bond given to the spiritual judge, and is liable to be otherwise punished for his contempt of the law.

¶ Also this act shall not extend to deprive the Archbishop of *Canterbury*, and his proper officers, of the right which hath hitherto been used in virtue of the statute of the 25 H. 8. c. 21. of granting special licences to marry at any convenient time or place.

By which statute of 25 H. 8. power is given to the Archbishop of *Canterbury* to grant faculties, dispensations, and licences, as the pope had done before. And by the same statute it is enacted, that all children procreated after solemnization of any marriages, to be had by virtue of a licence of dispensation from the Archbishop of *Canterbury*, shall be admitted, reputed, and taken legitimate in all courts and other places, and inherit the inheritance of their parents and ancestors.

¶ By § 29. of the 4 Geo. 4. c. 76. “ If any person shall, after
“ the passing of the act, with intent to elude it, knowingly and
“ wilfully insert, or cause to be inserted, in the register-book of
“ such parish or chapelry as aforesaid any false entry of any
“ matter or thing relating to any marriage, or falsely make,
“ forge, alter, or counterfeit, or cause or procure to be falsely
“ made, altered, forged, or counterfeited, or act or assist in
“ falsely making, altering, forging, or counterfeiting any such
“ entry in such register; or falsely make, alter, forge, or coun-
“ terfeit, or cause or procure to be falsely made, altered, forged,
“ or counterfeited as aforesaid, or assist in falsely making, alter-
“ ing, forging, or counterfeiting any such licence of marriage as
“ aforesaid; or utter or publish as true any such false, altered,
“ forged, or counterfeited register as aforesaid, or a copy thereof,
“ or any such false, altered, forged, or counterfeited licence of
“ marriage, knowing such register or licence of marriage re-
“ spectively to be false, altered, forged, or counterfeited; or if
“ any person shall, from and after the passing of the act, wilfully
“ destroy, or cause or procure to be destroyed, any register-
“ book of marriages, or any part of such register-book, with
“ intent to avoid any marriage, or to subject any person to any
“ of the penalties of this act; every person so offending, and
“ being thereof lawfully convicted, shall be deemed and adjudged
“ guilty

“ guilty of felony, and shall suffer the punishment of transportation for life, according to the laws in force for the transportation of felons.”

In all cases where banns shall have been published the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place.

And by Can. 63. every minister who shall celebrate marriage between any persons contrary to the canons aforesaid, or any part thereof, under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, shall be suspended for three years by the ordinary of the place where the offence shall be committed; and if any such minister shall afterwards remove from the place where he hath committed the fault, before he be suspended, then shall the bishop of the diocese, or ordinary of the place where he remaineth, upon certificate, under the hand and seal of the other ordinary from whose jurisdiction he removed, execute that censure upon him.

By a constitution of Archbishop *Reynolds*, matrimony shall be solemnized reverently, and in the face of the church.

And by the words, in the beginning of the office of matrimony, it is supposed to be done in the face of the congregation.

By the 4 Geo. 4. c. 76. § 21., which incorporates §§ 8. & 9. of the 26 G. 2. c. 33. “ If any person shall solemnize marriage in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special licence from the Archbishop of *Canterbury*; or shall solemnize matrimony without due publication of banns, unless licence of marriage be first had and obtained, from some person or persons having authority to grant the same; or if any person, falsely pretending to be in holy orders, shall solemnize matrimony according to the rites of the Church of *England*, every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be adjudged to be guilty of felony, and shall be transported for fourteen years;” the prosecution for which felony is by the same section to be commenced within three years after the offence committed. And by § 22. “ If any persons shall knowingly or wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid, or shall knowingly and wilfully intermarry, without due publication of banns or licence of marriage from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.” By § 31. it is provided, that this act shall not extend to any marriages among *Quakers* or *Jews*, where both the parties shall be *Quakers* or *Jews* (a); and by § 33. this act is only to extend to *England*. (b)

§ 2.

[(a) The marriages of Jews are tried by evidence of the laws of the Jews, as in case of marriages in a foreign country. See Sir *W. Scott's* learned judgment, *Lindov. Belisario*, 1 Hagg. C. Rep. 216.; affirmed in Court of Arches, *Ibid.* app. 7.; and that *Quakers'* marriages are good, according to their own forms of public declaration at their monthly meetings, see *Ibid.* app. 9. in note.]
(b) Whether clandestine marriages in Scotland of English parties, who resort thither to evade the English law, shall be sustained in England, hath been doubted;

ties, who resort thither to evade the English law, shall be sustained in England, hath been doubted;

doubted; and very learned men have questioned, notwithstanding that such marriages are valid by the law of Scotland, whether they are effective in England. Where parties are bound, by the laws of their own country, to execute any important act or contract with certain solemnities, it is doubted whether they can elude their own law by going purposely to another country where such solemnities are not essential, and then returning immediately when the act is done. It is a question of public law; and the most celebrated writers on public law have holden, that such an act is fraudulent, it is *fraudem facere legi*, which the laws of all nations disallow. In the case of *Robinson v. Bland*, 2 Burr. 1079. which was a security given in France for money there lost at play, wherein the locality of the transaction came in question, there is an *obiter* observation of Lord *Mansfield* very remarkable. "As to the money won at law, by the rule of the law of England, no action can be maintained for it. To this it has been objected, that the contract was made in France; therefore the law of France must prevail, and be the rule of determination: by which law it is alleged, that the money is there recoverable before the marshals of France, who can enforce obedience to their sentences by imprisonment. I admit that there are many cases where the law of the place of the transaction shall be the rule; and the law of England is as liberal in this respect as other laws are. It has been laid down at the bar, that a marriage in a foreign country must be governed by the law of that country where the marriage was had; which, in general, is true: but the marriages in Scotland of persons going from hence for that purpose were instanced by way of example. They may come under a very different consideration, according to the opinion of Huberus, p. 33. and other writers. No such case has yet been litigated in England except one, of a marriage at Ostend, which came before Lord *Hardwicke*, who ordered it to be tried in the ecclesiastical court: but the young man came of age, and the parties were married over again; and so the matter was never brought to a trial." 2 Burn's Eccl. Law, 438. But in Buller's N. P. 113. there is a short note of a case, wherein this point was afterwards determined, upon an appeal to the delegates, viz. *Crompton v. Bearcroft*, Dec. 1. 1768. The appellant and respondent, both English subjects, and the appellant being under age, ran away without the consent of her guardian, and were married in Scotland; and on a suit brought in the spiritual court to annul the marriage, it was holden that the marriage was good. [See this case stated 2 Hagg. C. R. 444.; and the same was decided in Chancery, on certificates of Scotch law, in *Grierson v. Grierson*, Lib. Reg. A. 1780. F. 552. Sir *W. Scott's* judgment in *Dalrymple v. Dalrymple*, 2 Hagg. C. R. 99. If *Gretna Green* marriages were invalid according to English law, and depended for validity solely on the Scotch law, there would seem ground to doubt the soundness of the decisions holding them valid; for it is apprehended that, when parties merely pass into Scotland to make the contract of marriage, and immediately return to England, the law of England properly governs the contract, according to Lord *Mansfield's* observations in *Robinson v. Bland*, *suprà*, and according to the rational principle laid down by Huber, *de Conf. Legum*, l. 1. tit. 3. § 10.—"Proinde et locus matrimonii contracti non tam est ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt; ut omni die fit homines in Frisia, indigenas; aut incolas ducere uxores in Hollandiâ, quas inde statim in Frisiam deducunt. Jus Frisicæ in hoc casu est jus loci contractus;" and see another passage to the same effect, *ibid.* p. 538. and Co. Litt. 79. a. note 1., and 2 Addams' R. 25. But by the law of England, unaffected by the marriage act, a marriage in the form used at *Gretna Green* is a good marriage, and the provisions of the marriage act cannot affect such marriage, since they are expressly confined to England; and this, according to Sir *George Hay*, was the ground of decision in *Crompton v. Bearcroft*, in which nothing appears to have been laid before the court to shew that the marriage was valid in Scotland. *Vid.* 2 Hagg. C. R. 430. Sir *W. Wynne*, however, (2 Hagg. C. R. 443.) states, that the case was determined by the delegates, on the ground that the marriage was good by the law of Scotland. In *Ilderton v. Ilderton*, 2 H. Bl. a marriage celebrated in Scotland was held to entitle the woman to dower in England. This was not the case of a marriage by parties going to Scotland to evade the English law. See *post* (D), *Of Foreign Marriages*, and (F) as to *Divorces*.]

(a) Note.—
The 21 Geo. 3. c. 53.
the 44 Geo. 3. c. 77. and the 48 Geo. 3. c. 127. brought in to confirm such marriages, were merely retrospective.

The above act of 4 Geo. 4. c. 76. having enacted, that the ceremony shall be solemnized in no other place than a public church or chapel, *wherein banns may be lawfully published*, except by special dispensation from the Archbishop of *Canterbury*; and the 26 Geo. 2. c. 33. § 8. having specified the place to be a church or chapel *where banns have been usually published*; it followed, that marriages solemnized in chapels erected since the 26 Geo. 2. c. 33. were invalid. (a) The 6 Geo. 4. c. 92. was therefore passed, which enacts, "That all marriages already solemnized in any church or public chapel, in that part of

"Great

“ *Great Britain* called *England* and *Wales*, and the town of *Berwick upon Tweed*, erected since the making of the said act of 26 Geo. 2. c. 33. and consecrated, shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels, having chapelries annexed, and wherein banns had been usually published before or at the time of passing the said 26 Geo. 2. c. 33.”

§ 1.

And “ That it shall and may be lawful for marriages to be in future solemnized in all churches and chapels erected since the passing of the said 26 Geo. 2. c. 33. and consecrated, in which churches and chapels it has been customary and usual before the passing of this act to solemnize marriages; and all marriages hereinafter solemnized therein shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels having chapelries annexed, and wherein banns had usually been published, before or at the time of passing the said act.”

§ 2.

By § 3. & 4. of this statute, registers of marriages solemnized as aforesaid in chapels where banns had not been usually published before 26 Geo. 2. c. 33. are made valid evidence, and are required within three months after the passing of this statute to be removed to the parish church.

6 Geo. 4. c. 92.
§ 3. & 4.

By 4 Geo. 4. c. 76. § 28., incorporating § 15. of the 26 G. 2. c. 33., all marriages shall be solemnized in the presence of two credible witnesses at the least, besides the minister who shall celebrate the same; and, immediately after the celebration of every marriage, an entry thereof shall be made in the register directed by the acts to be kept; in which entry it shall be expressed, that the marriage was celebrated by banns or licence, and if both or either of the parties married by licence be under age, not being a widower or widow, with consent of the parents or guardians, as the case shall be; and such entry shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses; which entry shall be made in the form prescribed by this section.||

If the marriage has been regularly solemnized, any subsequent irregularity in the entry shall not affect its validity.

St. Devereux
v. Much Dew-
church, Burr.

Set. Ca. 506. Bull. N. P. 114. S. C.

§ 23.

|| The above statute 4 G. 4. c. 76. has introduced a new and strong provision, by enacting, that if marriages be solemnized between parties under age, contrary to the act, by false oath or fraud, the guilty party shall forfeit all property accruing from the marriage; and it contains directions both as to the proceedings in equity for the forfeiture, and also for securing, under the direction of the court of equity, the forfeited property for the benefit of the innocent party, or of the issue of the marriage.||

See § 23,
24, 25.

The statute 26 G. 2. c. 33. (a) does not take away the evidence of presumption from cohabitation; though if the evidence be clear that the marriage was not celebrated according to the requisitions of the act, (as, where in a marriage by licence, one of the parties is under age, and no consent has been had,) it is

Rex v. Pres-
ton next Fe-
versham,
Burr. Set. Ca.
486. 1 Bl.
Rep. 192.
S. C. Bull.

totally

N. P. 114. totally void (b), and no declaratory sentence in the ecclesiastical
 S. C. || Fare- court is necessary.]
 mouth v. Watson, 1 Phill. (Prer.) 355. (a) So also of 4 Geo. 4. c. 76. (b) Not so now
 under 4 Geo. 4. c. 76.; see Rex v. Birmingham, 5 Barn. & C.||

(a) For the Also, by the (a) 7 & 8 W. 3. c. 35. § 2. it is enacted, " That
 punishment " every parson, vicar, or curate, who shall marry any persons in
 on gaolers " any church or chapel, exempt or not exempt, or in any other
 permitting " place whatever, without publication of the banns of matrimony
 such mar- " between the respective persons, according to law, or without
 riages, vide " licence for the said marriages first had and obtained, shall for
 10 Ann. c. 19. " every such offence forfeit the sum of 100l."
 § 176; and
 on persons
 erecting offices for making insurances on marriages, 10 Ann. c. 26. § 109.

And by § 3. of the said statute it is enacted, " That every
 " parson, vicar, or curate, who shall substitute or employ, or
 " knowingly and wittingly shall suffer and permit, any other
 " minister to marry any persons in any church or chapel to
 " such parson, vicar, or curate belonging or appertaining, with-
 " out publication of banns or licences of marriage first had and
 " obtained, shall for every such offence forfeit the sum of 100l. :
 " the aforesaid respective forfeitures to be recovered by action of
 " debt, bill, plaint, or information, in any of his majesty's courts
 " of record, wherein no essoign, wager, or protection of law, or
 " any more than one imparlance shall be allowed; one moiety
 " thereof to his majesty, his heirs and successors, and the other
 " moiety to him or them who shall inform or sue for the same."

[It has been
 determined,
 that, notwith-
 standing the
 statute, the
 ecclesiastical
 court is still
 at liberty to
 impose spi-
 ritual censures
 upon any per-
 sons marrying
 without licence
 Canons, pl. 14. S. C. 2 Atk. 650. S. C.]

And by § 4. of the said statute it is enacted, " That every
 " man so married without licence, or publication of banns as
 " aforesaid, shall forfeit the sum of 10l., to be recovered, toge-
 " ther with costs of suit, in manner as aforesaid, by any person
 " who shall inform or sue for the same; and likewise, that every
 " sexton or parish clerk who shall knowingly or wittingly aid,
 " promote, and assist at such marriages, so celebrated without
 " banns or licences as aforesaid, shall forfeit the sum of 5l., to
 " be recovered with costs of suit, in manner as aforesaid, by
 " any person who shall inform or sue for the same."

or publication of banns. Middleton v. Croft, 2 Stra. 1056. Vin. Abr. tit.

||(D) Of Foreign Marriages.

4 Geo. 4. c. 76. § 35. THE marriage act is, by the last section, expressly confined to
 4 Geo. 4. c. 91. England. The 4 Geo. 4. c. 91. declares and enacts, that
 marriages solemnized by a minister of the church of *England* in
 the chapel or house of any *British* ambassador (b) in the country
 to which he is accredited, or in the chapel belonging to any
British factory abroad, or in the house of any *British* subject
 resident in such factory, or solemnized within the *British* lines by
 any chaplain or officer, or other person officiating under the
 orders of the commanding officer of a *British* army serving
 abroad, shall be as valid as if solemnized within his Majesty's
 dominions according to forms of law; but it is expressly provided,
 that, the act shall not in any wise affect any marriages which have
 been

(b) How far
 foreigners in
 the suite of
 foreign ambas-
 sadors in this
 country mar-
 rying in am-
 bassadors'
 chapels may be
 exempt from
 the regulations

been or shall be solemnized beyond sea, except those above specified. Marriages, therefore, contracted in foreign countries are free from the *English* law of marriage, and when questioned in this country, are to be governed by the law of the country where they take place. In the case of *Dalrymple v. Dalrymple* (a), as to the validity of a *Scotch* marriage, Lord Stowell says, "This cause being entertained in an *English* court must be adjudicated according to the principles of *English* law applicable to such a case. But the only principle applicable to such a case by the law of *England* is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of *England* withdraws altogether, and leaves the legal question to the exclusive judgment of the law of *Scotland*." This principle, which is laid down by the writers on the civil and canon law (b), has long been recognized in the courts of this country (c), both at *Westminster* and *Doctors' Commons*; and it is obvious that the greatest inconveniences and incongruities must flow from adopting any other rule. The doctrine was fully recognized, in 1752, in the Consistory Court of *London*, in the case of *Scrimshire v. Scrimshire*. (d) *Scrimshire*, of the age of eighteen, married, in *France*, Miss Jones, of the age of fifteen. The marriage being solemnized in a private house, and by a priest not authorized by the law of *France*, and without the consent of parents, was declared null by a sentence of the Parliament of *Paris*; and on a suit by the lady for restitution of conjugal rights in the Consistory Court here, Sir *Edward Simpson*, in an elaborate judgment, shewed that the validity of the marriage must be tried by the law of *France*; and admitting the *French* sentence, not as a bar, but as evidence of the law of *France*, held the marriage void, and dismissed the suit. So, where an *English* minor, sent to *St. Omer's* for education, went to *Furnes*, in the *Austrian Netherlands*, and there was married by a priest, in the *Dutch* language, to a woman of *St. Omer's*: on proof, by practising advocates, that the marriage was invalid by the laws of *Holland* and *Flanders*, on account of the incompetency of the minister, the minority of the man, and the absence of banns, the marriage was declared invalid in the Consistory Court.

Lord H., an *Englishman*, was married in *Sicily* to the Princess of B., not according to the ceremonial rites of the country, but by a priest in a private house, and in the presence of two witnesses, before whom the parties declared themselves husband and wife. On a suit here for restitution of conjugal rights by the wife, it was proved, by the depositions of four advocates, that according to the decree of the council of *Trent*, which was the recognized law of *Sicily*, the marriage, though illicit, was still valid and indissoluble, being an expression of mutual consent to contract matrimony in the presence of the parish priest and of two witnesses. It also appeared, that by various civil ordinances, and by the Pragmatic Sanction of the reigning king, *Ferdinand*, tit. *de Delictis*, parties guilty of such a marriage were, if noble, liable to imprisonment for five years, the husband in a fortress,

of the marriage act, see *Pertreix v. Tondear*, 1 Hagg. C. R. 136.; and see 2 Hagg. 386. note †.
(a) 2 Hagg. C. R. 59.

(b) Voet. in Dig. lib. 23. de Ritu Nuptiarum, tit. 2. n. 85. fo. 55. Sanchez, de Matrim. lib. 3. de cland. Consensu. disp. 18. § 10. Mynsingerus, Singul. Observat. cent 5. obs. 20. n. ult. Gayllius, lib. 2. obs. 123.
(c) Kelyng. R. 79. 2 Saik. 651. 6 Mod. 195. S. C. and per Lord Hardwicke, 1 Atk. 50. Ambl. 315. (d) 2 Hagg. C. Rep. 395.

Middleton v. Janverin, 2 Hagg. C. R. 437. and see Harford v. Morris, id. 423.

Herbert v. Herbert, 2 Hagg. C. R. 265.

the wife in a convent; but that this punishment in no way affected the indissolubility of the marriage. Lord *H.*, under this law, had been sent to a fortress, from which he escaped; and the Princess to a convent, from which she was released on giving bail to appear at a distant day, which had not yet arrived. In a suit by the wife for restitution of conjugal rights, Sir *William Scott* held the marriage clearly valid, and refused the prayer of the husband to stay his sentence of cohabitation till the period of separation would expire, when the princess was bound to appear; saying, "that the court could not borrow the criminal law of *" Sicily, and incorporate it into its own rules."*

2 Hagg. C. R.
59.

(a) Per Sir
W. Scott,
2 Hagg. C. R.
81.

The case of *Dalrymple v. Dalrymple*, above referred to, was decided on the same principle. There was no question but the *Scotch* law must govern the marriage which took place in *Scotland*; and the sole question was, Whether, according to the law of *Scotland*, the marriage was valid or otherwise? Although the law of a foreign country is not strictly a subject of enquiry in this work, yet as the law of *Scotland* is peculiarly connected with *England*, and as it is, on the subject of marriage, with little variation, the general canon law of *Europe* (a), and consequently correspondent with the marriage law of *England* as it stood before the marriage act, we shall be excused for stating the result of this important case. In *April*, 1804, *J. W. H. Dalrymple*, of the age of nineteen, a cornet in the dragoon guards, being at *Edinburgh* with his regiment, and *Johanna Gordon*, a gentleman's daughter, above twenty-one, became attached to each other, and entered into a mutual promise of marriage, without date, which was endorsed "a sacred promise," and left in her possession, in these terms, "I do hereby promise to marry you as soon as it is "in my power, and never marry another, *J. D.* I promise the "same, *J. G.*" On the 28th *May*, 1804, they signed the following declaration, "I hereby declare *Johanna Gordon* is my "lawful wife; and I hereby acknowledge *J. W. H. Dalrymple* as my "lawful husband." By another paper signed by both, and dated 11th *July*, 1804, Mr. *D.* reiterates the above declaration, and promises "that he will acknowledge Miss *Gordon* as his lawful "wife the moment he has it in his power;" and she promises that "nothing but the greatest necessity (necessity which — "situation alone can justify) shall ever force her to declare this "marriage." The two last papers were enclosed in an envelope, inscribed "sacred promises and engagements." In various letters produced, Mr. *D.* calls Miss *G.* his wife, and describes himself as her husband; speaks of her drawing on him for money, "for "it is her right;" calls *her* sister his sister; and alludes to "our "marriage." Mr. *D.* removed from *Scotland* to *England* about the 21st *July*, 1804. During his stay in *Scotland*, it was proved by servants that he was frequently admitted in the evening, by order of Miss *Gordon*, to her father's house, when he went up stairs to the dressing-room adjoining the young ladies bedroom; and, on more than one occasion, he was seen coming away from the house early in the morning. The terms of many of his letters to Miss *Gordon*, during his stay in *Scotland*, apparently referred

referred to a marital intercourse as taking place between them, and, together with the other evidence, left no doubt on the mind of Sir *W. Scott* that the alleged marriage was consummated. Mr. *D.* remained in *England* till 1805, when he sailed for *Malta*, and remained abroad, with the exception of a month or two, till *May*, 1808. On his departure he wrote to Miss *G.*, renewing his injunctions of secrecy as to the marriage; and a correspondence was subsequently kept up till the autumn of 1806, when he directed his friend and agent not to forward her letters to him, as he would not read them, and to intercept any letters she might write to General *D.*, his father. On the death of the father, in 1807, Miss *G.* asserted her marriage rights, and furnished Mr. *D.*'s friend and agent with copies of the above papers, which she denominated, according to the style of the *Scotch* law, her "*marriage lines*." Soon after his return, in *May*, 1808, Mr. *D.*, contrary to the strenuous advice of his friend, married Miss *L. M.*, in *England*, according to established forms. Miss *G.*, then finding that Mr. *D.* was not amenable to the *Scotch* courts, proceeded in the Consistory of *London* for restitution of conjugal rights, resting her claim on the above documents, on the defendant's letters, and on the evidence of the servants as to a marital intercourse having occurred. The plaintiff's letters to the defendant were not put in by her, nor were they called for on behalf of the defendant.

On the part of the plaintiff, six experienced and eminent *Scotch* advocates (*a*), who were examined to prove the law of *Scotland* relative to marriages, concurred in pronouncing the marriage valid: three of them, Mr. *Erskine*, Mr. *Hamilton*, and Mr. *Ramsay*, conceiving, 1st, that the first undated promise, in conjunction with the subsequent *copula*, which they inferred from the letters and evidence to have taken place, constituted a marriage by the law of *Scotland*; and, 2d, that the engagement of the 28th *May*, 1804 (which most of them considered unweakened by the subsequent paper of 11th *July*), constituted a contract of marriage *de præsenti*, whether the *copula* had occurred or not. Mr. *Ramsay* also conceived the marriage valid, on the ground of the acknowledgment of a prior marriage contained in the defendant's letters, calling plaintiff "*wife*," and himself her "*husband*," which acknowledgment alone he conceived sufficient to constitute a marriage in *Scotland*. (*b*) Mr. *Cay* conceived that the *copula* was an ingredient essential to the validity of the marriage, viewing it in either of the above lights, and Mr. *Craigie* and Mr. *Hume* seem to have thought that, in the absence of the plaintiff's letters to the defendant (which a *Scotch* court would call for), the marriage could only be rested on the ground of the promise followed by *copula*; and that without those letters a matrimonial contract, *per verba de præsenti*, was not sufficiently made out. On the part of the defendant, four depositions of high legal authority were produced. Mr. *John Clerk*, formerly solicitor-general of *Scotland*, attached much weight to the circumstance of the defendant not being domiciled in *Scotland*, but an *Englishman* accidentally in the country with his regiment; and thought that,

(*a*) See their depositions at length, 2 Hagg. C. R. append.

(*b*) A declaration must be made with intent to constitute a marriage, or it will not have that effect. Therefore, where a man, in order to get lodgings in respectable houses, and save a woman from rude treatment,

acknowledged her for his wife, the circumstances were held by the House of Lords insufficient to infer marriage, reversing the decision of the Court of Session. *Cunningham v. Cunningham*. 2 Dow. P. R. 482.

though clearly subject to *Scotch* law while in the country, yet the same circumstances which would infer consent to marriage in a domiciled inhabitant, would carry no such inference against an *English* officer following the habits of his country; that the papers and letters did not constitute a marriage, but were certainly strong, though not decisive, evidence that one had been contracted; and that even admitting that they might be conclusive against Mr. *Dalrymple*, if unmarried, yet that they were clearly not so against Mr. *D.*'s wife (Miss *L. M.*), who would be a necessary party to any proceedings in *Scotland*, and who could not be deprived of her status except upon evidence competent and sufficient against her. That the papers lost much of their weight as evidence of a marriage, since no marriage ceremony was ever performed, either in a church or privately; and that he was of opinion, that according to *Scotch* law more was necessary than mere declarations in writing that the parties were married; and that, though they thereby consented to marry, they did not thereby become married persons, but only formed a contract to marry, from which either party might resile, as in case of imperfect obligations; for which he cited *M'Lauchlane v. Dobson*, in the Faculty Collection, and Lord Justice Clerk *M'Queen's* opinion thereon. That if the writings were intended to constitute a present marriage, *per verba de presenti*, then arose a question of law, whether they were a *habilis modus* of conveying such consent, as to which lawyers differed. He was of opinion they were not, though some lawyers thought that any intelligible form of expressing consent would constitute marriage; as in the case of *M'Adam v. Walker*, 4th March, 1807, Faculty Collection, where a man declared the woman to be his wife before several witnesses, for the purpose of constituting a marriage *de presenti*, and in the course of the same day he shot himself, no *copula* having followed the marriage (he had children by her before). The marriage there was sustained by the court, but an appeal was pending to the Lords, and he thought the decision erroneous. (a) That supposing a marriage had not been contracted, and that Mr. *D.* had only come under an obligation to marry Miss *G.*, such obligation was necessarily defeated by his subsequent marriage. Mr. *Cathcart* concurred with Mr. *Clerk* in thinking stronger evidence necessary to establish a marriage in the case of a stranger accidentally in *Scotland* than in the case of domiciled persons, and clearly thought that the writings and letters (even in the case of two domiciled parties), would not be sufficient to constitute a marriage, unless subsequent copulation or cohabitation took place. That by the ancient law and canons, in 1242, marriage *in facie ecclesie* was indispensable, which was law till the Reformation, when marriage continued to be celebrated by clergymen deprived of their functions; and the difficulty of proving solemnization at a distant period occasioned the statute of 1503, which introduced the presumption that if the marriage were not objected to in the life of the man, the woman should have her tierce if she shewed that she was, by habit and repute (b), his wife; that cohabitation, therefore, was not admitted to constitute marriage, but only to raise a presumption that a marriage

(a) The decision was affirmed in the House of Lords, *M'Adam v. Walker*, 1 Dow. R. 148.

(b) It seems the repute must be a

riage had been solemnized; that the various penal statutes against clandestine marriages shewed that celebration by a clergyman, or by some one assuming the functions of that office, was necessary to constitute marriage; and that he was not acquainted with a single instance in which it had been ultimately decided in *Scotland*, that the bare declaration of parties without celebration, *rebus integris*, constituted marriage, unless in the case of *M^cAdam v. M^cAdam (a)*, in which great difference of opinion prevailed in the court of session, and which was under appeal. But he admitted, that if parties had acted upon the faith of the declarations by consummation or cohabitation, this must bar *pœnitentia*, and render the consent of equal force as if given *in facie ecclesiæ*. Mr. *Gillies* agreed with the two last witnesses as to the weight of the circumstance of the defendant being an officer on service, not domiciled in *Scotland*; and was of opinion that the writings and letters, unless followed by copulation or cohabitation, would not constitute a valid marriage: that taken by themselves, they only amounted to an obligation to marry at a future time, which was rendered ineffectual by the defendant's subsequent marriage. Sir *Ilay Campbell*, late lord president of the court of session, differing from Mr. *Cathcart*, expressly says, that the solemnities of regular marriage are not, by *Scotch* law, indispensable, though required as matter of order: that irregular marriages may be contracted, 1st, by cohabitation, and general habit and repute; 2d, by a promise with subsequent *copula*; 3d, by formal acknowledgments *per verba de præsentî*, either in writing, or declared before witnesses, though not in presence of a clergyman; but they must be attended with *personal intercourse, if not subsequent, at least prior*, otherwise they resolve into a mere *stipulatio sponsalitia*, which may be resiled from, *rebus integris*. He thinks that the second and third grounds of marriage are made out in the case before him, subject to the proof of *copula*, which is disputed, and to the judge's consideration of all the circumstances, such as the youth and inexperience of Mr. *D.*, and the indefinite obligation of secrecy entered into between the parties; and he considers it no objection on the part of the defendant, that he was not domiciled in *Scotland*, but only transiently there with his regiment.

Sir *William Scott*, after taking a minute view of the writings and letters, and referring to the opinions of the advocates as to the character of these documents, concluded that they unquestionably fell under the denomination, not of promises to marry, but of acknowledgments and declarations of actual marriage. The law, therefore, respecting promises might be entirely thrown aside. He then elaborately reviewed the advocates' opinions. the text writers (b) on the *Scotch* law of marriage, and the decided cases respecting declarations or acknowledgments of marriage, and pronounced his judgment, that the "rule of the *Scotch* law "remained unshaken; that the contract *de præsentî* does not "require consummation in order to become *very matrimony*;" and that therefore the marriage was valid, even though personal intercourse were unproved; but that assuming the law to be otherwise, and that the *copula* was necessary to render a contract *de*

general and not a divided one in order to raise the presumption of marriage. *Cunningham v. Cunningham*, 2 Dow. P. R. 482.

(a) It appears that none of the judges objected to the marriage in this case on the ground of there being no proof of subsequent *copula*, but some entertained doubts of Mr. *M^cAdam's* sanity at the time of the marriage. *Hutcheson, Justice of P. Jurisd. b. iii. ch. 8.*

(b) See *Cragii Jus Feudale*, lib. 2. dieg. 18. s. 17. & 19. *Stair's Inst.* lib. 1. tit. 4. s. 6. *Mackinsie, Inst.* b. 1. tit. 6. s. 3. *Erskine, Inst.*

b 1. tit. 6.
s. 5. Kaimes's
Elucidat. p. 32.
(a) See Montague v.
Montague,
2 Addams, R. 375.

præsent a marriage, he still thought that fact established by the evidence, and that in this view of the case, according to the consent of all the legal authorities, the marriage was undoubtedly valid. (a) This judgment was affirmed on appeal, on 19th January, 1814, by the court of delegates.

Lacon v. Higgins,
3 Stark, Ca. 178. S. C. Dow. & Ry. N. P. Ca. 58.
(b) It would appear at least doubtful whether this marriage was null and void by the French law. The vice-consul's statement is certainly not correct, that all marriages contrary to art. 63, 64. and 74. of the civil code are void. The breach of art. 63. (which requires two

In an action for goods sold the defendant pleaded coverture; and being a *British* subject, proved her marriage to one *H.*, another *British* subject, at *Versailles* (whither they went from *Paris* to be married), and that the ceremony was performed by a clergyman of the church of *England* according to the rites of that church, at an hotel, and followed by cohabitation. The plaintiff, to shew the marriage invalid, called the *French* vice-consul, who produced a copy of the "*Cinq Codes*," purporting to be published by authority of the *French* government. He stated it to be a part of the library of his office, and similar to those copies on which the tribunals of *France* acted. *Abbott C. J.* (by consent of the parties) received this evidence of the law of *France* (b), from which it appeared that many forms were required in and prior to the ceremony of marriage which had not been complied with. *Abbott C. J.* said he had a difficulty in pronouncing the marriage void, unless there was a nullifying clause; on which the vice-consul was re-examined, and stated, that from his knowledge of *French* law, marriages contrary to these regulations were absolutely void, notwithstanding subsequent cohabitation and reputation of being man and wife. On this *Abbott C. J.* held, that the marriage, not being celebrated at the *British* ambassador's, was within the operation of the general law, and if invalid in *France* was so in *England*. And the issue on the coverture was accordingly found for the plaintiff.

publications of the parties' names, &c. at eight days interval before the door of the town-hall) is punishable by fine on the civil officers and parties, by art. 192.; and art. 193., in imposing a similar fine for the breach of the much more essential condition of art. 165., ("The marriage shall be celebrated publicly, before the civil officer of the domicile of one of the parties,") expressly says the penalty shall be enforced, "*though the contraventions should not be judged sufficient to pronounce the nullity of the marriage*," thereby implying that some contraventions, even of art. 165., would not produce nullity. And it has been decided (*Cour de Cass.*, *Juin*, 1803), that non-compliance with art. 74. by residing six months in the place of marriage does not render the marriage void. But the marriage in the text being not celebrated by the civil officer, nor publicly, nor in the domicile of either of the parties (contrary to art. 74. and 165.) would rather seem to be void. By art. 191. "Every marriage which has not been contracted publicly, and has not been celebrated before the competent public civil officer, may be attacked by the parties themselves, by the fathers and mothers and ancestors, and by all those having a vested and actual interest in it, and also by the public authorities;" and though cohabitation followed in this case, it would seem that it would not even fall within the restriction of art. 196., which provides, "that when there is an actual marriage, and the act of celebration before the civil officer is produced, the parties themselves cannot demand the nullity of the act," for in this case there was no celebration before the civil officer. However *French* lawyers differ as to the question. The late *M. Portalis* (*Exposé des Motifs*, p. 255.) says, "The most grave of all nullities is that which arises from the marriage not being celebrated publicly and in presence of the civil officer. There is no marriage but only illicit commerce between parties who do not form their engagement in the presence of the competent civil officer." *M. de Malleville*, on the other hand, says, that the nullity resulting from the contravention of article 165. is not radical, but depends on circumstances to be estimated by the judge. And *M. Paillet* is also of this opinion. *Paillet, Manuel de Droit François*, p. 85. As the evidence in the above case was received by consent, the case is not to be considered as a decision of the very learned judge, that a foreign law can be proved by

by the opinion of an unprofessional person, such as a vice consul. That a foreign law, if written, is to be proved by a copy of the law properly authenticated. See Picton's Ca. 30. Howell's Sta. Tri. 491. Boechtlink v. Schneider, 3 Esp. Ca. 53. Millar v. Heinrick, 4 Camp. 155. If unwritten by persons professionally conversant with the law, *ibid.*; and Dalrymple v. Dalrymple, 2 Hagg. C. R. 81.

But though the marriages of *British* subjects resident in a foreign country are governed by the law of the country, yet marriages of *British* subjects resident in a *British* settlement, subject to *British* dominion, are, in the absence of special provisions, governed by the marriage law of *England* as it stands, independent of the marriage act, which does not extend to any place out of *England*. Thus, where two *British* subjects were married at *Madras* by a catholic priest in a private room, according to the rites of the catholic church, and afterwards cohabited, it was held, that as this was a valid marriage according to *English* law, independent of the marriage act, it was valid according to the law to which the parties were subject at *Madras*; and it mattered not that they had not obtained the licence of the governor, as was customary in the case of marriages of protestant *Europeans*. (a) And the principle extends to *British* subjects in any foreign place occupied by a *British* military force. Their contracts are governed by the *British* law, which the *British* troops carry with them. (b)

Although the validity of the marriage contract is to depend on the law of the country where it is entered into, yet it is not quite clear to what extent the consequences flowing from the contract are to be governed by that *lex loci*. In some Continental courts various questions have been discussed as to the law which was to regulate in one country the effects of a marriage formed in another; such as questions as to the liability of the wife to the husband's debts, her right to dower, to communion of goods, and other matters. The only questions of this kind, of which we are aware, in *England* have respected the legitimacy or illegitimacy of the children, and the dissolubility or indissolubility of the marriage; (as to which last point, see *infra*, head F.). Huber de *Conflictu Legum*, (c) lays it down: "*Porro non tantum ipsi contractus ipsæque nuptiæ certis locis ritè celebratæ ubique pro justis et validis habentur, sed etiam jura et effecta contractuum nuptiarumque in iis locis recepta, ubique vim suam obtinebunt.*" And he gives us an instance: "*In Hollandiâ conjuges habent omnium bonorum communionem, quatenus aliter pactis dotalibus non convenit; hoc etiam locum habebit in bonis sitis in Frisiâ, licet ibi tantum sit communio quæstus et damni, non ipsorum bonorum. Ergo et Frisii conjuges manent singuli rerum suorum etiam in Hollandiâ sitarum domini.*" And he afterwards says: it had been disputed among the doctors, "*An immobilia bona etiam alibi sita, in tali specie communicentur; quod nos adfirmandum putamus.*" From some decided cases, this rule would appear to have been adopted by our courts, and the legitimacy of the children would seem to depend on the *lex loci* of the marriage contract. Thus (d), where *W. Sheddon* of *New York* entered into a regular marriage in *America* with a woman who had

(a) *Lautour v. Teesdale*, 8 Taunt. 830.
(b) *Rex v. Inhabitants of Brampton*, 10 East, 282.
Ruding v. Smith, 2 Hagg. C. R. 371.
Burn v. Farrar, *Id.* 369.; and 4 G. 4. c. 91. *ante*. It is, perhaps, doubtful whether this act is *prospective*, but it is *declaratory*.

(c) *Prælectiones Jur. Civ.* lib. 1. tit. 5.

(d) *Sheddon v. Patrick*, stated 5 Barn. & C. 444.

before

(a) *ubi supra*.
 (b) Doe v. Vardill, 5 Barn. & C. 458. A writ of error is now depending in the House of Lords.
 (c) The rule of the Scotch law, that subsequent marriage renders legitimate previously born children, was admitted in the argument to be subject to this limitation, that they are begotten and born whilst the father and mother are unmarried, and that they remain unmarried till their intermarriage, 5 Barn. & C. 439;

before borne him a son, and he died leaving an estate in Scotland undisposed of by will, it was held by the Court of Session in *Scotland*, and affirmed by the House of Lords, that his son could not inherit the *Scotch* estate, since by the law of *America* the marriage of his parents after his birth did not render him legitimate: and the same rule was followed in the case of the *Strathmore* peerage (a), where the son of Lord S., born in *England*, where his parents were domiciled before their marriage, was held not entitled to inherit the *Scotch* estates by the subsequent marriage of his parents in *England*, since according to *English* law such marriage did not render him legitimate. But the Court of King's Bench in a late case, has held, that the question of legitimacy of a child for the purpose of inheriting land in *England* must depend upon the law of the country where the land lies. (b) A child born in *Scotland*, of parents domiciled in that country, was accordingly held not entitled to inherit lands in *England* by the marriage of his parents in *Scotland* after his birth; though according to *Scotch* law such marriage rendered him legitimate. (c) The court decided this case on the ground, that though the validity of the marriage was to be determined by the *lex loci contractus*, the right of the issue to inherit land in *England* depended on the *lex loci rei sitæ*; that *English* land was not inheritable by every legitimate child (d), but only by a child legitimate *sub modo*, viz. born after wedlock, *hæres ex justis nuptiis procreatus*; and that the statute of Merton, which by its title declares "He is a bastard that is born before the marriage of his parents," was not restricted to those born in *England*.

and see Co. Lit. 245. a, note (1). But see 5 Shaw & Dunlop's Reports, p. 611; and it is clear that in some countries where the civil and canon law are adopted on this subject, an intermediate marriage is no bar to the legitimation by subsequent nuptials. Pothier, in treating of the effects of this legitimation, which, he says, (unlike legitimation by letters of the sovereign,) renders the children as perfectly legitimate as if born after wedlock, expressly mentions the case of the father contracting a valid marriage after the birth of his illegitimate children, and then, on his wife dying, marrying the mother of those children. In such case he takes it for granted, that all the children are legitimate, and that the only question is, which are to be considered the eldest; and he lays it down, that the children of the first marriage come first, since the others, though born before them, are only children of the second nuptials. Pothier, *Traité du Contrat de Mariage*, Part 5. Chap. 2. § 3. And see further as to this sort of legitimation, Vinnius Inst. l. 1. tit. 10. § 13. De legitimatione—Heineccius Elem. Jur. Civ. p. 50. and authorities there cited. (d) Huber, in speaking of "personal qualities," which every where follow the individual on whom they are by law impressed, does not instance that of legitimacy. His rule is, "*Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personæ alibi gaudent vel subjectæ sunt, fruuntur et subjiciantur*;" and he expressly disapproves the opposite principle for which some contend, that the individual is to enjoy those rights in other countries which belong to his "personal quality," by the law of the country where the quality is impressed upon him. "Thus," says he, "those who with us are in tutelage or *curâ*, as minors, *fili familias*, prodigals, married women, are accounted every where persons subject to tutelage, and shall enjoy and be subject to the law which belongs to tutelage in each separate place." The only limitation which he puts upon the universal recognition of the "personal quality" by foreign laws is, "*si nullum inde civibus alienis creetur præjudicium in jure sibi quæsito*." He does not draw a clear distinction between cases where the right claimed affects *moveables*, and where it affects *immoveable* property. He is clear, indeed, that a Frieslander having lands in Groningen cannot dispose of them by will, since such disposition is against the laws of Groningen, though allowed in Friesland. "The Frisick law not availing to affect property constituting an integral part of a foreign territory," though between two countries both allowing by law of testamentary disposition, the question, whether the testament is valid or not, would depend on the law of that country wherein it is made.

made. But then he says, that a citizen having attained to twenty years, and thereby become *major* by the law of his own country, may exercise all the rights of majority, and alienate *immoveable property* even in those places where the age of legal majority is twenty-five years. Thomasius, who annotates on this passage, dissents however from the doctrine, and admitting Huber's rule, "*Qualitates personales*," &c., thinks it is confined to personal contracts and to moveables, and that the individual in the above case could not affect real property in the foreign country till twenty-five. And in accordance with this principle is the language of Hertius, de Collisione Legum, sec. ix. § 9. "*Quilibet advena in percipiendâ hereditate succedit, non secundum suæ personæ, sed secundum jura terræ Saxonicæ, etiam cujuscunque terræ sit, sive Bavaricæ, Francicæ, vel Suevicæ nationis*;" and see Erskine's Inst. l.iii. t. 8. § 10.

In a late case of precisely similar circumstances where the question was whether the son was legitimate, so as to be able to inherit lands in *Scotland*, the Court of Session decided that he was. ||

Munro v. Ross, 5 Shaw & Dunlop's Reports, 605.

An appeal is depending in the House of Lords.

(E) Of Offences against the Rights of Marriage: And herein,

1. Of the Offence of a forcible Marriage.

|| BY the 9 Geo. 4. c. 31. § 19., which repeals the 3 Hen. 7. c. 2., and the 39 Eliz. c. 9., it is enacted, "That where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall from motives of lucre take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years."

Upon this statute no decisions have as yet taken place, but in the construction of the repealed statute, 3 Hen. 7. c. 2., which is in *pari materiâ* with it, the following points have been resolved. ||

That the indictment for this offence must set forth, both that the woman hath lands or goods, or that she was heir apparent, and that the taking was for lucre; and also that she was married or defiled; for the enacting clause, in saying, that what person takes any woman *so* against her will, plainly restrains the taking to such as is within the preamble (*b*); but it needs not set forth, that the taking was with an intention to marry or defile.

fol. 468. Swandson's case. (*b*) Yet these words, *eâ intentione ad ipsam maritand.*, are usually inserted in indictments upon this statute; and it is safest so to do. Hale's Hist. P. C. 660.

It is said in *Hale*, that to make the offence felony within the statute 3 H. 7. c. 2. the taking must be against her will; but herein, by *Hawkins*, that is no manner of excuse, that the woman at first was taken away with her own consent; because if she afterwards refuse to continue with the offender, and be forced against

Hob. 182.
Cro. Car. 485.
Dalis. 22.
And. 115.
3 Inst. 68.
Savil. 59.
12 Co. 20.
110. Stat.
Tri. Vol. v.
Hal. Hist.
P. C. 660.
Hawk. P. C.
c. 42. § 5.

against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her she was in her own power.

Cro. Car. 493.
3 Keb. 193.
Vent. 243.
Browne's
case. 1 Hawk.
P. C. c. 42.
§ 6.

That it is not material, whether a woman taken against her will be at last married or defiled with her consent, or not, if she were under the force at the time; because the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it, for having prevailed over the weakness of a woman, whom by so base means he got into his power.

3 Inst. 61.
Dalis. 22. Stra.
P. C. 44. Hal.
Hist. P. C.
661. 1 Hawk.
P. C. c. 42. § 7.

That those who after the fact receive the offender, but not the woman, are not principals within this statute; because the words are, *receiving wittingly the same woman so taken*, &c., but it seems clearly that they are accessaries after the offence, according to the known rules of common law.

Hal. Hist.
P. C. 660.
1 Hawk. P. C.
c. 42. § 8.

That those who are only privy to the marriage, but noways parties to the forcible taking away, or consenting thereto, are not within the statute.

Cro. Car. 448.
Hob. 183.
Hale's Hist.
P. C. 660.
|| *Aliter* if she
consent before arriving in the county of B. Gordon's case, 1 Russell on Cri. 572.||

That where a woman is taken by force in the county of *A.* and married in the county of *B.*, the offender may be indicted and found guilty in the county of *B.*, because the continuing of the force there amounts to a forcible taking within the statute.

Cro. Car. 488.
Vent. 243.
4 Mod. 8.
4 St. Tr. 455.
But had she
freely, with-
out constraint,

It hath been adjudged, as is the constant practice at this day, that on an indictment for a forcible marriage, grounded on this statute, the wife may be a witness against the husband; for it being by force, it cannot be said a marriage *de jure*, so as to make them one person in law.

lived with him that thus married her, any considerable time, her examination in evidence might be more questionable. Hale's Hist. P. C. 661. || But see Wakefield's case, mentioned in Russell on Cri. 2d vol. p. 605, 606, in which Mr. Baron *Hullock* ruled, that even assuming the young lady to be at the time of the trial the lawful wife of one of the defendants, she was a competent witness for the prosecution. And that she may be a witness for prisoner, see 1 Ry. & Moo. 354.||

2. Of the unlawful Abduction of an unmarried Girl under the Age of Sixteen from her Parents or Guardians.

This section was introduced in consequence of the case of the King v. Wakefield, mentioned in vol. 2. of Russell on Cri. 605. See the trial published by Murray.

|| By the 9 Geo. 4. c. 31. § 20. repealing 4 Ph. & Mar. c. 8. it is enacted, " That if any person shall unlawfully take or cause " to be taken any unmarried girl, being under the age of sixteen " years, out of the possession and against the will of her father " or mother, or of any other person having the lawful care or " charge of her, every such offender shall be guilty of a misde- " meanor, and being convicted thereof, shall be liable to suffer " such punishment, by fine or imprisonment, or by both, as the " court shall award." ||

The marriage of Miss Turner with Wakefield was annulled by a special act of Parliament, it being considered doubtful, whether it could be invalidated by the English and Scotch law. But see *Harford v. Morris*, 2 Hagg. C. R. 423. where the marriage of a ward twelve years and a half old by her guardian, under circumstances of forcible and fraudulent abduction to a foreign country, was held void by the delegates.

[On the former statute it had been resolved, that the marriage must be clandestine, and to the disparagement of the heiress. Hicks v. Gore, 3 Mod. 84.]

That a bastard under the care of her putative father is within the act. Rex v. Cornforth, 2 Stra. 1162. 1 Bott, pl. 556. S. C.

P. L. by Const, 405.

That the offence is within the jurisdiction of the Court of King's Bench.] Rex v. Moor, 2 Mod. 128. 2 Lev. 179.

S. C. 1 Freem. 444. S. C. 3 Keb. 708. S. C.

3. *Of the Offence of procuring an improvident Marriage, and therein of Marriage-Brochage Contracts and Agreements.*

It is of such consequence that all marriages should proceed from free choice, and not from any compulsion or sinister means, that it hath been held a matter indictable, or an offence for which the court will grant an information, to procure an improvident or an unequal marriage. Lev. 257. 5 Mod. 221.

And on this foundation, that marriage ought to be free, marriage-brochage bonds and contracts have been declared to be void, and decreed to be given up and cancelled. (a) [(a) And this though entered into after marriage. Toth. 27. 1 Ch. Rep. 87.]

So, though it was decreed in Chancery, that a bond of 1000*l.* penalty, for the payment of 500*l.*, given for procuring a marriage between persons of equal rank, fortune, &c. was good; yet, upon an appeal to the House of Lords, the decree was reversed, for that such bonds to match-makers are of dangerous consequence, and tend to the betraying and ruining persons of fortune and quality, and are not to be countenanced in equity; and that marriage ought to be procured by the mediation of friends and relations; and that such bonds would be of evil example to executors, guardians, trustees, servants, and others who have the care of children. Show. Par. Ca. 76. Hall v. Potter.

And the court will not only decree a marriage-brochage bond to be delivered up, but a gratuity of fifty guineas, actually paid, to be refunded; for that such bargains are in no shape to be countenanced. Abr. Eq. 90. Smith v. Bearing, 2 Vern. 392. ||And see Williamson v. Gihon, 2 Sch. & Lef. 357.||

[The defendant had a lease made by *Thomas Thynne* of the impropriation of *Thame* for two lives in reversion, after another lease for life of Mr. *Thynne* of *Egham*. On the death of Mr. *Thynne* without issue, the estate came to Lord *Weymouth*, who had made a lease, under which the plaintiff claimed. The plaintiff's bill was to set aside the defendant's lease, upon surmise that the consideration of the lease was the defendant's undertaking to procure a marriage between Mr. *Thynne* and Lady *Ogle*. It was objected that the Lord *Weymouth*, being a remainderman, claimed by settlement paramount, and came not in privity of estate; and therefore neither he nor his lessee were entitled to controvert, whether the lease was made on good consideration or not. But by the Court,—If the lease was gained by fraud, or an unjust consideration, it is to be deemed void, and the estate to be discharged. Striblehill v. Brett, 2 Vern. 445. Lord Hardwicke, speaking of this case, says, "the Lords did a very extraordinary thing, determining contrary, and without regard to the verdicts. They must have been of opinion

"the issues
"were directed in
"some improper shape;
"for it cannot be supposed,
"they set it aside as a
"marriage-brokerage contract upon the proofs." 1 Ves. 509.

Smith v. Ayckwell, 3 Atk. 566. S. C. || Debenham v. Oxe, 1 Ves. 276. Hylton v. Hylton, 2 Ves. 549. ||

discharged of it, as if no such lease had been made. An issue was directed to be tried at the bar of the Court of Common Pleas, whether the lease was made in consideration of defendant's assisting to effect or procure the said marriage. Two verdicts were given in favour of the defendant, whereupon the bill was dismissed. Upon an appeal to the Lords in Parliament the decree was reversed, and, without regard to the verdicts, the lease was set aside.

Upon motion for an injunction to restrain the defendant either from bringing an action on a promissory note given by the plaintiff to the defendant in 2000*l.* for undertaking to procure him a marriage with a lady, or that the defendant may be restrained from assigning it over to any other person, Lord *Hardwicke* said, As it is not only charged by the bill to be a marriage-brokerage agreement, but the charge is supported by an affidavit, I will make an order upon the defendant to keep the note in his own possession, and not to assign or indorse it over to any person whomsoever; but I will not extend the injunction so far as to prevent him from proceeding at law.

Cole v. Gibson, 1 Ves. 506. || And see Arundell v. Trevillian, 1 Ch. Rep. 87. ||

On a treaty of marriage between *P. B.* and Miss *H.*, then about twenty years old, articles were entered into, to which the intended husband and wife, the defendant, who was the intended wife's servant, and *R. A.*, were made parties. The first clause therein was for securing an annuity of 100*l.* to the defendant out of the wife's estate; but every other provision therein for the benefit of the wife and issue of the marriage was made revocable by the wife, after the marriage should be had. About the same time with the articles, a bond was given by *P. B.* before the marriage to pay the defendant 1000*l.*, which bond was afterwards delivered up to be cancelled, but at what particular time did not appear. A recovery was suffered to the use of the articles. And subsequent to the marriage, a new grant was made to the defendant of this annuity; which was continued to be paid for some time after the wife's death. A bill was brought to set it aside; and Lord *Hardwicke* directed three issues: 1st, Whether the bond was executed in consideration of, or as a premium for, defendant's procuring or assisting plaintiff in his marriage, or on any other and what consideration? 2d, Whether the 1000*l.* were thereby made payable at or on the marriage, or at any other and what time? 3d, Whether the annuity or rent-charge was granted in consideration of the bond, or procuring or assisting plaintiff in his marriage, or for any other and what consideration?

Shirley v. Martin, Excheq. 14th Nov. 1779.

3 Cox's P. Wms. 74. note. || And see Roche v. O'Brien, 1 Ball & Be. 558. Hatch v. Hatch, 9 Ves. 299., and St. John v. St. John, 11 Ves. 537. King v. Burr, 3 Meriv. 693. ||

Peyton v. Bladwell, 1 Vern. 240.

So, any private agreement or treaty infringing the open and public agreement on the marriage is considered as fraudulent; as in the following cases: Sir *J. B.* being executor of the plaintiff,
Peyton's

Peyton's mother, and having purchased an estate which belonged to the plaintiff's mother, promised that he would not only settle such estate upon the plaintiff, but also other lands of 300*l.* a year, if a convenient match could be found for the plaintiff. In 1676, Sir *J. B.* treated a marriage for him with the niece of the plaintiffs, Sir *J. R.* and *Denham*; and it was agreed between him and Sir *J. R.*, that Sir *J. R.* should give his niece 2500*l.* portion, to be laid out in lands after his death, and that Sir *J. B.* should settle lands of the value of 300*l.* a year, whereof 200*l.* *per annum* should be settled for the jointure, and that he would also settle other lands of 100*l.* *per annum* on himself for life, remainder on plaintiff *Peyton* and his heirs. Accordingly, by lease and release, Sir *J. B.*, in consideration of a bond entered into by Sir *J. R.* to pay 2500*l.* after his and his wife's death for the marriage portion, conveyed lands stated in the deed to be 300*l.* a year; and as to 200*l.* a year thereof, the same were limited for the jointure of the wife of plaintiff *Peyton*, remainder to the heirs male of their two bodies, remainder to *Peyton* in tail, remainder to him in fee; and as to the residue, to plaintiff *Peyton* in tail, remainder to him in fee. And Sir *J. B.* thereby covenanted, that the jointure lands were 200*l.* a year, and that within two years then next he would settle other lands of 100*l.* a year, and worth 1700*l.*, to be sold, to the use of himself for life, remainder to plaintiff *Peyton* in fee. After the marriage, Sir *J. B.* prevailed on plaintiff *Peyton*, who was very young, by promises of leaving him a greater estate by his will than he had promised to settle upon him, and by other insinuations, to execute a writing, whereby Sir *J. B.* was to receive the profits of the whole estate, allowing the plaintiff *Peyton* only 100*l.* a year, and to assign over to him Sir *J. R.*'s bond, and also to release and discharge the agreement for 100*l.* *per annum* on him and his heirs after the death of Sir *J. B.* The plaintiff's bill was to be relieved against these agreements, which had been extorted from the plaintiff *Peyton*, and to have the jointure made good, the lands settled for the jointure not being of the value of 200*l.* a year. After long debate the Lord Keeper decreed, that the defendant *Bladwell*, notwithstanding the agreement with plaintiff *Peyton*, should account for all the profits of the estate which Sir *J. B.* had been in possession of under that agreement, over and above the 120*l.* *per annum*, and the Master was to see what was the value of the jointure lands at the time of the settlement; and the defendant was decreed to make good so much as the jointure lands fell short of 200*l.* *per annum* at the time of the settlement made. And Sir *J. B.* having devised some lands to the plaintiff *Peyton*, the defendant was decreed to make up those lands, and to settle them according to the marriage agreement. And although it was strongly insisted by the defendant's counsel, that the agreement being to settle 100*l.* *per annum* on plaintiff *Peyton* and his heirs, he had power to release and discharge that agreement; and there was no benefit thereby intended to the wife or issue of that marriage; and in case the settlement had been made, it had been in plaintiff *Peyton's* power to have sold or given away those lands

lands (the settlement being to be made to him and to his heirs after the death of Sir *J. B.*), and therefore he might well release the agreement as to the 100*l.* per annum, and no one could be said to be injured by it, any more than if he had devised away or sold those lands; yet the court declared its detestation of such underhand agreements, and that it was a deceit and fraud as to Sir *J. R.*, who was drawn in to give a great portion with his niece, in expectation of a settlement adequate to it, which by this means is to be frustrated; for though plaintiff *Peyton* could have disposed of the lands, which were to have been settled on him and his heirs, yet that is frequently done in many settlements, the father by that means being left at liberty to provide for his younger children, and to reward them most who behave themselves best: and still there is a benefit intended to the issue of the marriage, and it is part of the consideration for which the portion was given; and therefore they declared this underhand agreement and release to be fraudulent, and set the same aside, and decreed the agreement to be performed, as to the 100*l.* per annum.

Redman v.
Redman,
1 Vern. 348.

Upon a treaty for a marriage between *C. R.* and the plaintiff, the plaintiff's father would not consent to the match, by reason that *C. R.* was indebted in the sum of 200*l.* to one *B.*, for which he and his mother stood bound in a bond. To remove this obstruction, *H. R.* (younger brother of *C. R.*) and the mother gave a new bond to *B.* for the payment of this debt; and thereupon the bond in which *C. R.* was bound was given up to be cancelled. But *C. R.* gave his brother *H. R.* a counter-bond to indemnify him against the debt, and paid the interest of the 200*l.* to *B.* during his life. It was in proof, that the plaintiff, the widow of *C. R.*, was privy to all this matter, and that she, being in love with *C. R.*, contrived this way to satisfy her father, that the marriage might take effect; but now being sued by *H. R.* on the counter-bond, as administratrix to her husband, she brought her bill to be relieved. Lord Chancellor said, This is a plain fraud, and by this contrivance the father of the plaintiff was drawn in to give the greater portion; and he absolutely refused to marry his daughter till *C. R.* was made a clear man, and, particularly, discharged of this very debt; and though *H. R.* had no obligation upon him to become bound for his elder brother's debt, yet it was all one to the plaintiff's father which way that debt became discharged; but that was to be first done, let it be one way or other. And his lordship declared, that in case *C. R.* himself had been the plaintiff, he should have been relieved; but the case was stronger, because if this bond should be suffered to lie on *C. R.*'s estate, it might swallow the assets, and defraud his creditors; as it also injured the plaintiff in the right she had by the custom of *London* to the personal estate of her husband; and therefore he decreed the bond to be delivered up.

Gale v.
Lindo,
1 Vern. 475.

Upon a treaty of marriage between one *G.* and the sister of *W. P.*, the woman not having so great a fortune as the man insisted upon, she prevailed with her brother *W. P.* to let her have 160*l.* to make up her portion, and gave him a bond for the repayment

ment

ment of it, upon which the marriage was had. The husband, who knew nothing of the bond, died without issue, and his wife survived him, and afterwards died, having made her will, and the plaintiff executor. *W. P.*, the brother, dies, and makes the defendant his executor, who put the bond in suit against the plaintiff as executor of the widow, to recover the 160*l.*, and thereupon he brings his bill to be relieved. For the defendant it was insisted, that although this might be a fraud, as against the husband or any issue of his who were to have the benefit of the marriage agreement, yet the husband being dead, and there being no issue, the bond was good against the woman herself, and, by consequence, against her executor, there being no creditors in the case, nor any deficiency of assets pretended. Lord Chancellor, — You admit the husband might have been relieved on a bill brought by him and his wife; that which was once a fraud will be always so; and the accident of the woman's surviving the husband will not better the case. Decreed the bond to be delivered up, and a perpetual injunction against it.

Lamlee the mother having a jointure in part, and 10*l.* per annum devised to her by her husband, and charged upon the other part of the premises in question, on the marriage of *Lamlee* the son, joined in the settlement, and accepted 15*l.* per annum in lieu thereof. The day before the settlement, she had taken a security from her son for 10*l.* per annum out of the leasehold estate, which was not comprised in the marriage settlement, and the son covenanted to pay it. The son died; the plaintiff, his widow, took out administration to him. The defendant brought an action of covenant against her for the non-payment of the 10*l.* per annum. The bill was to be relieved against this action on the ground of fraud; and the court, upon the authority of the above cases, decreed a perpetual injunction.]

An uncle gives his niece by will 1200*l.*; the niece marries, but, antecedent to the marriage, the father takes a bond from the then intended husband to pay him 200*l.* in case the daughter should happen to die without issue male, living her husband: the daughter did die without issue male, living her husband; whereupon the father sued the husband at law upon this bond; and the husband brought his bill in equity to be relieved against the bond, and had a decree accordingly; for it appearing that no money was paid, nor any consideration given for entering into it, the court took it to be in nature of a marriage-brokerage bond, and therefore ordered it to be delivered up.

[*A.* made an absolute conveyance of lands to *B.* and his heirs, in consideration of 1500*l.*, which sum was at that time the full value. On the next day *B.* executed a defeasance; declaring, that if *A.* or his heirs should, within sixteen years, pay to *B.* the 1500*l.* the conveyance should be void. *B.* entered and enjoyed the lands, and about three years afterwards, upon his marriage, settled them as an absolute estate on his wife and her issue. To this settlement *A.* was privy, but took no notice of the defeasance, or ever attempted to refute the general opinion that *B.* was the sole and absolute owner of the estate. Upon *B.*'s death, *A.* set

Lamlee v.
Hamman,
2 Vern. 499.

Pr. Ch. 267.
2 Eq. Ca. Abr.
tit. Bonds,
&c. D. pl. 1.
S. C. 2 Vern.
588. S. C.

Webber v.
Farmer, 2 Br.
P. C. 88. Mr.
Viner says,
that the de-
cree was af-
firmed in the
House of
Lords by eight
lords against
seven; *Cow-*
per and *Har-*

court against the decree, and *Parker* for it; that in a manuscript report of it, said to be Lord *Harcourt's*, there is added

a note that the wife's father had notice of the defeasance before the settlement made; a circumstance which is taken notice of in the argument for the appellant in 2 Br. P. C. 90. Vin. Abr. tit. Fraud, H. pl. 3.

Morrison v. Arbuthnot,
H. L. 1728.
1 Br. Ch. Rep.
548. note;
[and see *Palmer v. Neave*,
11 Ves. 165.]

up the defeasance, and filed a bill to redeem, to which the son and heir of *B.* pleaded the purchase deeds and his father's marriage-settlement. It was in proof, that *A.* made the conveyance to enable *B.* to obtain a marriage and a considerable fortune, though not with the particular lady whom he married. A perpetual injunction was decreed against *A.*, to stop all proceedings under the defeasance.

On a treaty of marriage between Lord *Arbuthnot*, then a minor, and the daughter of *Morrison*, it was agreed, that *Morrison* should pay 50,000 marks as a portion for his daughter, and a settlement was agreed to be made by Lord *Arbuthnot* and his friends in consideration of that fortune. The night before the execution of the articles, *Morrison* prevailed on Lord *Arbuthnot* privately to sign a writing, purporting that the real agreement was for 40,000 marks only, and that *Morrison* had agreed to the contract for 50,000, upon the express granting of this private obligation, by which Lord *Arbuthnot* bound himself to release *Morrison* from 10,000 marks, part of the 50,000. When Lord *Arbuthnot* came of age, he brought his action to have this obligation reduced, on two grounds, — 1. That it was granted by him, whilst a minor, without the consent of his guardians. 2. That it was *contra fidem tabularum nuptialium*, to elicit such a writing clandestinely, contrary to a solemn contract entered into in the presence of his friends. The Lords of Session sustained the reason of reduction, and held the obligation null. Against their decree, *Morrison* appealed to the House of Lords, where it was affirmed with 80*l.* costs.

Pitcairne v. Ogbourne,
2 Ves. 375.

A treaty was entered into between the plaintiff and his son of the one part, and *R. G.* and her uncle of the other part, for the marriage of the plaintiff's son and *R. G.* The uncle was treated with *in loco parentis*; the intended wife's whole dependence was upon him; she continued to live with him till the time of his death, and she took an ample provision under his will. Upon this treaty an annuity bond was entered into by the plaintiff, by which he stipulated to pay 150*l.* per annum to the husband, and to the wife, if she survived him. The wife survived the husband. The plaintiff filed his bill to reduce the payment to 100*l.* per annum, upon an agreement said to be entered into between the plaintiff, and the husband and wife, but to which the uncle was not privy; whereby, though the bond was to import payment for 150*l.*, yet, for reasons given on the transaction, the actual agreement was declared to be for 100*l.* only. The Master of the Rolls dismissed the bill, considering the private agreement as a fraud upon a material party.

Neville v. Wilkinson,
1 Br. Ch. Rep.
543.

Where a bond was entered into by the plaintiff to the defendant before the plaintiff's treaty of marriage, but the defendant, by the plaintiff's desire, upon the occasion of such treaty, misrepresented to the wife's father the amount of the plaintiff's debts, and particularly concealed from him the bond in question; Lord

Thurlow

Thurlow relieved by injunction against the bond, although it did not appear that there was any actual stipulation on the part of the wife's father in respect of the amount of the plaintiff's debts.

A bill was brought to be relieved against a bond drawn in common form, for payment of money; but proved to be made on an agreement, that the plaintiff should either marry her servant, or should by way of forfeiture pay him the sum of money mentioned in the condition of the bond. The court decreed the bond to be delivered up to be cancelled, it being contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion.

Joseph Montefiori, a Jew, being engaged in a marriage treaty, his brother *Moses*, to assist him in his designs, and represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between him and his brother *Joseph*; which balance he (*Moses*) acknowledged to have in his hands; though, in truth, no such balance, or any thing like it, existed. After the marriage had, *Moses* reclaimed this note, as being given on no consideration; and the matter was referred to arbitration. The arbitrators awarded the note to be delivered up, which *Joseph* refused to do; upon which the court was moved for an attachment against him for non-performance of this award; and on his part, a cross motion was made, to set aside the award, on a suggestion, that the arbitrators were mistaken in point of law. Lord *Mansfield*. — The law is, that where, upon proposals of marriage, third persons represent any thing material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represent it. *It shall be*, as represented to be. And the husband alone is entitled to relief, as well as when the fortune, &c. so misrepresented have been specifically settled on the wife: for no man shall set up his own iniquity as a defence, any more than as a cause of action. The arbitrators therefore being clearly mistaken in point of law, the award must be set aside. The rule for the attachment was discharged, and the rule for setting aside the award made absolute. (a)

A mother, who was guardian to her daughter, took a bond from the husband to give her a release of all accounts of the mesne profits of the estate within two years after the marriage. The court held such bond to be of the same nature with a marriage-brochage bond, and decreed it to be delivered up: for if a bond to give money if such a marriage could be obtained, was ill; by the same reason, a bond to forgive a sum of money must be ill also.

the marriage, in pursuance of a covenant in the marriage-articles, which were made on great deliberation; and that *Cowper C.* relieved against this covenant, saying, That to tolerate such an agreement would be paving a way to guardians to sell infants under their wardship. 1 Salk. 158. S. C.

The defendant, who was a tailor by trade, and entitled to a small real estate of about 14*l.* per annum, in 1730. made his addresses to the plaintiff, who was then about the age of twenty-six years, and was the daughter of a man esteemed in the neigh-

Kay v. Bradshaw, 2 Vern. 102.

Montefiori v. Montefiori, 1 Bl. Rep. 565. 1 Br. Ch. Rep. 548. S. C. cited by Lord *Thurlow*. *Jackson v. Duchaire*, 3 Term Rep. 551. *Ex parte Gardener*, 11 Ves. 40.||

||(a) A representation under mistake, if made *bonâ fide*, will not however bind the party making it to make it good. *Mere-wether v. Shaw*, 2 Cox, 124.||

Duke Hamilton v. Lord Mohun, 1 Abr. Eq. Ca. 90. 1 P. Wms. 118. S. C. mentions it as a release to be given within two years after

Woodhouse v. Shepley, 2 Atk. 555.

bourhood as a man of substance, and who could give her about 500*l.* for her fortune: the courtship had been carried on some time, before it came to her father's knowledge, who, as soon as he was acquainted with it, declared a great dislike of the match, and forbade the plaintiff giving the defendant any encouragement; notwithstanding which, the courtship was carried on in a clandestine manner till *January 1732*, when the defendant met the plaintiff at a market-town in the neighbourhood, and there, at an alehouse, the following bonds were executed, nobody being present except the witnesses, who were two strangers, and were called in for that purpose, *videlicet*, A bond from the plaintiff in the penalty of 600*l.*, with condition, that "if she did, on or before the expiration of thirteen months after the decease of her father, according to the usage and ceremony of the church of *England*, espouse and marry the defendant, if the defendant would thereunto assent, and the laws of the realm permit the same, or if it should happen the plaintiff should not, nor would not marry and take to husband the defendant as aforesaid, but should marry with some other person, then the plaintiff should and would well and truly pay, or cause to be paid, unto the defendant the sum of 500*l.* of lawful *British* money, at or immediately after failure of such marriage; but if it should happen that the plaintiff should die before the time limited and appointed for the said marriage, then the plaintiff should leave and give the defendant 10*l.* as a token of her love, to buy him a suit of mourning with; then the obligation to be void, else, &c."—A bond from the defendant in the like penalty, with condition, that "if he did, on or before the expiration of thirteen months after the decease of the plaintiff's father, according to the usage and ceremony of the church of *England*, espouse and marry the plaintiff, if the plaintiff should thereunto assent, and the laws of the realm permit; or if it should happen the defendant should not, nor would not marry and take to wife the plaintiff as aforesaid, but should happen to marry with some other woman, then the defendant did thereby covenant and agree to forfeit, surrender, and yield up unto the plaintiff for her own use, all his estate real and personal in *M.* and *S.*, or elsewhere by sea or land; but if it should happen the defendant should die *fore* the time limited and appointed for the said marriage, then the plaintiff was to have to her own use one half of all the defendant's estate, both real and personal, that he should be possessed of at the time of his decease; then the obligation to be void, else, &c."—An indorsement on the back of defendant's bond: Memorandum, That before the sealing of this bond, *R. Shepley* doth promise, covenant, and agree, that he will settle and assure the within-named *H. Woodhouse* a yearly dower, according to what portion she shall have, and make her a good assurance, as the law directeth, either of lands, money, or living, that shall please her; if this said *H. Woodhouse* shall have a child or children, then she shall have one half of his estate, and the child or children the other half that he shall die possessed of, or that by any means belong to him, or his inheritance,

“ inheritance, that may either fall to him by sea or land ; and if
 “ this said *H. Woodhouse* shall marry this *R. Shepley*, and have
 “ no children by him, then she shall pay to *Sarah Shepley* 20*l.* of
 “ lawful money as a legacy, and then all his lands, livings, goods,
 “ chattels, money, and any thing that shall ever belong to him,
 “ or that ever did in his lifetime, that has not been received, she
 “ shall have and peaceably enjoy, and take for her own use, and
 “ at her own disposing, both in her life and at her death, unto
 “ which I have put my hand. *R. S.*” Upon the examination
 of the witnesses to the bonds, it appeared they differed in their
 accounts of the execution : one saying, the bonds were read over
 before execution; the other, that they were not: one that they were
 exchanged; the other that they both remained in the custody of
 the defendant ; and in fact, at the time the answer was put in, they
 were both in the hands of the defendant. After this transaction,
 the execution of these bonds remained unknown, and the inter-
 course was continued till *May* 1736, when the plaintiff’s father
 died, who by his will left her a fortune of about 340*l.* The
 thirteen months expired, and then the plaintiff filed the original
 bill to be relieved against her bond, and dying soon after the cause
 was revived by her administrator. The cross bill was brought by
 the defendant to have satisfaction of this bond out of the assets of
H. Woodhouse, alleging he was always ready and willing to have
 married her, but was prevented from having any access to her by
 her brothers. Lord *Hardwicke* refused to decree satisfaction of
 this bond on the cross bill, but directed it to be delivered up to
 be cancelled on the original bill; grounding his decree upon
 public and general considerations, the encouragement which
 transactions of this kind, if allowed, would give to disobedience,
 and the *fraud* upon parents.

But where a father treated for the marriage of his son ; and
 in the settlement on the son, there was a power reserved to the
 father to jointure whom he should marry, in 200*l.* per annum,
 paying 1000*l.* to the son ; and the father afterwards treating
 about marrying a second wife, the son agreed with the second
 wife’s relations to release the 1000*l.*, and actually did release it ;
 but took a bond from the father, without the privity of the second
 wife’s relations, for the payment of this 1000*l.* ; equity refused
 to set this bond aside, because it would be injurious to the first
 marriage, which, being prior in time, was to be preferred.]

Roberts v.
 Roberts,
 3 P. Wms.
 66.

(F) Marriage how long to continue : And herein of the
 several Kinds of Divorces ; and herein,

1. *Of Elopement.*

MARRIAGE, for the reasons already given, being to continue
 during life, a wife can in no (a) case whatsoever leave her
 husband ; for in doing it she breaks the most solemn vow, which
 is made in the presence of God and in the face of the church,
 that she will cleave to him during life ; and therefore, if a woman
 runs away from her husband, without any (b) provocation, he shall

(a) That
 wife may
 have alimony,
 without any
 separation,
 Moor, 874.
 (b) For if a

husband not answer for any (a) contract she makes, nor be obliged to answer turn away his wife, or for her necessities.

by ill usage oblige her to go away, he gives her credit wherever she goes, and must pay for necessities for her. Salk. 118. pl. 10. 6 Mod. 171. 2 Ld. Raym. 1006. [But in this case if the wife, whilst she is living apart from her husband, commit adultery, it hath been holden, that the husband is not bound to receive her again, and, consequently, not liable for necessities provided for her subsequent to the time of her being guilty of adultery. Govier v. Hancock, 6 Term Rep. 603.] || And see Ham v. Toovey, 1 Selw. N. P. 278. Morton v. Fazan, 1 Bos. & Pul. 226, || (a) That a court of equity will not assist a wife, who elopes, with alimony.

2 Inst. 435.
Co. Lit. 32.
40. F. N. B.
150. Roll.
Abr. 680.

Also, if a woman elope from her husband, she loses her dower; but it seems, that elopement was no bar of dower at the common law, though a divorce were sued and obtained for the adultery; but now by the statute of W. 2. c. 34. it is expressly provided, that in such case the wife shall lose her dower; the words of which are, *si uxor sponte reliquerit virum suum, et abierit, et moretur cum adultero suo, amittat in perpetuum actionem petendi dotem suam, quæ ei competere posset de tenementis viri sui si super hoc convincatur, nisi vir suus sponte et absque coertione ecclesiæ eam reconciliet et secum cohabitare permittat, in quo casu restitatur ei actio*; and though she does not go away *sponte*, but is taken against her will, yet if after she consents, and remains with the adulterer, she shall lose her dower; for the remaining with him without reconciliation is the bar of dower, not the manner of the going away; and this was the old way of preventing the crime; for they thought it unfit that a wife, who did not share in the labours of the husband, should have any family provision.

[6 Term
Rep. 604.]

Dyer, 107.

In *Dyer* there is a precedent of such elopement pleaded, and issue taken upon the reconciliation of the husband; but it is there held, that the defendant cannot give in evidence any other elopements than that which is pleaded; for there may be divers elopements, and divers reconciliations, and defendant, at his peril, ought to take issue on one only; that is, as I understand the book, upon the last; for if there be divers reconciliations, yet, if she afterwards elope, the shewing that she was once reconciled after elopement, will not take away what is set up in bar of dower.

Perk. 554.
Brook. 12.
Roll. Abr.
680.
2 Inst. 436.
Co. Lit.
32. b.

If a woman be ravished, and remain with the ravisher against her will, she shall not lose her dower; but, if after such ravishment she consent to remain with him, she shall lose it, though the book thinks the contrary; and in the case cited there, she answered only to the elopement, and not to the remaining with the adulterer: but if she voluntarily go away from her husband, though she remain all her lifetime with the adulterer against her will; or if she remain not with him, but he turn her away, yet shall she lose her dower: but if she be reconciled, as the statute ordains, then she shall be endowed, though the husband hath aliened the land in the mean time.

(b) Perk.
35.
N. N. B.
150. Roll.
Abr. 680.
(c) 2 Inst.
436.

If she elope, and live in adultery in any other the manors or lands of her husband, some (b) books say she shall not lose her dower; either because it cannot be intended a running away from her husband, when she remains in any of his manors or lands; or, because he is to take care that no such live there: but my Lord (c) *Coke* holds the contrary, and says, though she cohabits with

with her husband in the same house, yet without his reconciliation *sponte*, she shall lose her dower; *a fortiori* in the other case; for the adultery, and the remaining with the adulterer, are the causes of her being barred of dower; and so, though she do cohabit, and be reconciled to her husband, yet if it be by church censures, she shall lose her dower; though (a) *Rolle* says, if she elope, and after live with her husband for some years till his death, by his consent, without compulsion of the church, she shall not be barred of her dower, though it be not averred, that she was reconciled to her husband; which seems reasonable enough, the permission to cohabit with him being an argument and proof of the husband's reconciliation.

(a) Roll.
Abr. 680.

If a man grants his wife, with her goods, to another, and she lives with the grantee all the lifetime of the husband, yet she shall lose her dower, by reason of her living with him in adultery; and in that case, where such a grant was pleaded, it was held, 1st, That the grant was void. 2d, That it did not amount to a licence, or, if it did, that it was void. 3d, That after the elopement, there shall be no averment admitted *quod non fuit adulterium*; though the grantee and the woman married after the husband's death; and though in that case, they brought sentence of purgation of the adultery, from the spiritual court, yet it was not allowed against such presumption.

2 Inst. 435.
Roll. Abr.
680. Dyer,
106. b. in
margine.

If the husband's relations keep him from his wife, so that she does not know what is become of him, and give out that he is dead, and thereupon procure her to release all marriages and interests which she can have in him as her husband, and also persuade her to marry again, which she does, with one who has notice that her first husband is alive, but she herself has no notice of it; though she live in adultery with this man, and though her husband be not out of the realm, nor beyond the seas, so that she ought to have taken notice of his being alive (b); yet, because *non reliquit virum sponte*, as the statute says, but by persuasion of his friends, not knowing herself but that he was dead, this is no such elopement as will bar her of her dower. past, and shall not have been known to be living by her during that time. See 9 G.

Roll. Abr.
680. Green
v. Harvey.
¶(b) Before
the wife can
marry a
second time
her husband
must have
been contin-
ually
absent from
her for the
space of seven
years then last
9 G. 4. c. 31. s. 22. ||

2. Of the Offence of taking away a Wife, and of Criminal Conversation.

At common law, the husband may have an action of trespass, *de uxore abductâ cum bonis viri*: also, this offence is prohibited by the statute of Westm. 2. c. 13., and a further punishment inflicted than was at the common law; and by Westm. 2. c. 34. it is punishable at the suit of the king, by the words following, *de mulieribus abductis cum bonis virorum suorum habeat rex sectam de bonis sic asportatis*.

2 Inst. 180.
1. 454.
Dyer, 256 b.

If the wife be *infra annos nobiles*, viz. under the age of twelve years at the time of taking away, some have holden, that the husband shall not have a writ *de uxore abductâ cum bonis viri*; but my Lord Coke holds the contrary, and that she is *uxor* until disagreement.

47 E. 3.
Action sur le
Statut. 37.
2 Inst. 435.
cont.

If the wife be taken away, and after be divorced, or if she die, yet

2 Inst. 434.

yet the husband shall have his action *de uxore abductâ cum bonis viri*; for in this action he shall not recover his wife, but damages; and he cannot have an action for taking her away as his servant, because the law gives him an action in another form.

Also, it is held, that though the words of the writ be *rapuit*, &c., yet here it is taken for a violent taking away, and not when carnal knowledge is had; so as this action may be brought against women as well as men.

2 Inst. 435.

Cro. Jac.

538, 539.

that it may

be *cepit et*

abduxit as well

Mich.

17 Car. 2.

at Oxford,

in *B. R.*

Walker v.

Rich, Ent.

1654, in

English.

as *rapuit*.

In an action of trespass *de uxore abductâ cum bonis viri sui*, the jury found for the plaintiff, *quoad* taking some goods, but as to all the rest, for the defendant. It was alleged, 1st, That this action concludes *contra formam statuti*, and so the plaintiff makes his case upon the statute, and has failed in proof; for the verdict is for the defendant, as to the taking away the wife, which is the only matter provided against by any statute. *Sed non allocatur*; for *per cur.*, if a man brings an action at common law, and concludes *contra formam statuti* generally, it shall not hurt; but if he recites a statute in particular, and lays the fact to be *contra formam stat. prædict.*, there he must make his case within the statute, else he has failed of his case; and it has been adjudged, that an indictment of barrety concluded *contra formam stat.* is good, though there be no statute that is express against it. 2d, That it does not lay *per quod consortium amisit*. 3d, That the word *ravish* in *English* implies a carnal knowledge only (though in latitude it signifies also a forcible taking away); and so the matter amounts to a felony of the plaintiff's own shewing, for which he can have no action of trespass; but to these the court paid no regard, because they were made immaterial by the verdict.

Also, the husband alone may bring an action for the battery, carrying away and detaining of his wife, *per quod solamen et consortium* of his said wife *amisit*; because the action is founded upon the special damage done to himself, and will be no bar to another action brought by baron and feme, or by the feme, after the death of the baron, for the same battery.

Cro. Car. 89,

90. adjudged

and affirmed

in *Cam. Scacc.*

Cro. Jac.

538. S. P.

adjudged.

2 Roll. Abr.

556. Jon. 440.

Lit. Rep. 339. 2 Roll. Rep. 51. S. P. adjudged.

Salk. 119.

pl. 12.

6 Mod. 127.

2 Ld. Raym.

1031.

Russel v.

Corne.

|| Todd v.

Redford, 11 Mod. 264.||

Sid. 387.

Palm. 393.

3 Mod. 120.

2 Ld. Raym.

1032.

7 Mod. 79.

[Force and violence being in law supposed to

In trespass and false imprisonment by baron and feme, *per quod negotia domestica* of the husband *ramanserunt infecta ad grave damnum ipsorum*; it was objected, that this being laid as a special damage to the husband, the action ought to have been brought by him alone; but adjudged for the plaintiffs after verdict, being only matter in aggravation of damages.

In trespass by baron and feme, for beating the feme, they may declare, that it was *ad damnum ipsorum*, notwithstanding a *feme covert* can have no damages, for this action will survive.

And as the husband may bring an action for the battery, carrying away, and detaining of his wife; so, also, may he have an action against a person for having criminal conversation with her, although the wife consent to the adulterer; for this is a matter

matter in which she cannot assent, by reason of the injury to the husband, and his interest in her.

husband, the courts, it should seem, proceeded upon this principle, when they formerly held, that the husband's consent, as being to the commission of an unlawful action, was not available as a justification; and that the defendant could not plead in bar, that the fact was by the plaintiff's licence; though it might be given in evidence in mitigation of damages. 12 Mod. 232. But it seems now thought that the husband's privity will defeat the action, though it doth not appear to be any where said that it is pleadable. Bull. N. P. 27. 4 Term Rep. 651.] || So, if the wife be suffered to live as a prostitute with the privity of the husband, and the defendant has thereby been drawn in to commit the act of which the husband complains, the action cannot be maintained. *Per Lord Mansfield C. J.* in *Smith v. Allison*, Bull. N. P. 27. *Hodges v. Windham*, Peake, N. P. C. 39. But infidelity in the husband goes only in mitigation of damages, and not as furnishing an answer to the action: so ruled by Lord Alvanley in *Bromley v. Wallace*, 4 Esp. N. P. C. 237. ||

[In this action, it is necessary to bring proof of the actual solemnization of the marriage; cohabitation and reputation are not sufficient, nor is any collateral proof whatever. But a copy of the register (a) is sufficient evidence of the fact of marriage; and the identity of the parties married may be proved by other means, and other persons, besides the minister, clerk, and subscribing witnesses.

some dissenters marriages are not registered, in which case other proof must necessarily be admitted. *Ibid.* The fact of a marriage may be established by the sentence of a foreign court, having competent jurisdiction, in a suit properly instituted there. 1 Ves. 159. || As to proof of Jewish marriage, see *Horn v. Noel*, 1 Camp. 61. *Ganer v. Lady Lanesbro'*, Peake, Ca. 17. *Lindo v. Belisario*, 1 Hagg. C. R. 216.; of Quakers' marriages, *ibid.* Append. p. 9.; of Scotch marriages, 2 Hagg. C. R. 54.; of Sicilian marriages, *ibid.* 263.; and see head *Foreign Marriages*. ||

In an action for criminal conversation, the marriage was proved by a person who was present when it was solemnized in the *Fleet*, in the year 1737, and the plaintiff's counsel offered to give in evidence the *Fleet* register, as a confirmation of the testimony. *De Grey C. J.* rejected the evidence, for that the whole of the transaction was illegal, and the register made by a person under no tie, and therefore not entitled to credit.

Lloyd, Salop Sum. Ass. 1794, *Heath J.* admitted these books in evidence; but *Le Blanc J.* in the subsequent case of *Cook v. Lloyd*, Salop Sum. Ass. 1803, Peake's Evid. Append. 36. rejected them. See further on the subject, *Lloyd v. Passingham*, 16 Ves. 59. *Coop. C. C.* 155. ||

It has been doubted whether the ceremony must not be performed according to the rites of the church; but as this is an action against a wrong-doer, and not a claim of right, it seems sufficient, if the plaintiff is of any religious sect, to prove the marriage according to the religious form of that sect.

tist, and recovered 500*l.*

The confession of the wife will be no evidence against the defendant; but a discourse between her and the defendant may be proved. So letters written to her by the defendant may be read as evidence against him, but her letters to him will be no evidence for him. (b)

letters had been written before the time when the criminal facts were proved to have been committed, Lord *Kenyon* admitted them, the object being to shew that the defendant had been solicited by the wife. *Elsam v. Faucett*, 2 Esp. 562. The wife's letters to the husband are, generally, not evidence for him, unless in case of absence before her misconduct, to shew her feelings towards him. *Trelawney v. Colman*, 1 Barn. & A. 90. ||

In actions of assault, the time of limitation is *four years*; but *Cooke v.*
the

accompany this
atrocious
injury to the

formerly held,
was not avail-
the fact was by the
12 Mod.
though it might be given in evidence in mitigation of damages.
Bull. N. P. 27. 4 Term Rep. 651.]
the husband, and
the husband complains, the
Bull. N. P. 27.
But infidelity in the husband goes only in mitigation
of damages, and not as furnishing an answer to the action: so ruled by Lord Alvanley in

Morris v.
Miller, 4 Burr.
3057.

1 Bl. Rep.
632.

(a) *Birt v.*
Barlow,
Doug. 171.

But among

some dissenters marriages are not registered, in which case other proof must necessarily be
admitted. *Ibid.* The fact of a marriage may be established by the sentence of a foreign court,
having competent jurisdiction, in a suit properly instituted there. 1 Ves. 159. || As to proof
of Jewish marriage, see *Horn v. Noel*, 1 Camp. 61. *Ganer v. Lady Lanesbro'*, Peake, Ca. 17.
Lindo v. Belisario, 1 Hagg. C. R. 216.; of Quakers' marriages, *ibid.* Append. p. 9.; of Scotch
marriages, 2 Hagg. C. R. 54.; of Sicilian marriages, *ibid.* 263.; and see head *Foreign Marriages*. ||

Howard v.
Burtenwood,
C. B. Sittings,
at Westminst.
Tr. 1776.

Espin, N. P.
343. || In

Doe dem.
Passingham v.

but *Le Blanc J.*

in the subsequent case of *Cook v. Lloyd*, Salop Sum. Ass. 1803, Peake's Evid. Append. 36.
rejected them. See further on the subject, *Lloyd v. Passingham*, 16 Ves. 59. *Coop. C. C.* 155. ||

Woolston v.
Scott, per

Dennison J.
1739, Bull.

1753, where
plaintiff was

an Anabap-
Bull. N. P. 28

Baker v.
Morley,

Guildhall,
1739, Bull.

N. P. 28.
|| (b) But

where the

Sayer, Bull.
N. P. 28.
2 Burr. 753.
||The action
for adultery is
now consi-
dered the

the criminal conversation, and not the assault, being the gist of this action not guilty within *six* years is the proper plea to it under the statute of limitations. And upon the same principle, the defendant is entitled to his costs, though the damages should be under forty shillings. (a)]

subject of an action of trespass. See *Woodward v. Walton*, 2 Bos. & Pul. N. R. 476., recognized in *Ditcham v. Bond*, 2 Maul. & S. 436.; and *semble* that the plea of the statute of limitations is "not guilty within four years." See *Blanshard* on the Statutes of Limitations, p. 96. *et seq.* || (a) *Batchelor v. Bigg*, 3 Wils. 319. 2 Bl. Rep. 855.

2 Salk. 553.

Also, the husband may not only bring an action at law for the criminal conversation, in which he shall be repaired in damages, but may also proceed in the ecclesiastical court for the adultery and solicitation of chastity: and the proceedings in the one court shall be no bar to the other.

But where there was an indictment for assaulting, beating, wounding, and endeavouring to ravish the wife of *B.*, upon which the party was convicted; and afterwards the husband brought an action of trespass for the same cause; and the party being also libelled against in the spiritual court for the same fact; *viz.* for soliciting her chastity, moved for a prohibition to the proceedings in the spiritual court; though it was urged for the jurisdiction of the spiritual court, that they may punish for the solicitation and incontinence, and that this suit was *pro salute animæ*, the others for fine and damages; yet, a prohibition was granted; for it being an attempt and solicitation to incontinence, coupled with force and violence, it does by reason of the force, which is temporal, become a temporal crime *in toto*; as if one says, *thou art a whore and a thief*, or *thou keepest a bawdy-house*, which are temporal matters, the party shall not proceed in the spiritual court; whereas if it were only, *thou art a whore*, a libel lies in the spiritual court: so, if it be said of a woman, that she is a bawd only, and not that she keeps a bawdy-house. But *per Holt C. J.* If one commit adultery, and the husband bring assault and battery, this shall not hinder the spiritual court; for it is a criminal proceeding there, and no indictment lies at common law for adultery.

3. Of the several Kinds of Divorces.

Co. Lit. 235.
a. Cro. Car.
462.

(b) Where
such sentence
of divorce is
given in the
spiritual court,
the issue shall be perpetually bound, so long as that stands in force: and shall not at common law be admitted to make any proof to the contrary. 7 Co. 43. Ken's case. Jenk. 289. Cro. Jac. 186.

Divorces are either such as (b) dissolve *a vinculo matrimonii*, and set the parties entirely at liberty, so that they may marry whom they please afterwards; or such as separate *a mensa et thoro*, from bed and board only; in which last the marriage continues in force, so that if either of them marry any other, such marriage is void.

47 E. 3. 78.

18 H. 6. 34.

Roll. Abr. 360.

(c) *Per*

32 H. 8. c. 38.

A divorce by reason of (c) precontract (d) dissolves *a vinculo matrimonii*; for the party being under a prior engagement, the second marriage is null and void, and, consequently, the issue of such second marriage are bastards.

no divorce could be for any precontract after marriage solemnized in the face of the church and consummate with bodily knowledge, or fruit of children; but *quoad* this matter, this was repealed *per* 2 & 3 E. 6. c. 23., and the whole act *per* 1 & 2 Ph. & M. c. 8. § 20., and the 32 H. 8. c. 38. *quoad* so much only as was not repealed by 2 & 3 E. 6. c. 23., was revived *per*

1 Eliz.

1 Eliz. c. 1. § 11. so that *quoad* this matter, the 32 H. 8. c. 38. stands repealed. — (d) *Qu.* If since 26 Geo. 2. c. 33., and 4 Geo. 4. c. 76., any such divorce can now be had, as no suit or contract of marriage, to compel the same, can be supported in the ecclesiastical courts? ||1 Blackst. Com. 435.||

So, a divorce by reason of consanguinity and affinity dissolves *a vinculo matrimonii*, such marriage being against the divine positive law, and therefore void. Co. Lit. 235. *Vide supra*, letter (A.)

So, a divorce by reason of frigidity, or impotence, dissolves the marriage absolutely (a), because the end of the contract cannot be answered. Co. Lit. 235. 5 Co. 98. But for this kind of divorce,

vide 5 Co. 9. Moor, 225. 2 Leon. 169. And. 185. Dyer, 178. pl. 40. (a) But if a man be divorced from a woman *propter perpetuam generandi impotentiam*, and then marry another, and have issue by the second marriage, which continues without divorce, the issue are lawful; for a man may be *habilis et inhabilis diversis temporibus*; and the second marriage is not avoided by any divorce, and therefore stands good in law. 5 Co. 9. Bury's case, Noy, 72. Moor, pl. 366. S. C. by the name of Morris v. Webber.

A divorce *causâ professionis* is reckoned by some amongst the causes that dissolve the *vinculum matrimonii*, the monks and nuns, by their being professed, having vowed perpetual chastity; but others hold, that in some cases it does not, and that in such the wife shall be endowed; but it is said, this divorce is now taken away by 32 H. 8. c. 38. and other acts, made on purpose to take away that and other scrupulous divorces. Roll. Abr. 681. 2 Leon. 169. Moor, 226. Cro. Car. 462. 2 Inst. 684. 687.

And though these kinds of divorces dissolve *a vinculo matrimonii*, yet the issue between the parties are not bastards, till there be a divorce actually had; for though such marriages be unlawful, yet they remain good till sentence of divorce be pronounced; and, consequently, the issue must be esteemed legitimate till such a dissolution. Roll. Abr. 357.

Also, though a divorce *causâ præcontractus*, *causâ con sanguinitatis*, *causâ affinitatis*, or *causâ frigiditatis*, dissolve the *vinculum matrimonii*, and leave the parties at liberty to marry again; yet, if either of the parties die before such sentence of divorce be actually pronounced, it cannot be pronounced (b) after; and therefore if the husband die before such divorce, the issue are legitimate, and his wife *de facto* shall have dower; for it was *legitimum matrimonium quoad dotem*, and the bishop ought to certify, that they were *legitimo matrimonio copulati*. Roll. Abr. 681. Co. Lit. 52. a. 53. b. 7 Co. 70. 5 Co. 98. 2 Leon. 169. ||Elliot v. Gurr, 2 Phil. Rep. 20.|| (b) But though in case of incest a divorce cannot

be had after the death of one of the parties, so as to bastardize the issue, yet the spiritual court may proceed to punish the survivor for the incest. Carth. 271. 4 Mod. 182. Salk. 121.

A divorce *propter adulterium* does not dissolve the marriage, but only makes a separation *a mensâ et thoro* (c); lest married persons should commit the crime in order to dissolve the marriage; and though such a divorce does not bastardize the issue, yet the children born in such a state of separation are *primâ facie* not presumed to be the husband's, unless it can be proved that they cohabited afterwards; but such divorce does not bar the wife of dower. (d) Co. Lit. 52. a. 53. b. 235. Cro. Car. 462. 7 Co. 42. Noy, 108. ||(c) The committee of a lunatic may sue for a divorce on be-

half of the lunatic. Parnell v. Parnell, 2 Hagg. C. R. 169. A woman divorced *a mensâ et thoro*, and living separate, cannot be sued as a *feme sole*. Lewis v. Lee, 3 Barn. & C. 291. ||(d) So laid down as to the point of dower, Tr. 10 E. 3. pl. 24. 1 Ro. Rep. 426. *arguend.*; and Powell v. Weeks, Noy, 108. Godb. 145. S. C. by the name of Lady Stowell's case; 1 Roll. Abr. tit. Baron and Feme, A. pl. 21. S. C. by the name of Stowell v. Wikes; and Cro. Car. 463. S. C. cited. But Mr. Hargrave, in note 9. on Co. Lit. 52. a. saith, that according to Rolle's report of this

this last case, 1 Roll. Abr. 681., it was adjudged, that the divorce for adultery was a bar of dower, And Lord *Thurlowe*, in the debate in the House of Lords upon Shadwell's Divorce Bill, is reported to have said, that in a divorce *a mensâ et thoro* for adultery, a woman forfeits her dower. Woodf. Parl. Rep. vol. 11. p. 339. — The reason why a divorce *propter adulterium* does not dissolve the marriage is, that the ecclesiastical court cannot divorce a *vinculo matrimonii* for any cause arising *subsequent* to the marriage: for if there has been a marriage *de jure*, it is not competent to that court to rescind it. In fact, the sentence of the spiritual court in a divorce a *vinculo matrimonii* is not so properly a dissolution of the contract, as a declaration of its absolute nullity *ab initio*. But the legislature, uncircumscribed in its powers, has frequently for adultery wholly dissolved the conjugal union. It has gone so far too in some cases as to bastardise children born after a certain time prior to the passing of the act. See Wakeman's and Briscoe's Divorce Bills, in 1796; and though it has in general made some provision for the unhappy woman whose criminal conduct has occasioned its interference, yet, where the case has been of a very atrocious nature, it has left her wholly at the mercy of her injured husband. See Shadwell's Divorce Bills, in 1796, and Woodf. Parl. Rep. *ubi supra*. — In the debate which took place upon Mr. Shadwell's Bill, the Lords *Thurlowe*, *Loughborough*, and *Grenville* expressed a wish, that the subject of divorce for adultery, were submitted by an enactment of the legislature to some regular judicial court, where the crime and the provocation to the crime would be carefully balanced, where facts and circumstances could be investigated with the temper, the deliberation, the caution, that ought to accompany such an investigation. ¶The first bill of this description appears to have been passed in the reign of Edward VI., from which period to the revolution few, if any, are to be found. Since the 12th Will. & M. there have been above 150, and 64 since the commencement of the present century. The commissioners appointed by Hen. VIII., and Edward VI., for reforming the ecclesiastical law in their elaborate report recommend divorces *a mensâ et thoro* to be abolished, and complete divorces to be allowed for adultery, desertion, bad treatment, &c., the innocent party to be allowed to marry again, the offending party to be punished by banishment or imprisonment. When this reformation failed, the practice of divorce bills originated. See *Reformatio Legum Ecclesiasticarum*, 1640. Gibson's Cod. J. E. p. 536. Burnet, Hist. Ref. 11. p. 315.¶

¶The law of *Scotland* as to divorces for adultery, differs from the *English* law. In that country the courts grant a divorce *a vinculo matrimonii*, on the ground of adultery. A question of the highest importance has hence arisen; *viz.* whether the *Scotch* courts have authority to dissolve by such divorce a marriage solemnized in *England*, or whether they ought to look to the law of the country where the marriage was made, and to hold it indissoluble in *Scotland* because it is so in *England*. The *Scotch* consistory courts, in various cases, have conceived themselves bound by this latter rule, and have offered to the *English* parties to grant a divorce *a mensâ et thoro*, but refused more. However, these decisions, when brought before the Court of Session, on appeal, have been uniformly reversed, and divorces *a vinculo* have been granted. The judges of *England*, on the other hand, have determined that such sentences of divorce are invalid. And where a man married in *England*, and then obtained a divorce *a vinculo* for adultery in *Scotland*, and then re-married in *England*, they held him guilty of bigamy; and that the exception in favour of parties divorced, in the statute 2 Jac. 1. c. 11. § 3. only applied to divorces by ecclesiastical courts, within the limits to which the act extends.¶

See the cases fully reported, Fergusson's Reports of Decisions in Actions of Divorce. *Rex v. Lolley*, Russ. & Ry. 257. 1 Russ. on Cri. 190.; and see *Tovey v. Lindsay*, 1 Dow. R. 117.

Cro. Car. 462.

¶What cruelty is held a sufficient ground, see *Harris v.*

Harris, 2 Hagg. C.R. 148.

Evans v. Evans, 1 Hagg. C.R. 36.

Holden v. Holden, 1 Hagg. C.R. 453.

Kirkman v. Kirkman, *id.* 409.¶

Waring v.

Waring, 2 Hagg. C.R. 153.

A divorce *propter sævitiam* or *metum* is of the same nature, and does not dissolve the bond of matrimony; but is only a provision for the woman's safety, that she may avoid her husband's cruelty and ill-usage.

¶The wife will not be entitled to this divorce if her own conduct has been provoking, and contrary to the duty of a wife.¶

MASTER AND SERVANT, || AND APPRENTICE.||

THE relationship between a master and a servant, from the superiority and power which it creates on the one hand, and duty, subjection, and, as it were (a), allegiance, on the other, is in many instances applicable to other relationships, which are both in a superior and a subordinate degree; such as lord and bailiff, principal and attorney (b), owners and masters of ships, merchants and factors, and all others having authority to enforce obedience to their orders from those whose duty it is to obey them, and whose acts, being conformable to their duty and office, are esteemed the acts of their principals. But these being treated of under their proper heads, we shall here consider this relationship, as it more particularly affects masters and those who are more properly called servants and apprentices.

||But the stat. 25 E. 3. st. 5. c. 2. is now repealed by 9 Geo. 4. c. 31. § 1. By the second section of which act, it is enacted, that petit treason shall be treated in all respects as murder.|| Plow. 86. 3 Inst. 20. 4 Co. 46. (b) Where a master of a ship is expressly said to be a servant to the owners, and the owners shall answer for him as such. 3 Mod. 323. 2 Vern. 643.

(a) Hence by the statute 25 E. 3. statute 5. c. 2. it is petit treason for a servant to kill his master; in the construction whereof it hath been held to extend to a mistress, or master's wife.

(A) Of the Manner of Hiring and Binding a Person
Servant or Apprentice.

(B) Who may serve, or are capable of binding themselves Servants or Apprentices.

(C) Of the Jurisdiction of Justices of Peace in binding out Apprentices, in obliging Masters to provide for them, in compelling them to refund the Money had with them, and in discharging Apprentices from their Masters, ||and also in settling Disputes between Masters and Servants.||

(D) Of the Necessity of serving an Apprenticeship, as a Qualification to follow a Trade within the 5 Eliz. c. 4. : And herein,

1. *What shall be said a Trade, which a Person is prohibited to follow, within the Statute.*
2. *What Manner of following or exercising a Trade shall be said within the Statute.*
3. *What Kind of Service will be a sufficient Qualification within the Statute.*
4. *By whom the Offence of following a Trade without a Qualification is cognizable.*
5. *Of the form of the Proceedings in order to a Conviction, for following a Trade without being qualified.*

(E) Of

- (E) Of assigning and turning over Apprentices to other Masters.
- (F) Of making Apprentices free.
- (G) How Apprentices are to be taken Care of when their Masters happen to die.
- (H) Of Servants' Wages, how recoverable.
- (I) What Acts of the Servant are deemed the Master's : of which the Master may take Advantage.
- (K) What Acts of the Servant shall be deemed the Master's, for which the Master shall answer and be bound.
- (L) For what Acts of his shall the Servant himself answer to others.
- (M) For what Acts of his shall the Servant answer, and be responsible to his Master : And herein,
 - 1. *Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.*
 - 2. *Where Servants and Apprentices shall be punished criminally, for Acts done in relation to their Masters.*
- (N) Of the Master's Authority over his Servant, and how far he may correct and punish him.
- (O) Of the Master's Remedies against others for enticing away, and other Injuries done, in relation to his Servant.
- (P) What a Master or Servant may justify doing in each other's Defence.

(A) Of the Manner of Hiring and Binding a Person Servant or Apprentice.

21 H. 6. 23.
 3 Keb. 304.
 6 Mod. 182. Ld.
 Raym. 1117.
 Salk. 68. pl. 7.
 (a) That by the contract he is considered as servant,

THE retaining a menial servant and taking an apprentice differ greatly as to the manner ; for as to the first it may be by parol (a) contract, or agreement only, and therefore such a one may be discharged by parol, and without writing ; but an apprentice must be by deed, and cannot be discharged without deed, and must be retained by the name of an apprentice expressly, otherwise he is no apprentice though bound.

though he has not yet actually done any service for his master, Dalt. Just. c. 58. And on such contract the master may have an action against him, if he either refuses to serve at all, or departs before the time is expired for which he agreed to serve. Dalt. Just. c. 58. And where the master has his remedy against another detaining him, *vide infra*, letter (O).

A ser-

A servant may hire himself for what time he pleases ; but it is said, that if a man retain a servant generally, without expressing any time, the law will construe it to be for one year, because that retainer is according to law.

Co. Lit. 42. b.
F. N. B.
168. H. 1 Bl.
Com. 425.
But see

Cutter v. Powell, 6 T. R. 520. and Selw. N. P. 1090. 6th ed. where it is said, if a servant be hired in the general way, he is considered to be hired with reference to the general understanding upon the subject, viz. that he shall be entitled to his wages for the time he shall serve, though he do not continue in the service during the whole year.||

Also, it hath been adjudged, that if a person retain a servant for a year, *et sic de anno in annum quamdiu ambabus partibus placuerit*, that after the second year begun, the retainer holds good for another year ; and that it shall not be a retainer for a year certain, and afterwards at will.

2 Keb. 16.
Cotes v.
Sadler.

And as an apprentice can only be bound by deed, so it is necessary, according to the custom of (a) some places, that such deed or indenture be enrolled ; as, in *London*, if the indentures be not enrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, &c. a *scire fac.* shall issue to the master, to shew cause why not enrolled ; and if it was through the master's default, the apprentice (b) may sue out his indentures, and be discharged ; otherwise, if through the fault of the apprentice ; as, if he would not come to present himself before the chamberlain, &c. for they cannot be enrolled, unless the apprentice be in court and acknowledge them.

2 Roll. Rep.
305. Palm
361. Mod.
Rep. 271.
pl. 22.
(a) Where persons binding themselves apprentices to mariners, their indentures are to be enrolled in the next corporate

towns. 5 Lev. 589. (b) Where it is necessary in order to prove him an apprentice. Skin. 579. pl. 2. And see a certificate relating to the enrolment of apprentices in vol. 3. of Lord Bacon's Works, 4to. 355. [By 5 G. 3. c. 46. § 18. the chamberlain, or other proper officer of every city, &c. where any apprentice obtains his freedom by servitude, shall enrol the name of every apprentice, who shall be placed out within such city, the name of the master and mistress, the apprentice fee, the trade, and the dates of the indenture, on pain of twenty pounds. And by § 41. all printed indentures shall have the notice or memorandum described in the act, printed under the same.]

But it hath been held, that this custom does not extend to one bound apprentice to a waterman, under twenty-one years of age ; for the company of watermen are but a voluntary society, and being free of that does not make one free of *London*.

6 Mod. 69.
Salk. 68. pl. 8.

[By 5 Eliz. c. 4. § 25. an apprenticeship can only be created by INDENTURE(c) : therefore, where the writing by which one person agreed to serve another for seven years began, "THIS INDENTURE witnesseth," but was in fact a *deed poll*, and not an indenture, it was holden, that the master could not maintain any action upon it against a person for enticing away and detaining *his* APPRENTICE.

|| (c) But this section relates only to apprentices taken by husbandmen. ||
Smith v. Birch,
1 Sess. Ca.
222. || By stat.

54 G. 3. c. 96. § 2. (an ill-worded section), § 25. of stat. 5 Eliz. c. 4. appears to be wholly repealed. It contains, however, a proviso (§ 4.) that the act shall not tend to defeat, alter, or prejudice the custom, &c. of the city of *London*, concerning apprentices ; or the ancient custom, &c. of any city, town, corporation, or company, lawfully constituted, or any bye-law, or regulation of any corporation or company.||

So, an *agreement* to execute indentures of apprenticeship will not constitute a sufficient binding under 5 Eliz. c. 4. although a service of seven years is performed under it ; for there must be an *indenture* duly executed : and of course, where there is neither indenture

Rex v. Stratton, Burr. Set. Ca. 272. Rex v. Whitchurch Ca-

nonicorum, indenture nor agreement, but only a binding by parol, there can be no apprenticeship. (a)

1 Const's Bott's P. L. 464. pl. 650. S. P. Rex v. Mannam, Burr. Set. Ca. 290. ||(a) These cases were decided before the passing of the 54 G. 2. c. 96. q. v.||

Case of St. Saviour's, Southwark, 1 Const's Bott's P. L. An indenture, however, though lost, shall be sufficient, on proof being made, that it was duly executed (b); but a declaration of the mother, that she heard the apprentice's father say he was bound by indenture, is not sufficient evidence of the fact.

463. pl. 648. ||(b) In the case of parish apprentices, it is provided by § 1. of 42 G. 3. c. 46. that the overseers of the poor shall keep a book for entering the name of every apprentice bound out by them, and each entry shall be signed by two justices; and by § 3. it is enacted, that the books may be inspected, and shall be deemed evidence.||

It is provided by 31 G. 2. c. 11. that although the instrument by which the contract is formed should not be indented, the apprentice shall nevertheless gain a settlement under it.

||The duties imposed by 8 Ann. c. 9. on indentures of apprenticeship, having by § 33. of that statute been placed under the management of the commissioners of the stamp-office were repealed by 44 Geo. 3. c. 98. and new stamp duties were imposed by that act: these were again repealed by 48 Geo. 3. c. 149. and the new duties granted by that act were again repealed by stat. 55 Geo. 3. c. 184. by the schedule of which act, part 1., the following stamp duties are payable upon indentures of apprenticeship:—

If the sum of money, or the value of any other matter or thing which shall be paid, given, assigned, or conveyed, or be secured to be paid, given, assigned, or conveyed to or for the use or benefit of the master or mistress, with or in respect of such apprentice, clerk, or servant, or both the money and value of such other matter or thing shall not amount to 30*l*. £1 0 0

If the same shall amount to -	{	£ 30	and not amount to.	{	£ 50	-	2	0	0
		50			100	-	3	0	0
		100			200	-	6	0	0
		200			300	-	12	0	0
		300			400	-	20	0	0
		400			500	-	25	0	0
		500			600	-	30	0	0
		600			800	-	40	0	0
		800			1000	-	50	0	0
		1000	or upwards		-	-	60	0	0

And where there shall be no such consideration as aforesaid moving to the master or mistress; if the indenture or other instrument shall not contain more than 1080 words, £1 0 0

And if the same shall contain more than that quantity, 1 15 0

The exemptions are “ of indentures or other instruments placing out poor children apprentices, by or at the sole charge of any parish or township, or by or at the sole charge of any public charity, or pursuant to the 32 G. 3. c. 57. for the further regulation of parish apprentices.

“ And all assignments of such poor apprentices; provided “ there shall be no such valuable consideration as aforesaid given “ to the new master or mistress, other than what may have been “ or

“or shall be given by any parish or township, or by any public charity.”||

By 8 Ann. c. 9. § 35. the monies paid or agreed to be paid with every clerk, apprentice, and servant, shall be truly inserted and written in words at length in the indenture or other writing which contains the covenants, &c. for such service; and such indenture or writing shall bear date upon the day of signing, sealing, or otherwise executing the same, upon pain to every master or mistress of double the sum given, one moiety to the king, and the other to the informer; with full costs to be recovered by action, &c. within one year after the term appointed for the service is expired.

By § 36. all indentures, &c. executed in the bills of mortality, shall be stamped at the head stamp-office, and the duties paid to the receiver-general within one month from the date of the indenture.

By § 37. all such indentures, &c. executed in any other part of *Great Britain* shall, at the option of the party, be sent either to the head stamp-office within the bills of mortality, or to some of the collectors residing without the bills of mortality, within two months after the date of such indentures, and the duties paid thereon: and in case the said payment shall be made immediately to the receiver general, the indenture shall be forthwith stamped; but, if made to the collector, he shall indorse on such indenture a receipt for the monies so paid in words at length, bearing date the day on which such payment shall be made, and subscribe his name thereto, and then deliver back the indenture to the bringer thereof.

By § 38. the indenture, &c. so indorsed, if made within fifty miles from the bills of mortality, shall, within three months after the date thereof, be brought or sent to the stamp office in *London*, and immediately stamped, as the case shall require.

By § 39. all indentures, &c. wherein shall not be truly inserted the full sum (a) received with such apprentice, &c., or which shall not be stamped according to the tenor of this act, within the time limited, shall be void, and not available in any court; and the apprentice be incapable of being free of any city, &c., or of following the intended trade.

|| (a) By full sum here is meant the insertion of a sum not less than that upon which duty is

really payable. *Rex v. Keynsham*, 5 East, 309.||

But by § 40. this act shall not extend to apprentices put out at the common public charge of any parish. (b)

fore, in *parish* indentures the sum to be paid need not be inserted. *Rex v. & A. 477.*||

|| *Vide 55 G. 4.*

c. 184. § 10.

(b) And, therefore, 1 Barn.

By § 43. no indenture required by this act to be stamped shall be given in evidence in any suit brought by the parties, unless the party producing it do first make an oath, that the sums inserted were all that were paid on behalf of the apprentice.

And by § 45. where any thing, not being money, shall be given, &c. to any master or mistress with any apprentice for whom a duty is chargeable by this act, the duty shall be paid to the full value of the thing given.

By 9 Ann. c. 21. § 66. if any master or mistress shall neglect to

pay the rates or duties, they shall forfeit fifty pounds, one moiety to the king, the other to him who shall sue for the same, &c.

Cuerden v.
Leland,
1 Bott's P. L.
545.

If a person agrees to go apprentice to another, and enters upon the service accordingly, and after a trial of three months is bound apprentice by indenture, but the indentures are dated at the time he entered on the service, and not at the time of the execution, the indentures are absolutely void to all intents and purposes, by 8 Ann. c. 9. § 35.

Id. ibid.

So also, where a mother bound her son apprentice, and paid twenty shillings to the master, which sum was recited in the indenture pursuant to 8 Ann. c. 9. § 45., but the sixpence duty was never paid, nor the indentures stamped with the additional stamp, they were held void.

Rex v. Ianvari
Dyffryn
Clwyd, Burr.
Set. Ca. 236.
5 Barn. & A. 412.]

So also, if on production of the indentures, they are not stamped, though the duty paid.

Rex v. Ditchingham, 4 Term Rep. 769.; || and see Rex v. Chipping Norton

Rex v. High-
nam, 1 Const's
Bott's P. L.
495. pl. 689.

So, an agreement of apprenticeship, entered into with a view to save the expenses of indentures, and to avoid the payment of the duties imposed by the above statute of 8 Anne, is void and of no effect.

Rex v. East
Knogle, Burr.
Set. Ca. 151.

But, in cases where the indenture is not produced, and evidence is given that indentures actually existed, and were duly executed, the court will presume that they were regularly stamped, and the duty paid.

Rex v. Badly,
1 Const's
Bott's P. L.
490. pl. 687.

But, before parol evidence is given of the contents of indentures, proof must be made of their being lost; and it seems, that some evidence ought to be given, not only that they were duly executed, but that the duty was paid.

Rex v. Nor-
throwam,
2 Stra. 1132.
Rex v. St.
Peter's, Ches-
ter, 1 Const's
Bott's P. L.
486. pl. 682.
S. P. Rex v.
St. Petrox, in
Dartmouth,
4 Term Rep.
196. S. P.

The additional stamp is only required, where the money, or other thing, is given, paid, contracted, or agreed for, with, or in relation to, the apprentice; and therefore, when the mother of a lad proposed to put him out an apprentice, but the intended master refused to take him, because he wanted clothes, and the grandfather agreed to give the master thirty shillings, which the master was to, and did, lay out for the boy in clothes, the court held, that there was not any stamp necessary on this account; for the statute means money given for the benefit of the master; and in this case he laid out the money merely as an agent to the boy's friends.

Baxter v.
Faulam,
1 Wils. 129.
Rex v. Yar-
mouth, Burr.
Set. Ca. 379.
S. P.

So, where in an indenture sixpence was the sum mentioned to have been given to the master as a fee with the apprentice; the court resolved, that the statute intended, that when more than fifty pounds was paid, a twentieth part thereof should be paid for duty, and a fortieth part when the sum was under fifty pounds; but that in the present case, there would not, under this mode of calculation, be any coin small enough to pay the duty in: and *de minimis non curat lex*.

Pennington
v. Sual,
1 Const's
Bott's P. L.
39. pl. 686.

So also, where in indentures of apprenticeship there was a covenant that the father would provide the apprentice meat, drink, washing, lodging, and clothes, and that the master should pay the apprentice five pounds a year in consideration of his faith-
ful

ful services and of the due performance of the covenants; the court seemed to think that the indentures did not require a stamp under the statute of 8 Anne.

But this point was afterwards more solemnly decided. Thus, where it was agreed in the indentures, that “sufficient meat, “drink, apparel of all kinds, physic, surgery, and lodging, and “all other necessities during the term, should be found and “provided for the apprentice by the father, for which purpose “the master was to allow him four shillings a week during the “term;” the court held the indentures good, although they were not stamped, and no duty paid. *Rex v. Portsea, Burr. Set. Ca. 854.*

So also, where in an indenture the apprentice covenanted, that “he would at his own expense provide for himself meat, drink, “washing, lodging, apparel, and physic, at all times during the “term; and the master covenanted to pay him five shillings “a week for the first three years, and seven shillings a week for “the remainder of the term;” it was ruled, that the indenture did not require the additional stamps imposed by 8 Anne. *Rex v. Walton Dale, 5 Term Rep. 515.* ¶ And a master stipulating for fourpence out of every shilling, of the earnings of his apprentice, is no benefit to him within the statute of Anne, for which an additional duty is to be paid, he being by law entitled to the whole. *Rex v. Wantage, 1 East, 601.*¶

And where an indenture was, that the father of the apprentice would, at his own charge, find and provide for his own son, good, competent, and sufficient meat, drink, and lodging, every *Sunday* in the year during the term; and would provide him with clothes and apparel of all sorts (except working aprons and shoes); and the master covenanted to provide him with meat, drink, and lodging, except on *Sundays*, during the term; the court thought the point so clearly settled, that they would not suffer it to be argued. *Rex v. Leighton, 4 Term Rep. 732.*

So also, money given by parish officers (in the case of a voluntary binding), as the consideration of the pauper’s being taken apprentice, is not liable to the duty imposed by the 8 Anne (a); for it comes within the exception of § 40. as being at the public charge of the parish. *Rex v. St. Petrox, in Dartmouth, 4 Term Rep. 196.*

¶ (a) And is exempted from duty in the stamp act, 55 G. 3. c. 184.¶

By 18 G. 2. c. 22. § 24. if any master or mistress neglect to pay the rates and duties within the respective times limited by 8 Ann. c. 9. and 9 Ann. c. 21., they shall further forfeit for every neglect double the rates and duties charged.

By 18 G. 2. c. 22. § 25. if any apprentice, &c. on the neglect of his master or mistress to pay the rates and duties, shall, on notice to his master or mistress, pay the said rates and duties, and also the penalties and forfeitures of this act, within one year after the same became incurred, such apprentice may, within three months afterwards, demand back the apprentice-fee; and if the same be not paid within three months after such demand, he may recover the same by action, and shall be discharged from his apprenticeship.

And by § 26. such apprentice shall have the same benefit of the time he shall have served, as he could have had in case of any assignment or turning over to any new master or mistress.

By 20 G. 2. c. 45. § 5. if any master or mistress, who shall

become liable to the double duties, shall pay them to the persons who ought to receive them; and also tender the indentures to be stamped at any time within two years after the end of the apprenticeship, and before any suit for them is commenced, the indentures shall be good and available in law and equity, and the apprentice as capable of following his trade as if the single duties had been regularly paid.

By § 6. if any apprentice shall, after such double duties incurred, make request in writing before one witness, to his master or mistress to pay them, and shall, on the neglect of his master or mistress to pay the said double duties within three months after such request, pay the same at any time within two years after the determination of his apprenticeship, he may, within three months after such payment, demand of his master or mistress double the apprentice-fee; and if the same be not paid within three months after such demand, he may recover the same by action, and shall, immediately after such payment, and upon signifying by writing under his hand that he desires to be discharged from his apprenticeship, be discharged from the same.

And by § 7. he shall have the same benefit of the time served, as if he had been assigned or turned over.

But by § 8. if where any prosecution shall be commenced against any master or mistress for penalties, the apprentice shall pay such double duties within two years after his apprenticeship expires, the indenture shall be good, &c.]

|| By 1 & 2 G. 4. c. 32. all indentures for binding parish apprentices, and all certificates of the settlement of poor persons, which previous to the act have been executed by one churchwarden or chapelwarden for any parish, &c. for which two church or chapelwardens had formerly been appointed, shall be as good and effectual as if executed by one or more church or chapelwardens, legally appointed, provided that nothing in the act shall affect any judgment of any court before the passing of the act.||

(B) Who may serve, or are capable of binding themselves Servants or Apprentices.

alt. c. 58.

IT is said, that if a married man and his wife bind themselves to serve, they shall be compelled thereto, according to their covenant or agreement; and that if a woman who is a servant shall marry, yet she must serve out her time; and her husband cannot take her out of her master's service.

It seems clearly agreed, that by the (a) common law, infants, or persons under the age of twenty-one years, cannot bind themselves apprentices, in such a manner as to entitle their masters to an action of covenant, or other action, for departing their service, or other breaches of their indentures; which makes it necessary, according to the usual practice, to get some of their friends to be bound for the faithful discharge of their offices, according to the terms agreed on.

11 Co. 89. b.
2 Inst. 379,
380.

3 Leon. 63.

7 Mod. 15.

[8 Mod. 190.

Dougl. 518.]

|| And see Win-

ston v. Linn,

1 Barn. & C.

469, 470. Cumming v. Hill, 3 Barn. & A. 59. Qu. Whether by custom of London an apprentice can be compelled to serve after twenty-one? *Ex parte Eden*, 2 Maul. & S. 226. || (a) Nor in equity. Abr. Eq. 6. But if an infant of five years of age, or other person who is not *potens*

in corpore, be retained, and serve in the best manner he can, his master must pay him his wages. Bro. tit. Labour, 46. Dalt. Just. c. 58.

But by the 5 Eliz. c. 4. § 43. it is enacted in the words following: "And because there hath been and is some question and scruple moved, whether any person being within the age of twenty-one years, and bounden to serve as an apprentice, in any other place than in the said city of *London*, shall be bounden, accepted, and taken as an apprentice; for the resolution of the said scruple and doubt, be it enacted by the authority of this present parliament, That all and every such person or persons, that at any time or times from henceforth shall be bounden by indenture to serve as an apprentice in any art, science, occupation, or labour, according to the tenor of this statute, and in manner and form aforesaid, albeit the same apprentice, or any of them, shall be within the age of twenty-one years, at the time of making their several indentures, shall be bounden to serve for the years in their several indentures contained, as amply and largely to every intent, as if the same apprentices were of full age at the time of making such indentures; any law, &c."

But notwithstanding this statute, it hath been held, in an action of covenant against an apprentice, for departing from his master's service without licence, within the time of his apprenticeship; where the defendant pleaded that at the time of making the indenture he was within age; and on demurrer to this plea it was argued, that this indenture should bind the infant, because it was for his advantage to be bound apprentice, to be instructed in a trade; and it was also urged, that he was compellable by the 5 Eliz. c. 4. *supra*, to be bound out an apprentice; that although an infant may voluntarily bind himself an apprentice, and if he continue an apprentice for seven years he may have the benefit to use his trade; yet neither at the common law, nor by any words of the above-mentioned statute, a covenant or obligation of an infant for his apprenticeship, shall bind him; but if he misbehave himself, the master may correct him in his service, or complain to a justice of peace, to have him punished according to the statute; but no remedy lieth against an infant upon such covenant.

By the custom of *London*, an infant unmarried, and above the age of fourteen, may bind himself apprentice to a freeman of *London*, by indenture with proper covenants; which covenants, by the custom of *London*, shall be as (a) binding as if he was of full age.

2 Keb. 687. (a) And for a breach an action may be brought in any other court, as well as in the courts of the city. Moor, 136.

[Although an infant cannot bind himself apprentice so as to entitle his master to an action of covenant for breach of any of the clauses in the indenture, yet it should seem (but the point has never been directly determined), that if in fact he does bind himself, he is not afterwards at liberty to avoid a contract so notoriously for his benefit.

S. C. Rex v. Evered, Cald. 26. Rex v. Hindringham, 6 Term Rep. 557. Ashcroft v. Bertles, *id.* 652.; [and see Newbury v. St. Mary's Reading, 2 Bott, 363. Rex v. Saltern, 1 Bott, 613. Rex v. Inh. of Chillesford, 4 Barn. & C. 94.]

Cro. Car. 179.
Gybert v. Fletcher.
Cro. Jac. 494. S. P.
[Whitby v. Loftus,
8 Mod. 459.
S. P. Brand v. Ewington,
Dougl. 518.
S. P.]

Moor, 134.
2 Bulst. 192.
2 Roll. Rep. 305.
Palm. 361.
Mod. 271.

St. Nicholas and St. Peter, in Ipswich,
2 Stra. 1066.
Burr. Set. Ca. 91. S. C. Ca. temp. Hardw. 323.

Rex v. Petrox, It has been determined, that an indenture of apprenticeship *to*
in Dartmouth, an infant is not void, but only voidable.]
4 Term Rep.

196. ||See also Rex v. Chillesford, 4 Barn. & C. 94.||

Rex v. Arnes- ||A father has no authority at common law to bind his infant
by, 3 Barn. & son apprentice without his assent, and the infant can only bind
A. 584. and himself by deed; therefore, where an indenture of apprentice-
see Rex v. ship was executed by the master and the father of the apprentice,
Cromford, but not also by the apprentice himself, it was held invalid, and
8 East, 25. that no settlement could be gained under it.
Rex v. Ripon,
9 East, 295.

Rex v. Cromford, 8 East, 25.

Rex v. St. But a parish apprentice's indenture is not void for want of
Nicholas, signing by the apprentice.||

2 Term Rep.

Rex v. Woolstanton, 1 Nolan, P. L. 500.

(C) Of the Jurisdiction of Justices of Peace in binding out Apprentices, in obliging Masters to provide for them, in compelling them to refund the Money had with them, and in discharging Apprentices from their Masters, ||and also in settling disputes between Masters and Servants.||

THE jurisdiction of justices of the peace herein depends on divers acts of parliament, particularly on the 5 Eliz. c. 4., the most material clause of which, as to this purpose, is § 35. which is as followeth: "That if any person shall be required by any householder, having and using half a plough-land, at the least, "in tillage, to be an apprentice, and to serve in husbandry, or "in any other kind of art, mystery, or science, before expressed, "and shall refuse so to do; that then, upon complaint of such "housekeeper, made to one justice of the peace of the county "where the said refusal is or shall be made, or of such house- "holder inhabiting in any city, town corporate, or market-town, "to the mayor, bailiffs, or head officer of the said city, town "corporate, or market-town, if any such refusal shall be there, "they shall have full power and authority by virtue hereof to "send for the same person so refusing; and if the justice, or the "said mayor or head officer, shall think the said person meet "and convenient to serve as an apprentice in that art, labour, "science, or mystery, wherein he shall be so then required to "serve, that then the said justice, or the said mayor or head "officer, shall have power and authority by virtue hereof, if the "said person refuse to be bound as an apprentice, to commit him "unto ward, there to remain until he be contented, and will be "bounden to serve as an apprentice should serve, according to "the true intent and meaning of this present act; and if any "such master shall misuse or evil entreat his apprentice, or the "said apprentice shall have any just cause to complain, or the "apprentice do not his duty to his master; then the said master "or apprentice, being grieved, and having cause to complain, "shall repair unto one justice of peace within the said county, "or to the mayor, or other head officer of the said city, town
"corporate,

“ corporate, market-town, or other place, where the said master dwelleth, who shall, by his wisdom and discretion, take such order and direction between the said master and his apprentice as the equity of the cause shall require; and if for want of good conformity in the master, the said justice of peace, or the said mayor or head officer, cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, or within the said city, town corporate, or market-town, if the said master dwell within any such; and upon his appearance, and hearing of the matter before the said justices, or the said mayor or other head officer, if it be thought meet unto them to discharge the said apprentice of his apprenticeship, that then the said justices, or four of them at the least, whereof one of them to be of the *quorum*, or the said mayor or other head officer, with the consent of three other of his brethren, or men of best reputation within the said city, town corporate, or market-town, shall have power by authority hereof, in writing under their hands and seals to pronounce and declare that they have discharged the said apprentice of his apprenticeship, and the cause thereof; and the said writing, so being made and enrolled by the clerk of the peace or town-clerk, amongst the records that he keepeth, shall be a sufficient discharge for the said apprentice against his master, his executors and administrators; the indenture of the said apprenticeship, or any law or custom to the contrary notwithstanding; and if the default shall be found to be in the apprentice, then the said justices, or the said mayor, or other head officer, with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him as by their wisdom and discretion shall be thought meet.

“ *Provided*, that no person shall by force or colour of this statute be bounden to enter into any apprenticeship, other than such as be under the age of twenty-one years.”

[By § 47. justices are authorized to grant warrant to apprehend apprentices or servants, who shall abscond from service, and to imprison them, until they demean themselves properly.

cannot object, in his defence, that he had been bound contrary to the directions of the act, and had therefore run away to avoid the indentures. *Rex v. Evered*, Cald. 26.

¶ By 20 G. 2. c. 19. § 2. one or more justices may on application or complaint made upon oath by a master or employer (a), against any such servant, &c. touching any misdemeanour or ill behaviour in his service, hear and examine the same, and punish the offender by commitment to the house of correction, there to remain and be corrected and held to hard labour (b), not exceeding one month, or otherwise by abating his wages, or by discharging him from his service. And in like manner it shall be lawful for such justice, on complaint on oath by any such servant, artificer, &c. against such master or employer, touching any misuse, refusal of necessary provision, cruelty, or other ill-treatment towards such servant, artificer, &c. to summon such

An apprentice apprehended under this act

(a) The employer is the person on whose behalf the employment is, and not the bailiff making the hiring. *Rex v. Hoseason*, 14 East, 605.
(b) See 14 East, 605.

master or employer to appear before such justice at a reasonable time prefixed in such summons, and such justice shall examine the matter, whether such master or employer appear or not, proof being made of the summons, and upon proof thereof, on oath, to his satisfaction, to discharge such servant, artificer, &c. from his said service, which discharge shall be given under the hand and seal of the justice *gratis*.||

|| (a) This extends to a complaint in writing preferred by the master, and verified by the oath of another person. *Finley v. Jowle*, 12 East, 248.||

(b) Enlarged to three months by 32 Geo. 3. c. 57. § 13.

|| (c) This statute is not repealed by 6 G. 3. c. 25. §. 1. empowering the justices to oblige

an apprentice, absenting himself from his master's service, to serve out after the expiration of the apprenticeship such time of absence, or to make satisfaction for it, and in default of such satisfaction to commit the apprentice; for the remedy given to the master by the latter statute is cumulative to the punishment inflicted by the former statute for his offence. *Gray v. Cookson*, 16 East, 15.||

By § 3. "Any two justices where the master dwells, may, upon complaint of any parish apprentice, or of any other apprentice upon whose binding no larger a sum than five pounds was paid, touching any misusage, refusal of necessary provision, cruelty or other ill-treatment, summon such master and examine the case, and upon proof on oath of the fact alleged, may, whether the master be present or not, if the service of the summons be proved, discharge such apprentice by a certificate under their hands and seals, for which no fee shall be paid. And by § 4. the two justices, upon complaint by the master on oath (a), may examine the same, and commit the apprentice to the house of correction to hard labour for any time not exceeding a calendar month (b), or may discharge such apprentice as aforesaid." By § 5. "Persons grieved may appeal to the next general quarter sessions, where the matter shall be finally determined, and such costs paid to the appellant or respondent as the sessions shall think reasonable, not exceeding forty shillings." (c)

By 6 G. 3. c. 25. "If any apprentice, except such with whom the sum of ten pounds was paid, shall absent himself during the term, he shall serve for so long a time as he shall absent himself over and beyond the term of his apprenticeship, unless he shall make satisfaction to his master for the loss he shall have sustained by his absence; and if he refuse so to do, one justice, on complaint of the master, may apprehend such apprentice, and, on hearing the complaint, determine the satisfaction that shall be made; and if the apprentice do not conform to such determination, the justice may commit him to the house of correction for any time not exceeding three months." By § 3. "The application of the master to compel satisfaction for absence as aforesaid, must be made within seven years next after the expiration of the term of apprenticeship." And by § 5. "The party grieved may appeal to the next general quarter sessions, on giving six days' notice of his intention to bring such appeal, and of the cause and motive thereof, to such justice, and entering into a recognizance within three days after such notice, to try such appeal; and the sessions shall finally determine the same, and award costs." But by § 6. "Neither the stannaries, nor the jurisdiction of the chamberlain, nor any other court within the city, shall be affected by this act."]

|| By

|| By stat. 4 G. 4. c. 34. intituled "An act to enlarge the powers of justices in determining complaints between masters and servants, and between masters, apprentices, artificers, and others," after reciting the titles of statutes 20 G. 2. c. 19. 6 G. 3. c. 25. 4 G. 4. c. 29., and that it is expedient to extend the powers of the said acts, it is enacted, that it shall be lawful not only for any master or mistress, but also for his or her steward, manager, or agent, to make complaint upon oath against any apprentice within the meaning of the said acts, to any justice of peace of the county or place where such apprentice shall be employed, of or for any misdemeanor, misconduct or ill behaviour of any such apprentice; and that the justice, in case the apprentice shall abscond, may on complaint thereof upon oath issue his warrant for the apprehension of such apprentice, and, upon hearing the complaint, may punish the offender by abating his wages, or committing him to the house of correction.

And by § 3. if any such servant, artificer, calico-printer, &c. shall contract to serve any person (by written contract signed), and shall not enter on his service, or having entered on it, shall absent himself before the term of his contract (whether written or not) shall be completed, or be guilty of any other misconduct in the execution thereof, a justice is empowered, on complaint on oath by the person with whom such servant, &c. contracted, or his steward, &c. to issue a warrant to apprehend such servant, &c. and to examine into the same; and if it shall appear such servant has not fulfilled his contract, or been guilty of any other misconduct therein, such justice may commit such servant, &c. to the house of correction, there to remain at hard labour not exceeding three months, and to abate his wages in part; or, in lieu thereof, to punish the offender by abating the whole or part of his wages, or to discharge him from his contract or employment.||

The justices of peace may discharge an apprentice not (a) only on the default of the master, but also on his own (b) default; but it hath been holden, that their jurisdiction herein extends only to such apprentices as were bound to trades within the statute of 5 Eliz. (c), and were compelled by them to serve; for that in such case it is but reasonable that the contracts, which were made by their authority, should be dissolved by the same power, but that they cannot discharge any voluntary agreements made between the parties.

order that the servant shall be discharged from his master, they need not discharge the master from his covenants; for when the servant is discharged, the other is no longer master. 5 Mod. 139. 2 Salk. 471. pl. 4. (b) A person, after three years' service, plainly appearing to be a natural idiot, discharged, and order affirmed. Skin. 114.—That by the custom of London, a freeman may turn away his apprentice for gaming. 2 Vern. 291.—But if an apprentice marries without the privity of his master, yet that will not justify his turning him away, but he must take his remedy on his covenant. 2 Vern. 492. [Nor can he send him away on account of his being sick, or so lame as to be unable to work, or having the king's evil to such a degree as to be deemed incurable. Rex v. Hales-Owen, 1 Stra. 99. Neither can the sessions discharge an apprentice on *general allegations of unkind usage* by the master, and the declaration of the master that he will not take his apprentice again; for by 5 Eliz. c. 4. § 35. the *particular cause* of the discharge must be stated in the order. Rex v. Davis, 2 Stra. 704. Rex v. Heaseman, Ca. temp. Hardw. 101. 2 Stra. 1014. S. C. But a neglect on the part of the master to instruct his apprentice in the mysteries of that trade he was bound to learn, is a sufficient cause of discharge.

Skin. 108.

pl. 7.

5 Mod. 139.

2 Salk. 471.

pl. 4.

(a) The order of discharge need not be mutual; therefore if they

charge. *Rex v. Amies*, 1 Const's Bott's P. L. 515. pl. 731. (c) But the contrary is now settled. *Rex v. Amies*, *ubi supra*. *Rex v. Collingburne*, 1 Stra. 663.] [In *Rex v. Sutton*, 5 Term Rep. 659. Lord *Kenyon*, C. J. appeared to be of opinion that insanity was not a legal cause for discharging a servant; but in *Rex v. Hulcoff*, 6 Term Rep. 587. this opinion being cited and relied upon, his Lordship expressed himself unwilling to go that length.]

Carth. 366.
5 Mod. 138.
2 Salk. 471.
pl. 4. Case
of Set. &
Rem. 20. pl.
29. The King
v. Gately.

Therefore, where an order of sessions was made to discharge a surgeon's apprentice from his master, for not instructing him in the art of surgery; but the master being a *mountebank* kept the apprentice for a tumbler on the stage; the order was quashed for want of jurisdiction in the justices, because a surgeon is not one of the trades mentioned in the 5 Eliz. c. 4.; and there it was held, that the justices have power only over such apprentices who are bound to the trades therein named, and not over apprentices to other trades.

Saund. 314.
Hawkes-
worth and
Hillars,
Salk. 67.
pl. 3. Skin.
108. pl. 7.
(a) Where
a court of
equity will
oblige a
master to
refund,
Finch's

And yet it hath been resolved, that the justices may not only discharge a merchant's apprentice (which has been agreed not to be a trade within the statute 5 Eliz. c. 4.), but also oblige the master to refund part of the money which he had with him. And this doctrine of refunding seems to be now established, as founded on (a) great reason, though not expressly mentioned in the act; for the justices being authorized to discharge according to their discretions, when the end of the apprenticeship cannot be attained with one person, it is but justice the master should return part of the money he has received with his apprentice, to place him out with a new master.

Rep. 396. Vern. 46. pl. 2. Vern. 64. pl. 57. 492. Atk. Rep. 149. pl. 89.

The King
v. Amies,
2 Barnard.
K. B. 244.
296. S. C.
Ses. Cas.
190.
pl. 170. S. C.
1 Const's
Bott's P. L.
515. pl. 731.
S. C.
2 Kel. 128.
pl. 104.
S. C. [But in *Rex v. Vandeleer*, 1 Stra. 69., justices cannot order monies to be returned on discharge of an apprentice.]

It hath been held, that an order on the master to return money is good, though it is not averred that he had any with the apprentice, for the order being to return money, is as necessary a proof of the receipt of it, as if it had been expressly alleged. And in this case the court seemed to be of opinion, that though the justices had jurisdiction as to discharging and obliging the master to refund, as well in other trades as those mentioned in the statute; that they are not obliged in their orders to set forth all the steps they take in their proceedings, there being nothing in the act which makes it necessary, and that there was a known and established distinction between orders and convictions.

Sand. 316.
Carth. 198.
Salk. 68.
pl. 6.
5 Mod. 138.
(b) So ruled
in the case
of the King
v. Amies,
Trin. 7 G. 2.
2 Barnard.
vies, *id.* 704.

It hath formerly been held, that the sessions cannot make an original order of discharge; but that, according to the statute, the parties ought first to apply themselves to a justice of peace; and if he cannot compound the matter, then he is to bind the master to appear at the next sessions. But it hath been ruled of (b) late, and seems now established, that an order on an original application is good, and that the previous application to one justice is only discretionary.

Salk. 67. pl. 3.

If the master, being bound to answer at the sessions, does not appear,

appear, it is a forfeiture of his recognizance; but yet at the same time the (a) justices may proceed to make an order against him. (a) For though the statute says the discharge must be made on the appearance of the master, yet it must have a reasonable construction, so as not to permit the master to take advantage of his own obstinacy. 2 Salk. 490. pl. 53. [But the master must be summoned. *Watkins v. Edwards*, 1 Mod. 286. And it must appear on the face of the order, that the master either appeared, or was summoned. *Reg. v. Rutter*, 1 Const's Bott's P. L. 513. pl. 723. *Rex v. Gill*, 1 Stra. 143. But it is said, that although there must be a summons, it need not be set forth in the order; nor need the order state, that the master was heard; for that summons and default is equal to appearance. *Rex v. Amies*, 1 Const's Bott's P. L. 515. pl. 731. But *qu.* of this opinion, for the statute expressly requires appearance, and Lord *Hardwicke* quashed an order, because it did not appear on the face of it that the master had appeared or made default. *Rex v. Heaseman*, Ca. temp. Hardw. 101.]

The order of discharge must be under the hands and seals of the four justices, according to the express appointment of the statute; but it is (b) said, that in a *certiorari* to remove the order, it is sufficient in the return to take notice of the order so made, for it is not necessary to certify the discharge itself. Sand. 316. Carth. 199. Comb. 344. (b) 2 Salk. 470. pl. 2.

[The order must state the reason of the judgment, for the statute requires the sessions to express the cause of the discharge. *Rex v. Heaseman*, Ca. temp. Hardw. 101.]

It must also be enrolled among the records of the sessions. *Rex v. Hales-Owen*, 1 Stra. 99.

The sessions of the place where the parties *live* have jurisdiction on this subject; and therefore, where *A.* was bound and enrolled apprentice to a freeman in *London*, but lived with his master in the county of *Middlesex*, it was holden, that the sessions of the county have a concurrent jurisdiction with the sessions of the city, and may discharge the apprentice in *Middlesex* for causes arising in *London*. *Rex v. Collingburne*, 1 Stra. 663.

By the 43 Eliz. c. 2. § 5. it is enacted, "That it shall be lawful for the churchwardens and overseers of the poor, or the greater part of them, by the assent of any two justices of the peace (c) to bind poor children apprentices, where they shall see convenient, till such man-child shall come to the age of twenty-four years (d), and such woman-child to the age of twenty-one years, or the time of her marriage; the same to be as effectual to all purposes, as if such child were of full age, and by indenture of covenant bound him or herself." (c) By 56 G. 3. c. 139. § 11. reciting that the provisions of the 43 Eliz. had been frequently evaded, it is enacted, "That no indenture of apprenticeship by reason whereof any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual unless approved of by two justices of the peace under their hands and seals, according to the provisions of the 43 Eliz. and of the said 56 G. 3. c. 139." [(d) But by 18 Geo. 3. c. 4. "the apprenticeship of a male child put out pursuant to the 43 Eliz. shall be for no longer term than till such child shall come to the age of twenty-one years."]

¶ Upon this section of 43 Eliz. c. 2. it has been decided that the justices must by their signing testify their assent, that no other mode of allowance is good, and that being a judicial act they must when they do it meet and confer together. (e) But one may sign alone, and afterwards be present at the signing by the other. (f) (e) *Rex v. Hamstall Ridware*, 3 T. R. 380. 4 Burn's Just. 469. (f) *Rex v. Winwick*, By 8 T. R. 455.

By the 1 Jac. c. 25. § 23. 21 Jac. c. 28. 3 Car. c. 4. § 22. this last-mentioned act is continued, with this further addition, "that
 " all persons, to whom the overseers of the poor shall, accord-
 " ing to this act, bind any children apprentices, may take and
 " receive and keep them as apprentices; any former statute to
 " the contrary notwithstanding."

By the 8 & 9 W. 3. c. 30., reciting, that whereas by an act made in the 43 Eliz. c. 2. § 5. it is, among other things, enacted, that it shall be lawful for the churchwardens and overseers of the poor of any parish, or the greater part of them, by the assent of two justices of the peace, whereof one to be of the *quorum*, to bind poor children apprentices where they shall see convenient; but there being doubts, whether the persons, to whom such children are to be bound are compellable to receive such children as apprentices, that law hath failed of its due execution; therefore it is enacted and declared, "That where any poor
 " children shall be appointed to be bound apprentices pursuant
 " to the said act, the person or persons, to whom they are so
 " appointed to be bound, shall receive and provide for them, according to the indenture signed and confirmed by the two justices
 " of the peace, and also execute the other part of the said indentures; and if he or she shall refuse so to do, oath being thereof
 " made by one of the churchwardens or overseers of the poor,
 " before any two of the justices of the peace for that county,
 " liberty, or riding, he or she shall for every such offence forfeit
 " the sum of 10*l.* to be levied by distress; the same to be
 " applied to the use of the poor of that parish or place where
 " such offence was committed; saving always to the person to
 " whom any poor child shall be appointed to be bound an apprentice as aforesaid, if he or she shall think themselves
 " aggrieved thereby, his or her appeal to the next general or
 " quarter sessions of the peace for that county or riding, whose
 " order shall therein be final, and conclude all parties."

[By 20 G. 3. c. 36. the same provisions are enacted with respect to poor persons put out apprentices in any particular district of England by virtue of any private act of parliament for the regulating and ordering of the poor.]

Previous to this act to remedy the inconveniences arising from the 43 Eliz. c. 2., which requires that there shall be two overseers distinct from the churchwardens, it had been enacted by 51 G. 3. c. 80. that indentures which had theretofore been signed by two persons only, acting as church-

|| By the 56 Geo. 3. c. 139. s. 1. it is enacted, "That from
 " and after the 1st day of *October*, 1816, before any child shall
 " be bound apprentice by the overseers of the poor of any
 " parish, township, or place, such child shall be carried before
 " two justices of the peace of the county, riding, division, or
 " place wherein such parish, township, or place shall be situate,
 " who shall enquire into the propriety of binding such child apprentice to the person or persons to whom it shall be proposed
 " by such overseers to bind such child; and such justices shall
 " particularly enquire and consider whether such person or persons reside, or have his, her, or their place or places of business within a reasonable distance from the place to which such
 " child shall belong, having regard to the means of communication between such places; or whether any circumstances
 " shall make it fit, in the judgment of such justices, that such
 " child should be placed apprentice at a greater distance; and
 " if the father or mother of such child shall be living, and shall
 " reside in or near the place to which such child shall belong,
 " such

“such justices shall (if they see fit) examine such father or mother, or either of them; and shall particularly enquire as to the distance of the residence or place of business of the person or persons to whom it shall be proposed to place such child, and the means of communication therewith; and such justices shall also enquire into the circumstances and character of such person and persons; and if such justices shall, upon such examination and enquiry, think it proper that such child should be bound apprentice to such person or persons such justices shall make an order declaring that such person or persons is or are fit person or persons to whom such child may be properly bound as apprentice; and shall thereupon order that the overseer or overseers of the place to which such child shall belong shall be at liberty to bind such child apprentice accordingly; which order shall be delivered to such overseer or overseers as the warrant for binding such child apprentice as aforesaid; and such order shall be referred to by the date thereof, and the names of the said justices in the indenture of apprenticeship of such child (a); and after such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship before the same shall be executed by any of the other parties thereto: Provided always, that no such child shall be bound apprentice to any person or persons residing or having any establishment in trade, at which it is intended that such child shall be employed out of the same county at a greater distance than forty miles from the parish or place to which such child shall belong, unless such child shall belong to some parish or place which shall be more than forty miles from the city of *London*, in which case it shall be lawful for the justices who shall authorize the apprenticing of such child to make a special order for that purpose, in which order such justices shall distinctly specify the grounds on which they shall think fit to allow of the apprenticing of such child to a person or persons residing or having an establishment in trade at a greater distance than forty miles from the parish or place to which such child shall belong.”

wardens and overseers, should be valid; and by 54 G. 3. c. 107. that indentures signed by persons as church-wardens of separate townships, the same persons not being sworn in as church-wardens of those townships, though church-wardens of the parishes in which those townships are situate, shall be as valid as if they had been actually church-wardens of such townships. And see 1 & 2 G. 4. c. 32. *ante*, p. 340.

(a) This part of the section requiring that the order of justices for the binding out of parish apprentices shall be referred to in the indenture by the date thereof, is compulsory, and therefore

an indenture in which the date of the order is omitted is void, and no settlement is gained by serving under it. *Rex v. Bawberg*, 2 Barn. & C. 222.

By § 2. of the same statute it is provided, that the indenture shall be allowed by two justices of the county or jurisdiction into which the apprentice is to be bound, as well as by two justices of the county or jurisdiction from which he is bound. By § 3. that the allowance by justices of the peace of the county shall be valid in towns and places having exclusive jurisdiction. By § 4. the distance to which apprentices may be bound is expressed not to be limited to cities which are counties of themselves. By § 5. it is declared that no settlement shall be gained, unless the directions of the act are complied with. By § 6. overseers binding apprentices contrary to the act shall each respectively forfeit

10*l.* for each apprentice so bound. By § 7. children shall not be bound out until nine years old. By § 8. provision is made for the disposal of those apprentices whose masters shall remove their residence out of the county, or forty miles from the parish or place wherein the same was when the apprentice was bound. By § 12, 13, 14, 15, & 16, it is declared how the penalties imposed for offences against the act are to be recovered and disposed of. By § 17. a power of appeal is given from the justices to the general or quarter sessions of the county. And by § 18. it is enacted, that the provisions and penalties therein contained respecting overseers of the poor shall be deemed to extend to all churchwardens having the power and authority of overseers of the poor.||

In the construction of the statutes above stated, pp. 347. and 348., the following opinions have been holden:—

T. Raym. 65.
177. Sid. 99.
Lev. 84. Vent.
325. S. P. cont.
Rex v. Fairfax,
Carth. 94.
Comb. 165.
S. C. 3 Mod.
269. S. C.

That by the 5 Eliz. c. 4. the justices of peace may bind a poor person to husbandry against the consent of his master; but that neither by that statute, nor the statute 43 Eliz. c. 2., which empowers the churchwardens, &c. to raise a stock of money, by way of assessment on the parish, for that purpose, they could impose an apprentice on a tradesman against his consent, but must assess and raise money to bind him out.

Show. 76. S. C. resolved by three judges against *Holt*. [Although the several reporters, who have given us the history of the case of the King v. Fairfax, assign different reasons for the judgment of the court in that particular case, yet they all agree, that the three judges, *contra Holt C. J.*, were of opinion, that the stat. 43 Eliz. having empowered the churchwardens and overseers, with the assent of two justices, to bind parish apprentices where they should see convenient, the order for that purpose was compulsory on the master.]

Rex v. Earl
Shilton,
1 Barn. & A.
275.

|| That an indenture binding a poor apprentice, which was executed by *one* churchwarden (where by custom there was but *one*) and one overseer, was valid.||

2 Salk. 491.
pl. 57. Min-
champ's case.
[Rex v. Sal-
tern, East.
24 G. 3. 1 Bott,
P. L. 555. pl.
791. S. P.]

That though by the statute 8 & 9 W. 3. c. 30. the master is bound under the penalty of 10*l.* to keep an apprentice bound to him pursuant to the statute 43 Eliz. c. 2., yet, if two justices bind a poor girl to a merchant, and he appeals to the sessions, where the order is reversed, it being thought unfit to compel a merchant to take an apprentice, the Court of King's Bench, on removing the order before them, may confirm the order of sessions (as they did in this case); for the statute having given an appeal to the sessions, they are made thereby proper judges, whether the person be a proper person to impose an apprentice on or not.

|| By stat. 5 G. 4. c. 13. (The Mutiny Act) s. 113. it is enacted that no officer of his majesty's forces residing in barracks or elsewhere under military law, shall be deemed liable to have any parish poor child bound apprentice to him; but that every such officer shall be wholly exempt from taking or receiving, or from having bound to him any such child as an apprentice, any law, statute, or usage to the contrary notwithstanding.||

Rex v. Crosse,
Comb. 289.
per Holt C. J.

The churchwardens and overseers need not aver, that the parents were not able to maintain the child, for they have a discretionary power, by the statute, of determining that.

And

And as the justices of peace have a power of imposing an apprentice on a master, in consequence thereof an indictment lies for disobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for such apprentice; for though an act of parliament prescribes an easier way of proceeding by complaint, yet that does not exclude the remedy by indictment.

binding or appointment within the 43 Eliz. c. 2. *Rex v. Trevilian*, 2 Stra. 1268.

[It is said to have been the opinion of all the judges, that a parish apprentice may be put to a clergyman.

So, a female parish apprentice bound to a day-labourer to learn the art and mystery of a housewife, has been holden good.

1 Const's Bott's P. L. 549. pl. 787.

A person occupying land in a parish (*a*), but living out of it, is compellable to receive a parish apprentice. And a custom to bind only to occupiers of a particular description is not good. in Nottingham, 2 Term Rep. 726. *Rex v. Saltern*, 1 Const's Bott's P. L. 555. pl. 791. (*a*) It is said *generally*, that the binding of parish apprentices may be to a person residing in another parish. *Rex v. St. Margaret's, Lincoln*, 1 Const's Bott's P. L. 549. || *Rex v. Barwick*, 7 Term Rep. 35.||

In binding apprentices under 20 G. 3. c. 36. it is not necessary that the master should actually reside within the parish: if he be an occupier there, it is sufficient; for *inhabitant* and *occupier* are for this purpose synonymous.

It is said, that an order of apprenticeship need not state the trade to which the pauper is intended to be bound.

But the justices cannot order, nor can the indentures covenant that the master, at the end of the term, shall give his apprentice two suits of clothes, one for holidays, and the other for working days; for this sounds like *wages*, and they can only order *maintenance*; and not even that after the term is ended.

A parish apprentice may be bound for a shorter, but not for a longer time than the statutes require; and if the indenture (*b*) be not for any certain time, it is not therefore bad; for with respect to the time the statute it only directory.

Woolstanton, *id.* pl. 780.

So, an indenture binding a poor girl an apprentice is not void for want of the alternative, "or till married."

And neither a parish indenture, nor a common indenture, though voidable, can be avoided but by the parties to it.

Parish indentures must be assented to by two justices in the presence of each other; for if it be done by them separately, the indenture is void.

Winwick, 8 Term Rep. 454.||

It is not necessary to the validity of the indentures of a parish apprentice, that the master should sign the counterpart. But after the master has signed the counterpart, he cannot appeal to the sessions. (*c*)

(*c*) *Rex v. Saltern*, 1 Const's Bott's P. L. 555. pl. 791.

Nor

6 Mod. 163.
Salk. 381.
The Queen v. Gold. [But the indictment must state, that the binding or appointment was a

1 Const's Bott's P. L. 540. pl. 771.

Rex v. St. Margaret's, Lincoln,

Rex v. Clapp, 3 Term Rep. 107. *Rex v. St. Nicholas*,

Rex v. Tunstead, 5 Term Rep. 523.

Rex v. Gillifler, Sir T. Raym. 63.

Rex v. Wagstaffe, Foley, 225.

Rex v. Chalburi, 1 Const's Bott's P. L. 543. pl. 779. (*b*) *Rex v.*

Rex v. St. Petrox, Burr. Set. Ca. 249. *Id. ibid.*

Rex v. Hamstall Redware, 3 Term Rep. 380. || *Rex v.*

Rex v. Fleet, Cald. 31. 2 Const's Bott's P. L. 547. pl. 482.

Rex v. St.
Nicholas, in
Nottingham,
2 Term Rep. 726.

Nor is it necessary to their validity, that the apprentice should sign the deed.

Rex v. Lang-
ham, Cald. 126.
(a) Rex v.
Harburton,
1 Const's
Bott's P. L. 558. pl. 792.

An infant parish apprentice and his master cannot by themselves, without the assent of the parish-officers, vacate the indentures. *Secus*, after the apprentice has attained twenty-one years of age. (a)

By 32 G. 3. c. 57. § 11. "In every case where a parish apprentice shall be discharged under the 20 G. 2. c. 19. the two justices shall order the master or mistress to deliver up the apprentice's clothes, and to pay a sum not exceeding ten pounds to the parish officers, for the purpose of placing such apprentice out again. And the two justices may compel the parish officers to enter into a recognizance to prosecute the master or mistress of any such parish apprentice for ill-treatment of the apprentice."

By § 12. "The justices may order any master convicted under 20 G. 2. c. 19., when liable to take a parish apprentice, to pay to the parish officers a sum not exceeding ten pounds, nor less than five pounds, for the binding out such poor child. But such master may appeal to the quarter sessions, on giving notice," &c.

By § 8. "If any master or mistress become insolvent, two justices, where such master or mistress live, may, on the application of such master or mistress, discharge any such apprentice from the indentures, if upon enquiry they find the allegation of insolvency to be true." But by § 9. "This shall not extend to any indenture under the 43 Eliz. c. 2., where a larger sum than five pounds shall have been given."

|| By the 33 G. 3. c. 55. Two justices at any special or petty sessions, upon complaint upon oath, by or on the behalf of any parish apprentice, or other apprentice, upon whose binding out not more than 10% was paid, (extended to 25%, by 4 G. 4. c. 29. §. 1.) of any ill usage by his or her master or mistress (such master or mistress having been duly summoned to appear and answer such complaint), may impose upon conviction any reasonable fine not exceeding 40s. upon such master or mistress as a punishment for such ill usage; and if not paid may by their warrant levy the same by distress and sale of the goods of such offender, rendering to him the overplus (if any), after deducting such fine, and the charges of such distress and sale, to be applied at the discretion of such justices, either to the use of the poor, or paid and applied to and for the use and benefit of such apprentice, for or towards recompense or compensation for the injury he may have sustained by reason of such ill usage.

And by 4 G. 4. c. 29. power is given to two justices to take into consideration the circumstances under which such apprentice or apprentices shall be discharged, and to make an order upon the master or mistress of such apprentice or apprentices

to

to refund all or any part of the premium or premiums, which may have been or shall be paid upon the binding or placing out of such apprentice or apprentices, as such justices in their discretion shall see fit; and in case of their order not being complied with, to levy the same by distress under their warrant.||

(D) *Of the Necessity of serving an Apprenticeship, as a Qualification to follow a Trade within the 5 Eliz. c. 4.*

AT common law, every person might follow what lawful trade he pleased; which being inconvenient in many instances, and a detriment to the public, in permitting persons to exercise trades in which they had little or no skill or experience; to prevent this mischief, and the better to train up and enure persons to labour and industry from their youth, and thereby make them more skilful and expert.

It is enacted by the (a) 5 Eliz. c. 4. § 31. " That it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use, or exercise any craft, mystery, or occupation, now used or occupied within the realm of *England or Wales*, except he shall have been brought up therein seven years, at the least, as an apprentice, in manner and form above said; nor to set any person on work in such mystery, art, or occupation, being not a workman at this day, except he shall have been apprentice, as is aforesaid; or else having served as an apprentice, as is aforesaid, shall or will become a journeyman, or hired by the year; upon pain, that every person willingly offending, or doing the contrary, shall forfeit and lose for every default forty shillings for every month."

11 Co. 55.
2 Buls. 191.
Skin. 133.
Sand. 312.

(a) It is said that no encouragement was ever given to prosecutions upon this statute, and that it would be for the common good if it was repealed; for no greater punishment can be to the seller than to expose goods to sale ill wrought; for

b
sy such means he will never sell more; *per Dolben Justice*. 3 Mod. 317. See stat. 8 Ann. 9. § 39. || Since the above note was written, this section of the statute 5 Eliz. c. 4. has been repealed by 54 G. 3. c. 96. § 1.||

[But by the 15 Car. 2. c. 15. hemp-workers of all kinds, net-makers, and makers of tapestry hangings, may set up without having served seven years.

By 24 G. 3. sess. 2. c. 6. § 1. 4. all officers, mariners, and soldiers, who have been in the land or sea service, or in the marines, or in the militia, or any corps of fencibles, since the second year of his majesty's reign, and have not deserted, their wives and children, may exercise such trades as they are apt for, in any town or place.

By 26 G. 3. c. 107. § 131. every person having served in the militia, when drawn out into actual service, being a married man, may exercise any trade in any town or place.

By 6 & 7 W. 3. c. 17. an apprentice discovering two offenders guilty of coining, so as they be convicted, shall be deemed a free-man, and may exercise his trade, as if he had served out his time.

And by the 17 G. 3. c. 33. it shall be lawful for any person carrying on or using the trade of a dyer within the counties of *Middlesex, Essex, Surrey, and Kent*, to employ journeymen who have not served an apprenticeship to the trade, without incurring any penalty.

The like liberty is given to hatters *generally* by the 17 G. 3. c. 55. § 5., and to woolcombers by 35 G. 3. c. 124.]

|| By the 54 G. 3. c. 96. § 1. the thirty-first section of the stat. 5 Eliz. c. 4. is declared to be repealed. But by § 4. of the same statute it is declared, that the customs of *London*, or of any other city, town, corporation, or company lawfully constituted, concerning apprentices shall not be affected.

And by stat. 56 G. 3. c. 67., passed for the purpose of enabling soldiers, mariners, &c. to exercise trades, it shall be lawful for officers, mariners, soldiers, and marines, who have been employed in his majesty's service since *June 22. 1802*, and have not since deserted, and also the wives and children of such officers, &c. to set up and exercise trades in any city, town, or place within this kingdom (excepting the two universities of *Cambridge* and *Oxford*); nor shall they be liable to be removed from the place in which they may set up trade to their last legal settlement, until they have become actually chargeable to the parish.

By § 3. this act is extended to militia-men and fencibles who have served five years, and been honourably discharged.||

In the construction of the statute of the 5 Eliz. c. 4. it will be necessary to consider,

1. *What shall be said such a Trade as a Person is prohibited to follow.* (a)

|| (a) In these five divisions, under the head (D), it must be borne in mind that the 51st section of the stat. 5 Eliz. c. 4. is repealed, except so far as the customs of London and other towns are concerned.||

2 Salk. 611. Herein we must observe, that it hath been ruled, that there are many trades within the general words and equity of the act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been (b) adjudged, that in every indictment, &c. it must be alleged, that it was a trade at the time of making the statute; for the words thereof are, *any craft, mystery, or occupation now used*, &c.; from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute.

2 Salk. 611. 1188, 1189. So, for not averring that the trade of a tiler was an art or mystery used in England at the time of making the statute, though the statute expressly mentions it. 4 Mod. 145, 146. But Comb. 288. *contra*.

8 Co. 150. Also, it seems agreed, that the act only extends to such trades as imply mystery and craft, and require skill and experience; and that therefore (c) merchants, husbandmen, gardeners, &c. are not within the statute; and on this foundation it hath been held, that (d) a hemp-dresser is not within the statute, as not requiring

2 Salk. 611.
pl. 3. 2 Ld.
Raym. 1188.
Ld. Raym. 514.
2 Ld. Raym.
1410. (b) Palm.
528. Sid. 175.
S.P. adjudged.
2 Salk. 611.
pl. 3. Ld.
Raym. 513.
2 Ld. Raym.
1188, 1189.
8 Co. 150.
2 Buls. 191.
Vent. 326.
(c) But they
are expressly
mentioned in

requiring much learning or skill, and being what every husbandman uses for his necessary occasions.

§ 27. 29.

(d) Cro. Car.
409. pl. 4.

It is said in (a) 2 Buls. to have been adjudged, that an upholsterer is not a trade within the statute, as not requiring (b) skill; but this hath been contradicted by a later (c) resolution, wherein it is said to have been resolved, that a (d) barber and tailor were trades within the statute.

(a) 2 Buls. 186.
but no resolution. 2 Salk.
611. pl. 3.
S. C. and
denied to be
law. (b) But

see Roll. Rep. 10. (c) 1 Lev. 243. Sid. 367. pl. 4. 2 Keb. Rep. 366. pl. 19. Vent. 346. 2 Salk. 611. pl. 3. Ld. Raym. 514. (d) Lev. Rep. 87. 243. 2 Lev. Rep. 206. Sid. 367. pl. 4. Vent. 326. Keb. Rep. 411. pl. 115.; *id.* 422. pl. 145.

Also, it is said in 2 Buls. that a pippin-monger is not within the statute, because there is no mystery in buying apples, and all his skill is in so laying his apples as to keep them from rotting: but this likewise hath been doubted in a late (e) case, where it was debated, whether the using of the trade of a costermonger or (g) fruiterer be within the statute; but there is no resolution.

2 Buls. 189,
190. Roll.
Rep. 10. Ld.
Raym. 514.
2 Salk. 611.
pl. 2. (e) 2 Lev.
206. Vent.
326. 346.

2 Salk. 611. pl. 2. S. C. cited, and said not to be resolved. (g) 3 Keb. Rep. 816. pl. 58.

It is clearly agreed, that the following the common trade of a brewer, baker, or cook, is within the statute, as unskillfulness herein may be very prejudicial to the lives and health of his majesty's subjects; but it is at the same time agreed, that the exercising of any of these trades in a man's own house or family, or in a private person's house, is not within the restraint of the statute.

11 Co. 54. a.
Cro. Car. 499.
Mo. 886.
Hob. 183. 211.
8 Co. 129.
Palm. 542.
Lit. Rep. 251.
Bridgm. 141.

On motion to quash an indictment for using the trade of a fellmonger, it was urged, that this was a business which required no skill, for that it was only to pull the wool from the skin; but *per Holt* Chief Justice,—If in the indictment it be averred to be a trade at the time of making the statute, we will not quash it; for whether it was a trade then or no, or whether any skill be requisite to the exercise of it, is a matter of fact proper for the trial of a jury.

2 Salk. 611.

So, the court refused to quash an indictment for using the trade of a seamstress, not having served as apprentice; because it was set forth in the indictment to be a trade in *England* at the time of making the act; so that if this trade of a seamstress be not within the act, the defendant will have the advantage of it on the trial.

2 Salk. 611.
pl. 3.
2 Ld. Raym.
1189.

But it is said, that the court had quashed an indictment for following the trade of a merchant-tailor, because they did not know what was meant by it, and it seemed to them nonsense and unintelligible.

2 Salk. 611.
pl. 3. The
King v. Har-
per, 2 Ld.
Raym. 1189.

A coachmaker is within this statute.

Vent. 346.

[It hath been objected, that the using of a trade in a country village is not within the statute; and in the case of *Rex v. Langley*, H. 6 G. 2. Mr. J. Page said, he had known indictments quashed upon such exception. It is said, however (h), by a very respectable author, that he doth not apprehend it would be now allowed; for, in such case, at the sittings at *Westminster* it was

1 Mod. 26.
2 Keb. 583.
1 Ventr. 51.

(h) Bull. N. P.
192.

(a) Ball v. Co-
bus, 1 Burr.
366.

mentioned, but Lord Ch. J. *Lee* made slight of the objection. In a subsequent case (a), on motion to quash an information against the defendant for exercising the trade of a baker, without having served an apprenticeship, at the parish of *S.* in *Kent*, one objection was, that it did not appear on the record that the offence was committed in a city, borough, or market-town; but the court held, that neither the enacting part of the statute, nor the preamble, gave any foundation for this objection, and that the offence was clearly well laid; though they said, if it came out in evidence, that the defendant followed the business only in a small village, it had been the common practice to find for him.]

2. *What Manner of following or exercising a Trade shall be said within the Statute.*

11 Co. 54.
Hob. 183.
¶(b) *Qu. Whether* embark-
ing capital in a
trade, and de-
riving the pro-
fits through a foreman, be within the act? 15 East, 161. Exercising a trade for seven years un-
molested was held to exempt from the penalty. *Ibid.*||

It seems agreed, that the following a trade within this statute, must be such whereby the party gets his livelihood; and that therefore the using of a trade of a brewer, baker, cook, tailor, &c. in one's own house, or in the private family of another, without any reward, is not within the statute. (b)

Carth. 162.
2 Salk. 610.
pl. 1.
3 Mod. 513.
Hobs *qui*
tam v.
Young, Show.
241. 266.
Comb. 179.
Holt, 66. pl. 1.
Skin. 428. pl. 5.
(c) For the
cloth is not
confined to
the use of his
own family,
but vended
out for the
sake of commerce;
and whether the utterance be in England or in Turkey is not material. 2 Salk.
610. pl. 1.

But in an action for using the trade of a clothier, not having been apprenticed to that trade; where by special verdict it was found that *A.* was a *Turkey* merchant, and exported great quantities of *English* cloth into the *Levant*; and for this purpose *only* he hired several cloth-workers, who had been all apprentices to the same trade, and kept also a master-workman of that trade to inspect their work; and that by these men he made great quantities of *English* cloth, all which he transported; and that he the said *A.* kept a dye-house, and hired men of that trade to dye his own clothes, and no other;—it was resolved to be within the restraint of the statute, though the cloth was made for his (c) own merchandise only, and though made by persons who had been apprentices; for here they are not traders, but hirelings, and he is the tradesman who hath all the profit, as *A.* in this case has.

Carth. 164.
[(d) But if it be
an exer-
cising of the
trade by the master,
it cannot be also an
exercising of it by
the journeyman, so
as to expose him to
the penalties of the
statute. Beach v. Turner, 4 Burr. 2449.]

So, if a man keeps journeymen shoemakers to make shoes for exportation, this is an exercising the trade (d) of a shoemaker within this statute.

Raynard v.
Chase, 1 Burr.
2. 2 Wils. 40.
S. C.

[But if a person brought up to the trade take a partner, who hath not served an apprenticeship to the trade, such partner, if he share only in the profits or loss of the business, and do not actually exercise the business, is not liable to the penalties of this act.]

Carth. 163.
1 Vent. 51.
2 Kcb. Rep.
1 Black. Com.

It hath been also holden, that this statute doth not restrain a man from using several trades, so as he had been an apprentice to all; wherefore it indemnifies all petty chapmen in little (e) towns

towns and villages, because their masters kept the same mixed trades there before. 416. Show. Rep. 242.

be the better opinion, that this statute hath not abrogated the particular customs concerning trades in particular towns and villages; and that therefore a widow, by custom, may continue her husband's business; and it seems, by some opinions, she may do it without any such custom, for that the wife serves as an apprentice; but for this *vide* Cro. Car. 547. 516, 517. 2 Buls. 187. 8 Co. 150. Palm. 541. 11 Co. 54. Noy, 5. Hutt. 151. Hob. 211. Sand. 311. Carth. 165.

If a coachmaker keeps servants to make his wheels, and workmen to curry his own leather, this is against the statute; because it is he only who receives all the profits of the several trades, and the wheelwright and the currier are but his servants. Carth. 163, 164. *per Holt*. Show. Rep. 267. Comb. 179.

So, in a case upon this statute, prosecuted by the Horners' Company against a comb-maker in *London*, for using the trade of a horner, *viz.* in pressing horn for making combs, which pressing did not belong to their trade; this was adjudged a breach of the statute, for a horner is a particular trade, and a very ancient company in *London*. Carth. 162. cited *per Holt* C. J. Comb. 180. Show. Rep. 242. 1 Mod. 190.

3. *What Kind of Service will be a sufficient Qualification within the Statute.*

As to this it hath been resolved, that there is no occasion for an actual binding, but that the following a trade for seven years is a sufficient qualification within the statute. Salk. 6 7 pl. 2 Salk. 615. pl. 7. S. P. being a hard law.

Ld. Raym. 758. || See the 54 Geo. 5. c. 96. repealing the 5 Eliz. c. 4. § 51. ||

So, where an action was brought on this statute, and, upon not guilty pleaded, it appeared that the defendant's father kept the same trade, and that he the defendant for several years had been employed by his father therein; it was held, that he might lawfully use that trade, for that he had been (a) *quasi* an apprentice to it, which was sufficient to satisfy the statute. Carth. 165. *per Cur. Ses.* Cas. 290. pl. 227. 1 Bl. Com. 428.

(a) And for the like reason it seems, that a wife living with her husband seven years, may after his death continue the trade; for the act does not require a man or a woman to be an actual apprentice, but the words are *tanquam* an apprentice. *Vide* the authorities *suprà*.

So, if a man lives with another, that uses a trade which the other is not qualified for using, seven years, he may set up the trade as well as if he had lived with one never so well qualified. Ca. Law and Eq. 71.

Also, it hath been held, that the service need not be in any particular country; and therefore an indictment for using the trade of a tailor, not having served an apprenticeship seven years, was quashed, because only said, not having served as an apprentice *infra regnum Angliæ aut Walliæ*; for it may be he did so beyond sea; and if it were any where it suffices. Salk. 67. pl. 2. The King v. Fox.

So, it hath been held, that serving five years to a trade out of *England*, and two in *England*, is sufficient to satisfy the statute, but that there must be a service of a full time either in *England* or out of *England*; and therefore serving five years in a country, where by the law of the country more is not required, will not qualify a man to use the trade in *England*. Ca. Law and Eq. 70. See 5 Keb. Rep. 550. pl. 55.

[So, it hath been holden, that if any man as a master has exercised French v.

Adams, 2 Wils. 168. Wallen v. Holton, 1 Bl. Rep. 233. If he has exercised a trade for seven years without any prosecution with effect.

cised and followed any trade as a master without interruption or impediment for the term of seven years, he is not liable to be prosecuted on this statute. So, if he hath worked at or followed two or more different trades for the term of seven years or more.]

4. *By whom the Offence of following a Trade without a Qualification is cognizable.*

This matter depends chiefly on the statute 31 Eliz. c. 5. § 7., whereby it is enacted, "That all suits for using a trade without having been brought up in it shall be sued and prosecuted in the general quarter sessions of the peace, or assizes of the same county where the offence shall be committed, or otherwise enquired of, heard, and determined in the assizes, or general quarter sessions of the peace for the same county where such offence shall be committed, or in the leet within which it shall happen, and not in anywise out of the same county where such offence shall happen or be committed."

Cro. Jac. 178. Hob. 184. Salk. 373. pl. 14.

In the construction hereof it hath been holden, that it restrains not a suit in the King's Bench or Exchequer, for such offence happening in the same county where these courts are sitting; for the negative words of the statute are not, that such suits shall not be brought in any other *court*, but, that they shall not be brought in any other *county*; and the prerogative of these high courts shall not be restrained without express words.

Hob. 184. 527. Cro. Jac. 85. pl. 9.

But where the offence is in a different county, such suits in these, or any other courts out of the proper county, seem to be within the express words of the statute.

Sid. 303. Keb. 584. 2 Lev. 204. Vent. 8. 564. 2 Lev. 204. Salk. 372. pl. 13. 5 Mod. 425. [See 4 Term Rep. 109.]

Yet it hath been doubted, whether an action of debt, or information in the courts of *Westminster-hall*, were not to be construed to be out of the meaning of the statute; but it seems to be now settled, in the construction of the statute 21 Jac. 1. c. 4., which provides, that no action of debt, or information, or other suit whatever, can be brought in any court of *Westminster-hall* on any penal statute made before the said statute of 21 Jac. 1. for any offence therein excepted, for which the offender may be prosecuted in the country; unless such offence shall be committed in the same county in which such court shall sit.

Jon. 193.

But these statutes hinder not the removal of any indictment into the King's Bench by *certiorari*, after which it may be tried there, or in the county by *nisi prius*.

6 Mod. 220. 2 Salk. 370. pl. 2. 2 Ld. Raym. 1038. 1179. Comb.

It hath been held, that quarter sessions of boroughs may receive indictments on the 5 Eliz. c. 4. as well as those of the county at large, in that there is no danger of oppression, because a *certiorari* lies.

254, 255. 1 Burr. 251. [So they may proceed by information. Cowp. 369.]

5. *Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified.*

Sid. 302. pl. 9. Dring v. Respass. [(a) But

The plaintiff, in an action on this statute, 5 Eliz. c. 4. (a), must (b) allege in his declaration, that the defendant did not use the trade

trade at the time of making the statute; for though it cannot be presumed that he did, after such a length of time, yet as the statute makes him liable, and subjects him to a penalty, the prosecutor must shew that he has transgressed the law, and that he is entitled to his action.

§ 25. 31. || [(b) Such allegation not necessary. 1 Burr. 367.

An indictment for following the trade of a *cutler*, not being an apprentice, *contra form*. 5 Eliz. c. 4. was quashed on demurrer; because the trade of a cutler was averred to be a trade then used *infra hoc regnum Angliæ*, whereas this kingdom was not then subsisting.

K. B. 147. 172. S. C.

It has been held, that an indictment against two or more, for following a joint trade, without having served a seven years' apprenticeship, required by the statute, is naught, in that it would be absurd to charge them jointly, because the offence of each defendant arises from the defect peculiar to himself.

1248. Vent. 502. 1 Stra. 623.

[In an indictment on this statute it is not necessary to specify and aver the want of other qualifications allowed by subsequent statutes, for such other qualifications or exceptions ought to be shewn by the defendant.]

Rex v. Pemberton,
2 Burr. 1035.
1 Bl. Rep.
230. S. C.

(E) Of assigning and turning over Apprentices to other Masters.

THE placing out an apprentice to a particular person arises from an esteem, and a good opinion of the party to whom he is so committed, that he will not only instruct him in his trade or calling, but will also be careful of his health and safety; and therefore the law has made it such a personal trust or confidence, that the master cannot assign or transfer it over to another. The master must also have the apprentice under his own care and inspection, and cannot send him abroad, though under the pretence of improvement, unless by express agreement, and unless the nature of his business requires it and implies such a power, as that of merchant-adventurer, sailor, &c. are said to do; therefore it hath been adjudged, that a surgeon sending his apprentice a voyage to the *East Indies*, though in company with other surgeons, and the better to instruct him in the art of surgery, was a breach of his covenant, whereby he bound himself to retain, teach, keep, and employ the said apprentice in his own house and service, &c.

Hob. 154.
pl. 180.

But by the custom of *London*, a freeman of *London* may turn over his apprentice to another master, being a freeman; and such second master shall have the same benefit of the apprentice's covenants, as shall the apprentice of the covenants on the side of the master, as if he had been originally bound to him.

March, 3.
Keb. 250.

But it hath been held, that though justices of peace have a jurisdiction

Comb. 524.

The King v. Chaplain.
 [(a) They cannot judge of an assignment, for they cannot try the validity of a deed.
 Rex v. Barnes, 1 Stra. 48.]

jurisdiction of discharging apprentices, and may bind them to other masters, that they cannot turn them over (a); and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed, because the justices have nothing to do about turning over an apprentice; and that though he applied to them, that could not give them a jurisdiction.

[By 32 G. 3. c. 57. § 5. any master or mistress taking a parish apprentice under the 8 & 9 W. 3. c. 30. § 5. may, by indorsement on the indentures, or by other instrument in writing, and with the consent of two justices, testified by such justices under their hands, assign such apprentice for the residue of the term. And by § 7., the person to whom such apprentice is intended to be assigned shall, at the same time, on the counterpart of the indentures, &c., declare his acceptance of such apprentice, and acknowledge himself bound by the covenants in the indenture; and such master or mistress so taking an apprentice by assignment, may, from time to time, assign such apprentice over to any other master or mistress.]

|| The 56 G. 3. c. 139. § 9., after enforcing the provisions of the 32 G. 3. c. 57. with respect to assigning or discharging apprentices, enacts, § 10., that "any person or persons who, after the 1st of *October*, 1816, shall put away or transfer any parish apprentice to another, or who shall in any way discharge or dismiss from his or her service any parish apprentice, without such consent as aforesaid (*i. e.* such consent as is directed in the 32 G. 3. c. 57.), shall forfeit a sum not exceeding 10*l.* for every apprentice so transferred."||

(F) Of making Apprentices free.

Sid. 107.
 pl. 20.

2 Show. 154.
 pl. 158. [By the 12 G. 3.

c. 21. where any person entitled to his freedom shall apply to the mayor, &c. to be admitted, giving notice and specifying the nature of his claim, and the mayor, &c. shall not admit him within a month afterwards, a *mandamus* shall go, and if he be admitted, the mayor, &c. shall pay costs.] (b) Mr. Common Serjeant said, that if a man trade upon his own account within the seven years of his apprenticeship, the chamberlain of London will not make him free, because he has not fully served an apprenticeship of seven years. 1 Ld. Raym. 383.

Lev. 91.

Sid. 107.

Keb. Rep.

458. pl. 57.

id. 470. pl. 79.

id. 659. pl. 43.

T. Raym. 69.

Townsend's case.

WHEREVER by the custom of any town, borough, &c., the serving an apprenticeship entitles the party to his freedom, the persons refusing to admit him, without sufficient (b) cause, may be compelled thereto by *mandamus*.

Therefore, where to a *mandamus* to the mayor, &c. of *Oxford*, to admit a person to be free of that city, who had served seven years' apprenticeship; to which it was returned, that he put himself apprentice seven years according to the custom, and that he covenanted to serve seven years, and not to marry within the time, and that within the first two years he married, and so broke his covenant; and that his master accepted of him to serve for the residue of the time, which he did, but not as an apprentice, but rather as a journeyman; though it was urged, that by his breach

breach of covenant he lost his right of freedom, yet the court held the contrary; and that though an action of covenant might lie, yet that it was no loss of his freedom; and therefore awarded a peremptory *mandamus* to admit him.

So, where a *mandamus* to the mayor, &c. of *Lincoln*, to admit *A.* to his freedom, he having served an apprenticeship there; and the mayor returned, that *A.* (being a quaker), refused to take the usual oath, according to the custom of the said city, but offered to take the solemn affirmation and declaration; the court held this sufficient to entitle him to his freedom, within the statute 7 & 8 W. 3. c. 34.

Rex v. Mayor
of Lincoln,
5 Mod. 402.
Carth. 448.
S. C.
Ld. Raym.
557. S. C.
[Rex v. Tur-
key Company,
2 Burr. 1004. S. P.]

Also, it is frequent for masters to bind themselves to make their apprentices free at the end of their time, which they must perform according to their covenants.

6 Mod. 227.
260. [1 Ld.
Raym. 382.]

(G) How Apprentices are to be taken Care of when their Masters happen to (a) die.

IT seems agreed, that if a man be bound to instruct an apprentice in a trade for seven years, and the master die, that the condition is dispensed with, being a thing personal; but if he be bound further, that in the mean time he will find him in meat, drink, clothing, and other necessities; here, the death of the master doth not dispense with the condition, but his executors shall be bound to perform it, as far as they have assets. [For there is a great difference between a covenant to *maintain* and a covenant to *instruct*: the first is a lien upon the executor, though not named, in right of the testator's assets being come to his hands; but the other is a *fiduciary* trust annexed to the person of the master.]

Sid. 216.
pl. 21. Keb.
761. 820.
Lev. 177.
[1 Const's
Bott's P. L.
524. pl. 745.
Cro. El. 555.]
Burn, 58.
(a) There
seems to be
no sufficient
clear provi-
sion, what
shall be done
often happen.

with an apprentice upon the master's dying, which is a case which must needs often happen.
Burn's Observ. 245.

But if a person is bound apprentice by justices of peace, and the master happens to die before the term expired, the justices have no power to oblige the executor, by their order, to receive such apprentice and maintain him; for by this method the executor is deprived of the liberty of pleading *plene administravit*, which he may do, in case covenant be brought against him, and must maintain the apprentice, whether he hath assets or not.

Carth. 231.
Salk. 66. pl. 1.
Show. 405.
The King v.
Peck.

But it is said, that in the case of the master's dying, by the custom of *London*, the executor must put the apprentice to another master of the same trade.

Salk. 66. pl. 1.
204. pl. 2.
Per Holt C. J.
March, 5. pl. 6.
Lond. 339, 340.

Keb. Rep. 250. pl. 15. Boh. Priv.

[By 32 G. 3. c. 57. § 1. if the master or mistress of any parish apprentice die during the term of such apprenticeship, upon whose binding no larger sum than five pounds shall have been paid, the covenant in the indenture for the maintenance of such apprentice shall not continue in force longer than three calendar months

months after the death of such master or mistress; during which three months the apprentice shall continue to live with and serve the executors or administrators, or with such person as they shall appoint. And in all such parish indentures of apprenticeship there shall be annexed to the covenant for maintenance a proviso, that such covenant shall not continue longer than three calendar months after the death of such master or mistress; but if such proviso be omitted, the covenant on the part of the master or mistress to maintain the apprentice shall continue only for three calendar months after his or her death: within which three calendar months, by § 2., two justices of the peace where the master or mistress died shall, on the application of the widow of such master, or the husband of such mistress, or of any son, daughter, brother, or sister, or of any executor or executrix, administrator or administratrix, of the deceased, by indorsement on the indenture, direct the apprentice to serve another master for the remainder of his term. And by § 3., the same regulations, which are above directed to take place on the death of any original master or mistress, shall also take place on the death of any subsequent master or mistress. By § 4., if no application be made to two justices within the three months, or if, on application, the two justices should not think fit to continue such apprenticeship, the indentures shall be void. But by § 5. this act shall not extend to any parish apprentice not living with and serving such original or subsequent master or mistress at the time of his or her death. By § 6. if the original master or mistress, or any subsequent master or mistress, or the personal representative of such master or mistress, having assets, during the three months, shall refuse or neglect to maintain and provide for such apprentice according to the form of such covenant, two justices, on complaint of the apprentice, or the parish officers, may levy sufficient for the purpose by distress and sale of the effects or assets of such master or mistress.]

(H) Of Servants' Wages, how recoverable.

9 Co. 88. a. b. **I**T is clearly agreed, that if a person retains a servant, and 2 Roll. Rep. 269. ||And see White v. Cuyler, 6 Term Rep. 176. If a master turn away a servant without a previous warning, the servant is entitled to a month's wages. Robinson v. Hindman, 5 Esp. 235; but it is otherwise if the servant be dismissed for misconduct. Spain v. Arnott, 2 Stark. 256.||

Brownl. 54.

So, if a man be retained in *London*, to serve beyond sea, he may have his action for his wages in *England*, and lay his action in any country, in like manner as an obligation bearing date at *Roan* in *France* may be sued in *England*, alleging the place to be in such a country where he brings his action.

Bridgm. 119.
||(a) This
section of the

“As to the jurisdiction of justices of peace herein, by the
“5 Eliz. c. 4. § 15. (a) for the declaration and limitation what
“wages

“ wages servants, labourers, and artificers, either by the year or
 “ day, or otherwise, shall have and receive, it is enacted, That
 “ the justices of peace of every shire, riding, and liberty, within
 “ the limits of their several commissions, or the more part of
 “ them, being then resident within the same, and the sheriff of
 “ that county, if he conveniently may, and every mayor, bailiff,
 “ or other head officer within any city or town corporate,
 “ wherein is any justice of peace, within the limits of the said
 “ city or town corporate, and of the said corporation, shall
 “ yearly at every general sessions first to be holden and kept
 “ after *Easter*, or at some time convenient within six weeks next
 “ following every of the said feasts of *Easter*, assemble them-
 “ selves together; and they so assembled, calling unto them
 “ such discreet and grave persons of the said county, or the said
 “ city, or town corporate, as they shall think meet, and con-
 “ ferring together, respecting plenty or scarcity of the time, and
 “ other circumstances necessary to be considered, shall have
 “ authority by virtue thereof, within the limits and precincts of
 “ their several commissions, to limit, rate, and appoint the wages,
 “ as well of such and so many of the said artificers, handi-
 “ craftsmen, husbandmen, or any other labourer, servant, or
 “ workman, whose wages in time past hath been by any law or
 “ statute rated and appointed, as also the wages of all other
 “ labourers, artificers, workmen, or apprentices of husbandry,
 “ which have not been rated, as they the same justices, mayor,
 “ or other head officers, within their several commissions or
 “ liberties, shall think meet by their discretions to be rated,
 “ limited, or appointed by the year, week, month, or otherwise,
 “ with meat and drink, or without meat and drink; and what
 “ wages every workman or labourer shall take by the great for
 “ mowing, reaping, or threshing of corn and grain, or for mow-
 “ ing or making of hay, or for ditching, paving, railing, or
 “ hedging by the rod, perch, lugg, yard, pole, rope, or foot, and
 “ for any other kind of reasonable labour or service,” &c.

statute of
 Eliz. is re-
 pealed by
 53 G.3. c. 40.¶

In the construction of this statute, the following opinions have been holden:—

That though the statute only gives the justices power to set the rate for wages, and not to order payment, yet grafting hereupon they may now, from the frequent practice, and the indulgence the law gives to remedies for wages, order payment, as well as assess the rates.

10 Mod. 69. Sess. Cas. 35. pl. 37. Case of Set. and Rem. 234. 2 Salk. 411. pl. 5. 442. pl. 5. 484, 485. 3 Salk. 262. Stra. 8.

¶ By 20 Geo. 2. c. 19. § 1. it is enacted, that complaints and differences between masters and servants in husbandry, hired for one year, or longer, or between masters and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers (*a*), shall be determined by one or more justices of the county, &c. where such master, &c. shall reside, although no rate or assessment of wages has been made that year by the justices, &c. where such complaints shall be made;

2 Ld. Raym.
 820, 821.
 Fortesc. Rep.
 317, 318.
 6 Mod. 91.
 204.

(*a*) This provision extends to *all* labourers, not merely those in the occupations mentioned.
 Lowther v. Radnor,
 8 East, 115.

But a person employed by an attorney to keep possession of goods under a *fi. fa.* is not within the act. *Branwell v. Penneck*, 7 Barn. & C. 536.
 (b) Replevin cannot be maintained for a distress under this clause. *Wilson v. Weller*, 1 Brod. & B. 57.
 3 Moo. 294. S. C.

made; which justice or justices are empowered to examine upon oath such servant, artificer, &c., or any other witness touching such complaint, and to make such order for payment of so much to such servant, &c. as shall seem meet, not exceeding 10*l.* as to a servant, and 5*l.* as to an artificer, &c.; and in case of refusal or nonpayment of any sums so ordered, for twenty-one days after such determination, such justice shall issue his warrant to levy the same by distress (b) and sale, rendering the overplus to the owner, after payment of charges of distress and sale.

By 4 G. 4. c. 34. § 2. justices, in case of disputes between masters and their apprentices, may order payment of wages to apprentices, provided the sum in question does not exceed 10*l.*; and by § 4., in the case of absence of masters, power is given to justices, upon the complaint of servants in husbandry, to summon such masters' stewards or agents, and to make an order upon them for the payment of wages, provided the sum does not exceed 10*l.*, and in case of non-compliance therewith to levy the same under their warrant by distress. And by § 5., every justice before whom any complaint shall be made in pursuance of the 20 G. 2. c. 19., or 31 G. 2. c. 11., may order the amount of wages due to any servant in husbandry, artificers, labourers, or other persons named in the acts to be paid within a proper period, and on refusal to be levied by distress and sale. ||

Hil. 8 G. 2.
Shergold and Halloway, in *B. R.*

That though a single justice may compel payment, yet the power of settling wages is only in the sessions; and that a single justice cannot arrest the party refusing to pay in the first instance.

2 Stra. 1002. S. C. 2 Ses. Cas. 100. pl. 100. S. C.

Ca. Law and Eq. 68.
 6 Mod. 91.

That justices of peace have no jurisdiction to judge of wages, except in case of husbandmen; but yet the court in favour of servants will always, unless the contrary appears upon the face of the order, presume servants to be servants in husbandry, and will admit of no collateral proof to the contrary.

2 Jon. 47.

But an order, that a person shall pay so much to his coachman, was quashed; for here it appears upon the face of the order, that he is not a servant in husbandry.

6 Mod. 204,
 205.

And on the authority of this case it hath been held, that the justices cannot make orders for the payment of footmen bricklayers, carpenters, &c. servants' wages; because their jurisdiction is confined to the wages of such servants whom they may compel to serve according to the statute.

2 Salk. 442.
 pl. 5.
 6 Mod. 204.
Fortesc.
Rep. 317.
Case of Set.
 & *Rem.* 234.
 2 Salk. 261.
 pl. 20.

So, where, upon the face of the order, it appeared to be for the payment of the wages of two persons retained by A., overseer of the works in the gardens of *Hampton Court*, the order was quashed. But in this case it was held, that had the order been general, — *viz.* to pay so much to two of his labourers, or two of his servants, — the court would have supposed them servants in husbandry; but that here there was no room for such an intendment, since the contrary appeared.

So, where one *Rycraft*, a justice of peace in *Middlesex*, made an order for the payment of a seaman's wages; upon an action brought against him, the plaintiff recovered 30*l.* damages. 5 Mod. 140.

[It hath been holden, that this statute extends to covenant-servants, if in husbandry. Reg. v. Cecil, 2 Ld. Raym. 1505.]

11 Mod. 266. S. C. || See the 55 G. 3. c. 40. ||

But if the order bear upon the face of it, that it was made upon the oath of the servant, it will be quashed; for there is no necessity to resort to the oath of the party in this case, since evidence may be given of the service.] *Id. ibid.*

(I) What Acts of the Servant are deemed the Master's, of which the Master may take Advantage.

THERE are several acts which, being done by a servant, will be equally effectual and advantageous as if done by the master himself. Hence it is held, that continual claim made by a servant is good; as, if he enters into a part, and claims, &c. or if the master says that he dares not go to any part of the land, nor approach nearer than *D.*, and commands his servant to go to *D.* and claim, and the servant does so; this is sufficient, though the servant had no fear, for he doth as much as he was commanded to do, and all that his master durst or ought by the law to do. Lit. § 435. Co. Lit. 257. b.

But if the master be in health, and command his servant to go to the land and claim, &c., in this case, a claim made by the servant, as near as he dares, is void, for he does not do all that he is commanded, nor so much as the master durst have done. Lit. § 435. Co. Lit. 258. b.

But if the master be sick, or a recluse, (one who, by reason of his order, cannot go out of his house,) and he command his servant to go and claim for him, and the servant go as near as he dares by reason of fear, &c., this is sufficient, though the command were to go to the land; and yet, regularly, when a servant doth less than he is commanded, his act is void; but when a servant exceeds his master's command, it is void only so far as he hath exceeded. Co. Lit. 258. a.

If a feoffment with livery be made of land, the servant of the owner being in possession, the livery is void, though made with the consent of the servant; for the servant continuing in possession, it must be only for the use and benefit of him that placed him there, and consequently the possession of the servant must be looked upon as the possession of the master; and the servant having no interest, but in right of his master, his consent was void, and he could neither make a surrender, nor a tenancy at will, to the feoffor. 2 Roll. Abr. 5.

The master hath an interest in the labour and acquisitions of his servant, and his acts herein are said to be for the benefit of the master, according to the rule, *Quicquid acquiritur servo acquiritur domino*; but the master of a hired servant cannot maintain trover for any property acquired by the servant; nor can he Co. Lit. 117. a.

he have any other remedy against a person who employs him but an action on the case, *per quod servitium amisit*.

Salk. 68.
pl. 8. Barber
and Dennis,
12 Mod. 415.

But it is otherwise of an apprentice; and therefore where a waterman's widow took an apprentice, who went to sea, and earned two tickets, which came to the defendant's hands; the widow brought trover, and had judgment; for what the apprentice gains, he gains to his master; and whether legally apprentice or not, is no ways material, for it is enough if he be so *de facto*.

Godb. 360,
361. Seignior
and Walmer.

It is said, that the master shall have advantage of his servant's contracts, in the same manner as he shall be bound by them, as to those matters which come within his compass as a servant; as where a servant was sent by a master to a debtor, and appointed by him *ad componendum et agreandum* the money due from the debtor; and there being a promise made to the servant, to pay what was due upon the balance and agreement, it was held, that the master might maintain an action in his own name, on the promise to his servant.

Lightly v.
Clouston,
1 Taunt. 112.
Foster v.
Stewart,
3 Maul. & S. 191.

|| The master of an apprentice, seduced to work for another, may either sue in tort for the seduction, or may bring *assumpsit* for work and labour done by the apprentice for the person who seduced him and employed him.||

Stamf. 60.
Bro. tit.
Appeal, 92.

If the servant is robbed of the master's goods, the master or servant may have an appeal.

Latch, 127. S.P.; and he that begins first shall recover, and prevent the other of his action.
Per Dodderidge.

Roll. Abr. 98.
Cro. Jac. 223.
[Where a

If a servant is cozened of his master's money, the master may have an action on the case against the cozenor.

clerk had embezzled notes and money belonging to his master to a considerable amount, which he had paid away to the defendant, in the insurance of tickets in the lottery, which insurance was contrary to the statute of 12 G. 3. c. 5. § 56.; it was holden, that as these notes and money were not paid *bonâ fide*, but for an illegal consideration, and their identity could be traced, the master should recover them. *Clarke v. Shee*, Cowp. 197.] || See also *Solomons v. Bank of England*, 13 East, 155. n.||

But for this
*vide tit. Hue
and Cry*.

If a servant be robbed of his master's money, though in the absence of his master, the master may maintain an action for it against the hundred.

(K) What Acts of the Servant shall be deemed the Master's, for which the Master shall answer and be bound.

THE reason why the acts of a servant are, in many instances, esteemed the acts of the master, arises from the relation between a master and servant; for, as in strictness every body ought to transact his own affairs, and it is by the favour and indulgence of the law that he can delegate the power of acting for him to another, it is highly reasonable that he should answer for such substitute at least *civiliter*; and that his acts, being pursuant to the authority given him, should be deemed acts of the master.

Therefore,

Therefore, if a servant sells a piece of cloth, and warrants it to be good, an action of deceit lies against the master. 11 East, 4. 6.

So, if a man brings a horse to a smith to be shod, and the servant pricks it; or if the servant of a surgeon makes the wound worse; in both these cases an action lies against the master. 5 Co. Pilkington's case. 2 Roll. Abr. 693. Cro. Eliz. 181.

So, if the servant of a taverner sells wine to another which is corrupted, an action on the case lies against the master, though he did not command the servant to sell it to any (*a*) particular person. 9 H. 6. 53. Roll. Abr. 95.

horse, or other merchandize, in a fair, no action lies against the master, unless he commanded him to sell to a particular person. 9 H. 6. 53. Roll. Abr. 95. S. C. Fitz. *Action sur la Case*, 5. S. C. Poph. 143. and 2 Roll. Rep. 6. S. C. cited.—But if by the command and covin of the master he sells to a particular person, an action lies against the master, for it is then his own sale. 9 H. 6. 53. Roll. Abr. 95. Bridgm. 128. S. C. cited. || A servant, however, employed to sell a horse has an implied authority to warrant that it is sound. *Alexander v. Gibson*, 2 Camp. 555.; and in the case of a general agent the master will be bound by the warranty, though made contrary to his express directions. *Per Ashhurst J. in Fenn v. Harrison*, 3 Term Rep. 761. ||

So, if a goldsmith makes plate, wherein he mingles dross, so that it is not according to the standard, and by his servants sells it; an action lies against the master, because it fails in the price in silver. Cro. Jac. 471. 2 Roll. Rep. 28.

But if *A.* being possessed of certain artificial and counterfeit jewels, of the value of 168*l.*, and, knowing them to be such, delivers them to *B.* his servant, commanding him to transport the said jewels to *Barbary*, and to sell them to the king of *Barbary*, or such other person as would buy them; but (*b*) gives *B.* no charge to conceal their being counterfeit; and thereupon *B.* goes into *Barbary*, and, knowing those jewels to be counterfeit, shews them to *C.* for good and true jewels, and affirming to *C.* that they were worth 810*l.*, and desires *C.* to sell them to the said king for 810*l.*, which money *C.* pays *B.*, and *B.* thereupon immediately returns to *England*, and pays the 810*l.* to *A.* his master; and after the jewels being discovered to be counterfeit, *C.* is imprisoned by the said king till he repays the 810*l.* out of his own effects; of all which matters *C.* gives notice to *A.*, and demands satisfaction, &c.; yet no action lies against *A.*, for jewels are in themselves of an uncertain value, and *B.* was not by *A.* particularly directed to *C.*, and all that was done *quoad C.* was the voluntary act of the servant, for which the master is not bound to answer. 2 Roll. Rep. 5. 26, 27. Bridg. 125. Poph. 143. Cro. Jac. 469. Southern v. Haw.

King *E. 6.* sold a quantity of lead to *A.*, and appointed the Lord *North*, who was then chancellor of his Court of Augmentations, to take bond for payment of the money; the Lord *North* appointed one *B.*, who was his clerk, to take the bond, which was done, who delivered it to the lord; and he delivered it back again to his clerk, in order to send it to the clerk of the Court of Augmentations: *B.* suppressed this bond: and it was held by all the judges, that the Lord *North* was chargeable to the king; because the possession of the bond by his servant, and by his order, was his own possession. Dyer, 161. a. pl. 48. 3 Mod. 333. S. C. cited.

So, where an officer of the customs made a deputy, who concealed the duties, and the master, being ignorant of the concealment, Dyer, 258. b. pl. 38.

5 Mod. 323.
S. C. cited.

4 Leon. 125.
Seaman and
Browning.

5 Mod. 323.
S. C. cited.

Carth. 487.
Salk. 17.

pl. 8. 145.

5 Mod. 455.

Ld. Raym.

646. Comyns,

100. pl. 68.

Lane v. Robert

Cotton and

Sir Thomas

Frankland,

12 Mod. 482.

[(a) This

opinion of the

three judges

hath since

been confirm-

ed by the

decision of

the Court of

K. B. in

Whitfield v.

Lord Le

Despencer,

Cowp. 754. in

which case it was

holden, that the

postmaster was

liable only for

personal neglect

or misconduct.]

|| And see

Gidley v. Lord

Palmerston, 5

Brod. & Bing.

275.]

|| In the last

case, the post-

masters-general

were held not

liable,

though they

had the appoint-

ment of their

servants. Where

the public officer

has not the appoint-

ment of his serv-

ants, this is an

additional ground

for exempting

him from liability.

Thus, the

captain of a ship

of war was held

not answerable

for damage

done by running

down another

vessel, the mis-

chief happening

during the watch

of the lieutenant

who was on deck,

and who had

the management

of the navigation

of the vessel at

the time, and it

not being the

captain's duty

to be there; for

here there was

no personal order

given by the

captain, and the

lieutenant was

not his servant,

he having no

power of appoint-

ing or dismissing

him, but both

he and the lieuten-

ant being servants

of his majesty.]

It hath been

held, that owners

of ships were

answerable to

freighters for

the acts of the

masters and

mariners, in

the same man-

ner as other

masters are

for their serv-

ants; and should

answer for

their embezz-

lements, secre-

ting of goods,

&c. But this

proving a great

discouragement

to trade, by

the 7 G. 2. c.

15. it is

provided, that

for such embezz-

lements, &c.,

without the

owners' know-

ledge, the own-

ers shall only

forfeit the value

of the ship or

vessel, with

all her appur-

tenances, and

the full amount

of the freight

due, or to grow,

for and during

the voyage

wherein such

embezzlement,

&c.

The acts of a

servant are

deemed the

acts of the

master, in

dealing and

contracting

for his master,

in those things

in which

ment, certified the customs of that part of the revenue into the Exchequer upon oath; he was adjudged to be answerable for this concealment of his servant.

So, where the lessor was bound, that the lessee should quietly enjoy; and it was found, that his servant by his command, and he being present, entered; this was held to be a breach of the condition, for the master was the principal trespasser.

Two are constituted postmasters-general by letters patent, pursuant to the statute 12 Car. 2. c. 35., and in the patent there is a power to make deputies, and appoint servants at their will and pleasure, and to take security of them in the name and use of the king; and that they, the postmasters-general, shall obey such orders as from time to time should come from the king; and as to the revenue, shall obey the orders of the treasury: and it is farther granted to them, that they shall not be chargeable for their officers, but only for their own voluntary faults and misbehaviour; and this granted with a fee of 1500*l.* per annum. And *A.* having Exchequer-bills, encloses them in a letter, directed to *B.* at *Worcester*, and delivers it at the post-office at *London*, into the hands of *J. S.*, who was appointed by the postmaster-general to receive letters, and had a salary; the letter having miscarried, and the Exchequer-bills lost, it was held by three judges (*a*), against *Holt C. J.*, that the postmasters-general are not liable; and this, from the multiplicity of servants they are obliged to employ, and against whom it is impossible for them to secure themselves, the inconsiderableness of the *premium*, &c.

|| And see *Gidley v. Lord Palmerston*, 5 Brod. & Bing. 275.]

|| In the last case, the postmasters-general were held not liable, though they had the appointment of their servants. Where the public officer has not the appointment of his servants, this is an additional ground for exempting him from liability. Thus, the captain of a ship of war was held not answerable for damage done by running down another vessel, the mischief happening during the watch of the lieutenant who was on deck, and who had the management of the navigation of the vessel at the time, and it not being the captain's duty to be there; for here there was no personal order given by the captain, and the lieutenant was not his servant, he having no power of appointing or dismissing him, but both he and the lieutenant being servants of his majesty.]

It hath been held, that owners of ships were answerable to freighters for the acts of the masters and mariners, in the same manner as other masters are for their servants; and should answer for their embezzlements, secreting of goods, &c. But this proving a great discouragement to trade, by the 7 G. 2. c. 15. it is provided, that for such embezzlements, &c., without the owners' knowledge, the owners shall only forfeit the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due, or to grow, for and during the voyage wherein such embezzlement, &c.

The acts of a servant are deemed the acts of the master, in dealing and contracting for his master, in those things in which

Vent. 190. 235.

Raym. 220.

2 Keb. 72.

112. 135.

Mod. 85.

2 Lev. 69.

Morse v.

Sluce,

2 Salk. 440.

pl. 1. Carth. 58.

3 Lev. 259.

Boson

v. Sanford.

Doct. & Stud.

Dial. 2. c. 42.

he has a general authority; as (a), if a servant usually buys for the master on tick, and the servant buys some things without the master's orders, yet, if the master were trusted by the trader, the master is chargeable, though the things never came to the master's (b) use.

2 Vern. 643.
Comb. 450.
1 Ld. Raym. 224.
3 Salk. 234.
pl. 4.
(a) Show. 95.

so ruled upon evidence by *Holt* C. J. (b) That coming to the master's use, clearly implies an authority from the master, and shall charge him. *Brownl.* 64.; ¶and see *Precious v. Abel*, 1 *Esp.* 550. But it is otherwise if from the nature of the case an authority cannot be implied, see *Hiscox v. Greenwood*, 4 *Esp.* 174.¶

But if a man sends his servant with ready money to buy meat, or other goods, and the servant buys upon credit, the master is not chargeable.

Show. 95.
Per Holt
C. J. ¶*Rusby*
v. Scarlett,

5 *Esp.* 76. *Pearce v. Rogers*, 5 *Esp.* 214. *Stubbing v. Haintz*, *Peake*, 47.¶

So, if the master had forbidden the tradesman to trust his servant, this shall excuse the master on evidence. *Brownl.* 64.

And herein it is said, that a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him; which general authority is not liable to be (c) determined for a time, by any particular orders or instructions, to which none but the master and servant are privy; for that if this should prevail, there would be an end of all dealing but with the master.

Ca. Law and
Eq. 110.
(c) A case
cited between
Monk and
Clayton,
where the act
of a servant,
though out of

place, bound his master, by reason of the former credit given him by his master's service, the other not knowing that he was discharged.

If a master sends his servant to receive money, and the servant instead of money takes a bill, and the master, as soon as told thereof, disagrees, he is not bound by this payment; but acquiescence, or any small matter, will be (d) proof of the master's consent; and that will make the act of the servant the act of the master.

2 Salk. 442.
pl. 4.
5 *Mod.* 398.
6 *Mod.* 36.
Ld. Raym.
928.
Com. Rep.
138. pl. 92.

Ward and Evans, and *vide* 10 *Mod.* 109, 110. 11 *Mod.* 72. ¶*Maunder v. Conyers*, 2 *Stark.* 281.¶ (d) If a merchant's apprentice draws a bill in this manner, *I promise to pay such a sum for my master*; to charge the master with this note, it is said, there ought to be either an authority precedent, or a consent subsequent; or that the master had intrusted him with his affairs; otherwise the master shall not be chargeable. *Comb.* 450. *Ld. Raym.* 224. 3 *Salk.* 234. pl. 4. ¶And where a party has dealt with a tradesman on credit, it is not sufficient to give notice to the tradesman's servant, that he means to pay ready money in future; it must be given to the tradesman himself. *Greatland v. Freeman*, 3 *Esp.* 85.¶

If *A.* brings case against the master of a stage-coach, on the custom of the realm, for a trunk lost by his negligence; and on evidence it appears that the trunk was delivered to the servant who drove the coach, who promised to take care of it, and that the trunk was lost out of his possession; the action does not lie against the master; for a stage-coachman is not within the custom as a (e) carrier is, unless he take a distinct price for the carriage of goods, as well as persons; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom; for no master is chargeable with the acts of his servant, but when he acts in execution of the authority

Salk. 282.
pl. 11. ruled
by *Holt* at
nisi prius,
and the
plaintiff
non-suited
accordingly.
(e) That if a
carrier's por-
ter receives
goods, the
carrier shall

be liable. given by his master; and then the act of the servant is the act
Comb. 118. of the master. (a)

Per Dolben J.

(a) Most, if not all, stage-coaches now carry goods for hire, and therefore come within the description of arriers.

Maunder v. || A master is not responsible for goods ordered by his servant,
Conyers, in the master's name, but without his authority, unless he has on
2 Stark. Ca. former occasions paid for goods ordered by him, or there is some
281. Todd v. other evidence to shew that the servant had authority.||
Robinson,

1 Ry. & Moo. 217. Gilman v. Robinson, *ibid.* 226.

2 Salk. 441. The master must answer for torts and injuries done by his
pl. 2. *per* servant in execution of his authority; as, where a pawnbroker's
Holt C. J. servant took a pawn, the pawner came and tendered the money
at nisi prius at to the servant, who said he had lost the goods; upon which the
Guildhall. pawner brought trover against the master, and it was held well.
Ld. Raym.
738. Cas. temp. Holt, 642. pl. 3.

2 Salk. 441. So, where a servant of *A.* with his cart run against another
pl. 2. cited cart, wherein was a pipe of sack, and overturned the cart, and
Ld. Raym. spoiled the sack; it was held, that an action lay against *A.*
739.

2 Salk. 441. So, where a carter's servant run his cart over a boy; it was
pl. 2. cited held, the boy should have his action against the master, for the
Ld. Raym. damage he sustained by his negligence.
739.

Vent. 295. So, where the servant of *A.* brought a coach and two ungo-
2 Lev. 172. vernable horses of his master's to *Lincoln's Inn Fields*, a place
3 Keb. 650. much frequented by people, and there drove them to make them
Michel and tractable, and fit them for a coach; and the horses being unruly,
Alestreet. || See and for want of care, &c., ran upon the plaintiff, and hurt and
Bush v. wounded him; in an action brought both against the master and
Steinman, servant, it was held that it well lay; and that it shall be intended
1 Bos. & Pul. the master sent the servant to train the horses there.
404. Mat-
thews v. West,
London Water-works Company, 5 Camp. 403. Harris v. Baker, 4 Maul. & S. 27.

M^cManus v. || In the last case in the text, there was no wilful misconduct in the
Crickett, servant; but if a servant in driving a carriage, in order to effect some
1 East, R. 106. purpose of his own, wantonly strike the horses of another person,
Croft v. and produce an accident, the master is not liable; and it is a ques-
Alison, 4 Barn. tion for the jury, whether the mischief arose from accident, or
& A. 590. mere negligence in the servant, or whether it arose from his wilful
misconduct.

Croft v. Where the carriage or horses are jobbed, as it is called,
Alison, 4 Barn. questions have arisen, whether the hirer is answerable, as master,
& A. 590. for mischief happening from the negligence of the coachman.
Laugher v. Where the party appoints the coachman, and furnishes the horses,
Pointer, and hires the carriage, it has been held that he is well described
5 Barn. & C. as the owner and proprietor of the carriage, and there can be no
547.; and see doubt he would be held liable, as master, for the negligence of
Dean v. the coachman in driving it. But where the owner of a carriage
Branthwaite, hired the horses for the day, to draw it, and the owner of the
5 Esp. Ca. 55. horses appointed the coachman; in an action brought against the
Sammell v. owner
Wright, *ibid.*

owner of the carriage, for damage occasioned by the negligence of the coachman, *Abbott C. J. and Littledale J.* held, that the defendant was not liable, since the coachman was not his servant. *Bayley J. and Holroyd J.* held, however, the contrary.||

[It was lately ruled on the authority of the precedent in *Turberville v. Stampe*, 1 Ld. Raym. 264. 3 Ld. Raym. 375. that a declaration charging the *master*, the defendant, with having negligently driven his cart against the plaintiff's horse, was supported by evidence, that the *servant* drove the defendant's cart.]

|| In the civil law the responsibility for injuries done by a servant was confined to cases of menial or domestic servants, to whom the party stood in the relation of *paterfamilias*. Our law does not admit this restriction. *A.* employed *B.*, a surveyor, to repair his house; *B.* contracted with *C.*, a carpenter, to do the work, who contracted with *D.*, a bricklayer, for the bricklayer's work; and *D.* contracted for the lime with *E.*, a limeburner; and *E.*'s servant improperly laid the lime in the road, by which the plaintiff's carriage was overturned. *A.*, the owner of the house, was held answerable for the act to the plaintiff. In such cases the intermediate agents are not liable; the action must be brought either against the hand committing the injury, or against the superior for whom the act was done.||

Adam, 3 Taunt. 514. *Stone v. Cartwright*, 6 Term Rep. 411.

(L) For what Acts of his shall the Servant himself answer to others.

IF a master command his servant to do what is lawful, and he misbehave himself, or do more, the master shall not answer for his servant, but the servant for himself, for that it was his own act; otherwise it would be in the power of every servant to subject his master to what actions or penalties he pleased.

1 Taunt. 568. *Nicholson v. Mounsey*, 15 East, 584. *Croft v. Alison*, 4 Barn. & A. 590.||

And on this foundation it hath been ruled, that if a man command his servant to do a lawful act, as to pull down a little wooden house, (wherein the plaintiff was, and would not come out, and which was carried upon wheels into the land, to trick the defendant out of possession,) and bid him take care that he hurt not the plaintiff; if, in doing this, the servant hurt the plaintiff, in trespass of assault and wounding brought against the master, he may plead not guilty, and give this in evidence; for that he was not guilty of the wounding, and the pulling down the house was a lawful act.

But it is laid down as a rule, that in every case where the master has not power to do a thing, whoever does it by his commandment is a trespasser as well as the master.

If a master locks a man into his house, and delivers the key to his servant, if the servant be ignorant that any body be there, the

263. *Chilcot v. Bromley*, 12 Ves. 114.

Brucker v. Fromont, 6 Term Rep. 659.

Inst. lib. 4. tit. 5. § 1. Dig. lib. 9. tit. 3. *Bush v. Steinman*, 1 Bos. & Pul. 409.; and see *Leslie v. Pounds*, 4 Taunt. 649. *Matthews v. West London Water-works Company*, 3 Camp. 402. *Flower v.*

6 Term Rep. 411.

Skin. p. 228. pl. 7. || See *McManus v. Crickett*, 1 East, 106. *Bowcher v. Noidstrom*,

Skin. 228.

8 E. 4. 45. *Per Choke*.

22 E. 4. 45. *Per Jenny*.

servant is not chargeable; but if he know that the master had imprisoned one tortiously, and he still kept him in prison, he is liable to an action.

Stephens v. Elwall, 4 Maule & S. 259. || A servant may be charged in trover, although the act of conversion be done by him for the benefit of his master.||

Roll. Abr. 95. (a) If the attorney in an action of debt knows of, and was witness to, a release of the debt, made before the action brought for it; yet no action lies against the attorney, || by the defendant, || for he acted only as a servant, and in the way of his calling. Mod. 209. [*Sed qu.*]

Roll. Abr. 95. If the servant of A. lease lands to another for years, reserving a rent to A., and, to persuade the lessee to accept thereof, he promise that he shall enjoy the land during the term, without incumbrances; if the land be incumbered, &c., the lessee may have an action on the case against the servant, because he made an express (b) warranty.

2 Roll. Rep. 270. Broking v. Came. (b) If one command his servant to sell an ill horse, and the servant sell him for a good one, whereby the servant is arrested and indamaged, yet the servant shall not have his remedy against his master. Cro. Jac. 471. * Qu. If the servant did not know it was was an ill horse? *

Yelv. 157. If a man draws a bill, to which he puts his seal, in this form: *Memorandum, That I have received of J. S., to the use of my master, the sum of 40l., to be paid at Michaelmas following*; the servant is liable hereby, for though in the premises it is said to be to the use of his master, yet the payment being indefinite, must be understood to be by him who sealed the bill: but it is said, that if it had been to be repaid by his master, that (c) the servant had not been liable.

Talbot v. Godbolt. (c) Whether he who speaks for or fetches goods for his master, without any particular promise of paying for them, is liable to pay for them; and where, upon the circumstances of such a case, though he may be held liable at law, a court of equity will relieve; vide Preced. Chan. 46. Abr. Eq. 308.

Mich. 7 G. 2. in B. R. Thomas v. Bishop. 2 Kel. 156. pl. 116. S. C. 2 Barnard. K. B. 320. S. C. 2 Stra. 955. S. C. || And see Lefevre v. Lloyd, 5 Taunt. 749. Goupy v. Harden, 7 Taunt. 159. Chit. on Bills, 27. (7th edit.) ||

So, Mr. Mildmay, agent to the York Buildings Company, residing in Scotland, drew a bill of exchange in favour of J. S., on their cashier in London; which bill run thus: "To — Bishop, Cashier to the Honourable Governor and Assistants of the York Buildings Company, at their house in Winchester Street. Sir, pray pay to J. S., or his order, 200l., and place it to the account of the Company for value received, as per advice, by your humble servant, Charles Mildmay." The letter of advice referred to was directed to the governor and company, informing them of the draught made upon Mr. Bishop, in favour of J. S. (but it did not appear that this was the usual method of drawing bills on the company); Mr. Bishop accepted the bill generally, viz. Accepted by J. Bishop; and if this acceptance should charge him in his own right, was the question? It was saved for the judgment of the court, after a verdict at *nisi prius* for the plaintiff; and it was resolved it should.

(M) For what Acts of his shall the Servant answer, and be responsible to his Master: And herein,

1. *Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.*

IF a man commits money to his servant to carry to such a place, and he is robbed, the servant shall not answer for it; for a servant only undertakes for his diligence and fidelity, and not for the strength and security of his defence, and therefore shall not be obliged to preserve his master's property at all adventures. And herein the law, as now settled, makes a difference between a servant and another independent person; for every other person has naturally no more than the single care of his own affairs, and is not bound in point of duty to defend or intermeddle with the property of another; but where he will officiously create to himself such an undertaking, he is obliged to answer the loss, if any happen; but a servant is, by the duty of his place, under the command of his master, and is bound, in point of necessity, to take care of another's affairs. Now the first contract, whereby he becomes a servant, implies no more than an undertaking for his care and obedience; and whenever he afterwards intermeddles in the affairs of his master, it is but in consequence of that original contract, and therefore cannot be extended any further; and since, when he first contracted, it was no more than an undertaking for his own care and fidelity, whenever he intermeddles with his master's affairs, it is under that general undertaking, and, by consequence, he cannot be charged but for deficiency in point of care, or of faithfulness; and therefore is not answerable for any inevitable accident.

8 Co. 84. and
vide tit.
Bailment.

But if *A.* is employed by *B.* to sail from *England* to the *Indies*, and *A.* covenants that he or his servants will not thence import any calicoes, &c., and *A.* retains *C.* as his servant in this voyage, and acquaints him with the covenants, and notwithstanding *C.* falsely and fraudulently brings thence certain calicoes, &c., *A.* shall have an action against *C.*, for though no action lies by a master for the bare breach of his command, yet if a servant does any thing falsely and fraudulently, to the damage of his master, an action will lie.

Sid. 298. Lev.
188. 2 Keb.
88. Hussey
and Pacey.

So, if a merchant's servant takes his master's goods that are arrived at a port in *England*, and, before payment of the customs, lands them, *per quod* the goods are forfeited and seized by the king; the master may have an action of trespass upon the case against his servant.

Roll. Abr. 105.
Cro. Jac. 265.
Lane, 65. S.C.
Leveson v.
Kirk.

So, if a servant, that drives his master's cart, by his negligence suffers the cattle to perish, an action upon the case lies against him.

7 H. 4. 14.
Bro. tit. Action
sur Case, 34.

If a man deliver a horse to his servant to go to market, or a bag of money to carry to *London*, which he neglects to do, the master may have an action of account or detainee against him.

21 H. 4. 14.
Moore, 248.

10 Mod. 109.
Nixon v.
Brohan.

A master sends his servant, that used to transact affairs of that nature for him, on *Saturday* morning with a note drawn upon Sir *Stephen Evans*, with order to get from Sir *Stephen* either bank bills or money, and turn them into exchequer notes; but the servant having other business of his master's upon his hands, to save himself the time and trouble of going to Sir *Stephen*, goes to *B.* and prevails with him to give him a bank bill for Sir *Stephen's* note, and then in pursuance of his master's orders invested it in exchequer notes, which he brought to his master, not letting him know but that he had gone to Sir *Stephen*; Sir *Stephen Evans* failing on the *Monday* following, it was adjudged, that this loss should fall on the master, and not on *B.*; and the court was of opinion that the master could not recover it of the servant, the loss being occasioned by a mere accident, and not by either folly or negligence.

2. *Where Servants or Apprentices shall be punished criminally, for Acts done in relation to their Masters.*

Hale's Hist.
P. C. 505.
666.

At common law, a servant or apprentice, without any regard to age, might be guilty of felony in feloniously taking away the goods of their master, though they were goods under their charge, as a shepherd, butler, &c., and may at this day for any such offence be indicted, as for a felony at common law; but at common law, if a man had *delivered* goods to his servant to keep or carry for him, and he carried them away *animo furandi*, this was considered only a breach of trust, but not felony.

Hale's P. C.
505. note.

2 East, P. C.
c. 16. § 14.
p. 564. Russell
on Cri. b. 4.
c. 66.

¶ This, however, was never settled law; it was only *doubtful* whether a servant could commit larceny of goods delivered to him by the master to keep or carry; the stat. 21 H. 8. c. 7. (*post*, 375.) recites such *doubts* whether it were felony or not; but subsequent decisions have long established the contrary doctrine, *viz.* that where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting them to his own use. This rule appears to hold universally in the case of servants, whose possession of their master's goods, by *delivery* or permission from the master, is now held the possession of the master himself. Thus, where a mercer's book-keeper having received bills from his master to enclose to correspondents, in the usual course of business, and instead of enclosing them he got cash for them, and absconded with it; the judges were of opinion that this was larceny, as the possession still continued in the master. So, where the prosecutors (cornfactors) had purchased a cargo of oats in a vessel lying in the *Thames*, and they sent the prisoner, who was employed in their service as a lighterman, with their barge to the cornmeter for as much of the oats as the barge would carry, and the prisoner received a quantity of oats, and embezzled part; the judges held it larceny, considering it a taking from the actual possession of the owners, as much as if they were in their granary.¶

Paradise's ca.
2 East, P. C.
c. 16. § 14.
p. 565.; and see
1 Leach,
525.

Spears' ca.
2 Leach, 825.
2 East, P. C.
568.; and see
4 Taunt. 276.;
and the other
cases to the
same effect,
Russell on Cri.
b. 4. c. 16.

But

But now by the statute of 21 H. 8. c. 7. (a) it is enacted, "That all and singular servants, to whom any caskets, jewels, money, goods, or chattels, by his or their masters or mistresses shall from henceforth be delivered to keep, that if any such servant or servants withdraw themselves from their masters or mistresses, and go away with the caskets, jewels, money, goods, or chattels, or any part thereof, to the intent to steal the same, and defraud his or their masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their masters or mistresses, or else being in the service of his or their masters or mistresses, without any assent or commandment of his master or mistress, embezzle the same caskets, jewels, money, goods, or chattels, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it; that if the said casket, jewel, money, goods, or chattels, that any such servant shall go away with, or which he shall embezzle with purpose to steal as aforesaid, be of the value of 40s. or above, that then the same false, fraudulent, or untrue act and demeanour, shall from henceforth be deemed and adjudged felony, &c. Provided it extend not to apprentices, nor to any person under the age of *eighteen* years; but every such apprentice, or person within that age, doing that act, shall be and stand in the like case as they were before the making of this act."

By the act of 27 H. 8. c. 17. clergy was taken away in this case, if the indictment were laid specially upon the act of 21 H. 8. c. 7. and pursuant to the same, and by the act 28 H. c. 2. this act of 21 H. 8. c. 7. was made perpetual; but by the act of 1 E. 6. c. 12. these acts were both repealed; but again, by the act of 5 Eliz. c. 10. § 3. (b) this act of 21 H. 8. c. 7. was re-enacted and made perpetual; but it did not revive the act of 27 H. 8. c. 17. for taking away clergy. But now by 12 Ann. c. 7. clergy in such case is taken away from facts committed in any house or out-house, except as to apprentices under the age of *fifteen* years robbing their masters. (c)

In the construction of this statute the following opinions have been holden (d):

the doctrine of the common law being both changed and settled since the period, these opinions are not all law at this day, nor are any of them of much importance, but being part of the original text, the Editor has not felt at liberty to expunge them. ||

1. That it extends only to such as were servants to the owner of the goods both at the time they were delivered, and also at the time when they were stolen. Hawk. P. C. c. 33. § 12.

2. That it is strictly confined to such goods as are delivered to keep; and therefore that a receiver, who, having received his master's rents, runs away with them, or a servant, who being entrusted to sell goods, or to receive money due on a bond, sells the goods, &c. and departs with the money, is not within the statute; but that a servant who receives his master's goods from another (e) servant, to keep for the master, is as much guilty as if he had received them from the master's own hands; because such a delivery is looked upon as a delivery by the master. Dyer, 5. pl. 2, 3. 3 Inst. 105. Hawk. P. C. c. 33. § 15. (e) Or the master's wife, she being as well his mistress as if she were sole. Hale's Hist. P. C. 668.

|| (a) Repealed by 7 & 8 G. 4. c. 27.; but see the provisions of 7 & 8 G. 4. c. 29. post, 377, 378. ||

Hale's P. C. 666, 667.

|| (b) This stat. 5 Eliz. c. 10. is repealed by 7 & 8 G. 4. c. 27.

(c) Benefit of clergy is abolished by 7 & 8 G. 4. c. 28. § 6. ||

|| (d) The statute being repealed, and

these opinions

Hawk. P. C. c. 33. § 12.

Dyer, 5. pl. 2, 3. 3 Inst. 105. Hawk. P. C. c. 33. § 15.

(e) Or the master's wife, she being as well his mistress as if she were sole. Hale's Hist. P. C. 668.

Hawk. P. C.
c. 33. § 14.

3. That it includes not the wasting or consuming of goods, howsoever wilful it may be; nor the taking away of an obligation, or any other bare *chose in action*.

Crompt. 50.
Dalt. c. 102.
Hawk. P. C.
c. 33. § 15.

4. That it extends not to the taking of such things, whereof the actual property is not in the master at the time; and therefore, that if a servant having money or corn, &c. delivered to to him, melt down the money of his own head, without the command of his master, into a piece of plate, or turn the corn into malt, and then run away with them, that he is not within the statute; because the property of these things is so far changed, by altering them in such a manner, that they cannot be known again, and the master cannot afterwards take them without being a trespasser. But it is agreed, that if a servant make a suit of clothes of cloth, or a pair of shoes (a) of leather, delivered to him by the master, and then run away with them, that he is not within the statute; because the property is no way altered: and even in the first case, *Hawkins* seems to be of opinion, that the taking of the plate and malt is within the statute; and that the whole act of the servant, taken together, should be deemed a conversion of the master's goods to his own use, with an intent to steal them, which brings it within the express letter of the statute; on which foundation it hath been resolved, that a servant who changes his master's money from silver to gold, and then runs away with it, is within the statute.

(a) How can a pair of shoes be within the statute, if the leather was not of the value of 40s., which is not very probable?

¶ It is to be observed, that the cases referred to in page 374. as establishing the doctrine that a conversion by the servant of his master's goods, received from his master to keep, is larceny, are all cases where the possession has been clearly vested in the master, antecedent to the delivery to the servant. Where, however, the goods are delivered to the servant by a third party for the use of the master, a different principle applies. The master, in such cases, is not held to have had such a possession in himself as to make the subsequent conversion of them by the servant larcenous.

Waite's ca.
1 Leach, 28.
2 East, P. C.
c. 16. § 17.
2 Russell on
Cri. 204.

Thus a cashier of the Bank of *England*, who had received from a third party a bond, to be deposited with the bank, and who fraudulently sold the bond, and converted the money, was held not guilty of larceny of the bond.

Bull's ca.
2 Leach, 841.
2 Russell on
Cri. 205.
where see
other cases to

the same effect. So, a servant attending his master's shop, and receiving money from a customer, which he ought to have put into the till, but which he purloined, was held guilty only of breach of trust, for the master had no possession of the money.

The distinction thus established, taking these frequent cases of embezzlement by servants out of the law as to larceny, gave rise to the several statutes against embezzlement.¶

¶ As to embezzlements by bankers, &c. and other agents, of money, securities for money, or

[By 15 G. 2. c. 13. § 12. (passed in consequence of *Waite's* case, *supra*), " If any officer or servant of the Bank of *England*, " being entrusted with any note, bill, dividend, warrant, bond, " deed, or any security or effects of any other person lodged or " deposited with the said company, or with him as an officer or " servant of the said company, shall secrete, embezzle, or run " away

"away with the same, or with any part thereof, he shall suffer death without benefit of clergy." (a) chattels intrusted to them for special purposes, see 7 & 8 G. 4. c. 29. § 49, 50. Russell on Cri. b. 4. c. 18, 19, 20, 21, and 22. 2d edit. (a) See further, as to embezzlements by servants of the Bank of England, 35 Geo. 3. c. 66.; 37 Geo. 3. c. 46.; 39 Geo. 3. c. 85.; and the cases, Russell on Cri. b. 4. c. 20. ||

By 5 G. 3. c. 35. § 17. and 7 G. 3. c. 50. (b) "If any deputy, clerk, agent, letter-carrier, postboy, or rider, or any other officer or person whatsoever, employed in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the post-office, shall secrete, embezzle, or destroy any letter, packet, or bag of letters, which he shall be intrusted with, or which shall have come to his possession, containing any bank-note, bank post bill, bill of exchange, Exchequer bill, South Sea or East India bond, dividend warrant, navy, or victualling, or transport bill, ordnance debenture, seaman's ticket, state-lottery ticket or certificate, bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuity or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, or of the Bank, South Sea, East India, or any other company, or society, or corporation, *American* provincial bill of credit, goldsmith's or banker's letter of credit, or note for or relating to the payment of money, or other bond or warrant, draught, bill, or promissory note whatsoever for the payment of money, or shall steal and take any of the same out of any letter or packet that shall come to his possession, he shall suffer death without clergy." (c) ||(b) And see 52 Geo. 3. c. 143. § 2. Russell on Cri. b. 4. c. 21. (c) It seems that it is not felony within this statute for a person employed in the post-office to steal out of a letter entrusted to his care a draft on a London banker, purporting to be drawn in London, but actually drawn above ten miles from London, on unstamped paper. *Rex v. Pooley*, 5 Bos. & Pul.

311. Russ. & Ry. 12.; and Russell on Cri. b. 4. c. 21., where see the cases as to embezzlements in the post-office. ||

By 7 Jac. 1. c. 7. and 17 G. 3. c. 56. "Persons employed in the hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, silk, or dyeing manufactures, who shall embezzle or clandestinely dye any of the materials with which they are entrusted, and any persons who shall knowingly buy, sell, pawn, or dispose of the same, shall be liable to be punished by fine, whipping, and imprisonment."]

|| By the 7 & 8 G. 4. c. 29. § 46., for the punishment of depredations committed by clerks and servants in cases not punishable capitally, it is enacted, that if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master; every such offender, being convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years; or to be imprisoned for any term not exceeding three years, and if a male to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

And by § 47, 48. of the same statute, for the punishment of embezzlements committed by clerks and servants, it is enacted, that if any clerk or servant or any person employed for the purpose, These provisions are substituted for the repealed statute 39 Geo. 3.

c. 85. Some of the decisions on this repealed statute are of importance, and may be seen, Russell on Cri. b. 4. c. 17.

(a) In § 46. *suprà*.

pose, or in the capacity of a clerk or servant, shall by virtue of such employment receive or take into his possession any chattel, money, or valuable security, for, or in the name, or on the account of his master, and shall fraudulently embezzle the same, or any part thereof; every such offender shall be deemed to have fraudulently stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned. (a) ||

(N) Of the Master's Authority over his Servant, and how far he may correct and punish him.

38 H. 6. c. 25. Sid. 175.

(b) It is said, that the master in his justification must set forth the retainer, the place where, and in what business, being matters issuable. Sid. 177. (c) Where the plaintiff replied *non moderate castigavit*, held well, though not so pertinent an issue as *immoderate castigavit*. Vent. 70. Sid. 444. 2 Keb. 623.

IT is clearly agreed, that a master may correct and punish his servant in a reasonable manner for abusive language, neglect of duty, &c.; and that, in an action of assault and battery brought against him, he may justify, that he was (b) his servant, gave provoking language, &c., and that therefore *moderate castigavit*; and on issue of (c) *immoderate castigavit*, if it appears in evidence that the punishment was such as is usual from masters to their servants, the master will be acquitted.

2 Mod. 167.

8 Mod. 120.

218. 330.

21 H. 6. 26.

2 Inst. 316.

(c) He should have pleaded not guilty to the wounding; and now in such case, by virtue of the stat. 4 Ann. c. 16. § 4. the defendant may plead double, not guilty to the whole, and justify as to a part of the trespass.

But as such correction must be moderate, it has been held, that the master cannot justify wounding his servant; as in assault, battery, wounding, and imprisonment, &c., defendant justifies, for that he and the plaintiff were servants to the sheriff of *Suffolk*; and that the plaintiff, when he should have been attending in court, was at a conventicle; and that he, by command of the sheriff, *leviter et molliter manus imposuit* upon the plaintiff, and brought him thence; which is the same trespass, &c. On demurrer to this plea it was held ill; because as to the wounding (c) he says nothing at all, and in that he cannot justify.

2 H. 4. 4.

11 H. 4. 75.

9 Co. 76. a.

2 Mod. 167.

Also it hath been held, that though a master may beat his servant, yet he cannot delegate that power to another; for though a lord might beat his villein, either with cause or without, and he could have no remedy, yet if another by his command did it, the villein might have had an action.

Hale's Hist. P. C. 454.

From this authority which a master hath over his servant, it is held in law, that if a master designeth moderate correction to his servant, and accordingly useth it, and the servant, by some misfortune, dieth thereof, this is not murder, but *per infortunium*; because the law alloweth him to use moderate correction, and therefore the deliberate purpose hereof is not *ex malitiâ præcogitatâ*.

But

But if the master design an immoderate or unreasonable correction, either in respect of the measure, or manner, or instrument thereof, and the servant die thereof; this *per* (a) *Hale* cannot be excused from murder, if done with deliberation and design; nor from manslaughter, if done hastily, passionately, and without deliberation; and herein, says he, consideration must be had of the manner of the provocation, the danger of the instrument which the master useth, and the age or condition of the servant that is stricken; and the like of a schoolmaster towards his scholar.

And if a master whip a criminal condemned to such punishment, happens to occasion his death; if such persons in their correction be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, they are guilty of manslaughter at the least; and if they make use of an instrument improper for correction, and apparently endangering the party's life, as an iron bar, or sword, &c., or kick him to the ground, and then stamp on his belly and kill him, they are guilty of murder. Hawk. P. C. c. 29. § 5. for which are cited Bracton, lib. 1. c. 4. H. P. C. 31. Crompt. 28. Dalt. c. 96. Keilw. 136. Kelyn. 65. 5 Mod. 287. Fost. Cr. Law. 262.

(a) 1 Hale's Hist. P. C. 454.— And *per* Hawkins, where as school-master in correcting his scholar, or a father his son, or a master his servant, or an officer in whipping a criminal condemned to such punishment, happens to occasion his death; if such persons in their correction be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, they are guilty of manslaughter at the least; and if they make use of an instrument improper for correction, and apparently endangering the party's life, as an iron bar, or sword, &c., or kick him to the ground, and then stamp on his belly and kill him, they are guilty of murder. Hawk. P. C. c. 29. § 5. for which are cited Bracton, lib. 1. c. 4. H. P. C. 31. Crompt. 28. Dalt. c. 96. Keilw. 136. Kelyn. 65. 5 Mod. 287. Fost. Cr. Law. 262.

(O) Of the Master's Remedies against others for enticing away, and other Injuries done in relation to his Servant.

IT is clearly agreed, that from the interest a master has in the labour and service of his servant, he may maintain an action for enticing (b) or taking him away.

away a man's servant out of his actual service, trespass will lie; but that for enticing him, only an action on the case. Salk. 380. pl. 17. 2 Ld. Raym. 1116.—[Trespass will lie for enticing him away; and this though he be only a journeyman. Hart v. Aldridge, Cowp. 54.]

Also, if without any enticement a servant leave his master, without licence or just cause, and *J. S.*, knowing him to be his servant, retain him, an action lies.

21 H. 6. 51. pl. 18. (b) But it is said, that for taking Noy, 10. 106. Leon. 240. Keilw. 180. 2 Lev. 65.

||Blake v. Lanyon, 6 Term Rep. 221.||

But it hath been held, that an indictment does not lie for enticing away a servant, being a private injury, which may be redressed by civil action.

Salk. 380. pl. 17. 3 Salk. 191. pl. 21. 6 Mod. 99.

182. 289. 2 Ld. Raym. 1116. The Queen v. Daniel.

||A master may, if he chooses, waive his action for the tort, and bring an action of *indebitatus assumpsit*, for work and labour done by his servant or apprentice, against the person who tortiously employed him.||

Lightly v. Clouston, 1 Taunt. Rep. 112. Foster v. Stewart,

3 Maul. & S. 191. Eades v. Vandeput, 5 East, 39. n.

In case the plaintiff declared, that *J. S.* 19 Sep., 16 Car. 2., was retained as an apprentice to serve the plaintiff for nine years, and continued in his service till the 31st of October, 21 Car. 2., when the defendant procured the said *J. S.* to leave the plaintiff's service, &c. (c) *per quod* the plaintiff *totum proficuum quod ratione servitii præd. J. S. per totum residuum termini recipere potuisset totaliter perdidit*, &c. and after (d) a verdict for the plaintiff, and general damages given, though it appeared the term was not expired, it was intended that damages were given for all the term, as well the time to come as past; for the damages must be intended

T. Raym. 200. 2 Saund. 169, 170. Lev. 299. Hambleton v. Veere. (c) The plaintiff declared for a battery of his servant, 19 Jan. &c., *per quod* he lost his service intended

for a long time, viz. for the space of six months then next following, &c.

intended to be taxed according to the declaration; and if it should be intended otherwise, it would be uncertain to what time they were taxed, whether to the exhibition of the bill, or verdict given; and judgment arrested accordingly.

After a verdict for the plaintiff, though the original bore *teste* before the end of the six months, yet the plaintiff had his judgment; for the viz. was more than needed, being not of the substance of the action, but for aggravation of damages only. Hob. 284. All. 23. *per Cur.*; but yet *vide* Cro. Jac. 619. Yelv. 94. (d) Where upon a demurrer it may be helped, for the plaintiff may take damages for the departure only. Mod. 271. pl. 22.

And. 13. 9 Co. 113. 10 Co. 131. Style, 94. 2 Bulst. 198. Sid. 175.

(a) And as it is this that entitles the

For the battery of a servant, the master as well as servant may bring an action, and each shall recover damages, for both are injured; the servant in his person, and the master (a) by the loss of his servant's labour; and therefore a recovery in an action brought by one of them, cannot be pleaded in bar to an action brought by the other.

master to his action, he must always declare *per quod servitium amisit*. Cro. Jac. 618. Roll. Rep. 393.—And therefore the defendant may plead not guilty, and give it in evidence, that he did not lose his service. 2 Roll. Abr. 682. || And see Hall v. Hollander, 4 Barn. & C. 660. where the action was held not to be maintainable, the servant, by reason of his tender age, being incapable of performing any service.]

Yelv. 89, 90. Brownl. 205. 2 Roll. Abr. 568. 1 Salk. 111.

But if a man beats another's servant to that degree that he dies thereof, the master loses his action, and must proceed by indictment; for the private injury to him is drowned in the general injury to the public.

Roll. Abr. 98. Roll. Rep. 124. 2 Bulst. 332.

If a surgeon, in consideration of a sum of money, undertakes to cure my servant of a hurt, and he applies unwholesome medicines thereto, on purpose to make the wound worse, by which I lose the service of my servant for a long time, I may have an action on the case against the surgeon.

3 Bur. 1878. 3 Wils. 18. 2 Term Rep. 166.

|| (b) And a master, not standing in the relation of a

[If a daughter, who is under age, and lives with her father, be seduced, the father (b) may maintain an action against the seducer to recover a compensation for the loss of her service; and he may do so, whatever be her age, if she lived with him at the time, and acts of service be proved: and the slightest acts of service will suffice.]

parent, may maintain this action for debauching his servant. *Fores v. Wilson*, Peake's N. P. C. 55.; so in like manner it may be maintained for the seduction of an adopted child. *Irwin v. Dearman*, 11 East, 25. And it may be maintained for the seduction of a married daughter serving in her father's family, apart from her husband. *Harper v. Luffkin*, 7 Barn. & C. 587. So by the father of a girl hired by defendant colourably as a servant, but with the design of seducing her; for the relation of master and servant was never in fact contracted between the girl and the defendant. *Speight v. Oliveira*, 2 Stark. Ca. 493. ||

(P) What a Master or Servant may justify doing in each other's Defence.

Hale's Hist. P. C. 484.

FROM the relationship between a master and servant it hath been agreed, that a master killing a person in defence of his servant, or a servant in defence of his master, are not guilty of murder; and that, in those cases, the act of the assistant shall have the same construction as the act of the party assisted should have had if it had been done by himself.

Also,

Also, a servant may justify an assault in defence of his (a) master; and, by some opinions, so may a master in defence of his servant; but others hold that he cannot, because in such case he may have an action *per quod servitium amisit*. he cannot justify in defence of his master's son, because not servant to him. Dalt. 156. Nor in defence of his master's goods. 2 Lutw. 1481. 2 Roll. Abr. 546. Owen, 151. Cont. Salk. 407. pl. 2. (a) But c. 72. Crompt.

A servant shall not avoid a deed made by duress to his master, nor *vice versâ*. Roll. Abr. 687. 2 Brownl. 276.

As to a master's maintaining a servant, or a servant his master, in suits and legal proceedings, it is agreed, that a master may go along with his servant, or with his domestic chaplain, to retain counsel: also, he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in court in favour of his cause: also, if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but the master cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hand; but these, with the servant's consent, he may safely disburse. Bro. Maintenance, 6. 14. 2 Roll. Abr. 116. Moor, 814. ||See tit. Maintenance.||

As to a servant's maintaining his master, it is agreed, that a person retained generally as a servant, and not for a particular occasion only, may lawfully ride about to speed his master's business; and may go to counsel for him, and shew his evidence to the counsel, or to the jury, and stand by him at a trial; but cannot lawfully lay out his own money in the suit. Hetl. 79. 2 Roll. Abr. 116. Keilw. 50.

MERCHANT AND MERCHANDIZE.

[THE protection of trade was very early a favourite object of the laws of this country. In the time of King *Athelstan* we find a very remarkable law, which says, that any merchant who has made three voyages upon his own account beyond the *British Channel*, or narrow seas, shall be entitled to the privilege of a thane. *Et si mercator tamen sit, qui per trans altum mare per facultates proprias abeat, illa postea jure thani sit dignus.*] Wilkins' Angl. Sax. Leg. *Judicia Civitatis Lond.* p. 71. ||See the introductory chapter to Chit. on Commercial Law, vol. 1.||

It seems agreed too, from the fundamental principles of our government, that the king cannot regularly prohibit trade, nor lay a penny imposition on it; but that every man may use the sea, and trade with other nations, as freely as he may use the air.

And this freedom of trade is not only allowed by the common law, but hath also been asserted and established by the care and wisdom of princes and parliaments; and to this purpose it is provided by *Magna Charta*, c. 30. That (b) all merchants (c), if they were not openly prohibited before, shall have their safe and sure (b) This respects aliens only; which strongly proves that the English

had this liberty before; otherwise they would not have extended it to aliens, and left the English without it. 2 Inst. 57. (c) This prohibition must be by act of parliament, because it concerns the whole realm, which is implied in the word *openly*, and relates to aliens only. 2 Inst. 57.

Skin. 355.
3 Lev. 352.
4 Mod. 176.
Sands v. Child
and Lynch.

But notwithstanding this freedom of trade, yet it seems agreed, that the king may in time of war, and for the public service and safety, lay an embargo on ships, and employ the ships of his subjects on the public service; but this, says my Lord Chief Justice *Holt*, ought to be upon great emergencies, and for the public benefit, and not for the private interest of any person or society: also it seems agreed, that the king may, by his writ of *ne exeat regno*, retain a subject from going out of the realm; and may, by his privy seal, command any of his subjects to return out of a foreign nation, on pain of having their lands seized, &c. It hath likewise been holden, that the king by his prerogative may restrain his subjects from trading with an infidel nation, state, or people, without his licence; and on this foundation principally it was held, in the case of *Sands* and the *East India Company*, that the king's charter, which gave them an exclusive right to trade to the *East Indies*, was good. But this doctrine seems now exploded, for nothing can exclude the subject from trade but an act of parliament.

2 Roll. Rep.
113. Yelv. 155.
3 Mod. 226,
227. Show. 127.
Molloy, 418.
[(a) These customs were first established to supply the want of laws, and afterwards admitted as laws.]

(b) There are four sorts of merchants, viz. merchants adventurers,

merchants dormant, merchants travelling, and merchants residents. 2 Brownl. 99. *per Coke*. — But it is said, that a merchant includes all sorts of traders, as well and as properly as merchant adventurers; and that a merchant tailor is a common term. 2 Salk. 445. *per Holt*; and *vide* head of *Bankrupts*.

Carth. 82.
2 Vent. 293.
Show. 127.
Comb. 45.
Sarfield v.
Witherly.

It hath been adjudged, that a gentleman who is abroad on his travels, and draws a bill of exchange, makes himself a merchant within the custom as to this special purpose, to make him responsible to the party upon non-payment; and this the rather from the inconveniences that might ensue, and the suspicion that might increase amongst foreign merchants upon bills of exchange, if persons who took upon themselves to draw such bills should not be liable to the payment thereof.

(c) The custom of merchants

But as the laws and customs of merchants are of various kinds, and most of them chiefly known (c) to merchants themselves, we shall

shall here only insert what we find in our law-books relating to the following heads: is part of the common law of this king-

dom, of which the judges ought to take notice; and if any doubt arise to them about the custom, they may send to the merchants to know their custom, as they may send for the civilians to know their law. Winch. 24.—May direct an issue for trial of a custom among merchants. Hard. 486.*—* The law of merchants cannot be proved by witnesses, for it is the law of the land. Pillan v. Van Mierop, 3 Burr. 1663. ||If by the law of merchants is meant the custom, the last proposition is not correct, and certainly is not borne out by the case 3 Burr. 1663. Where a new question arises, depending upon the course of mercantile practice, the custom has repeatedly been held receivable in evidence. Thus, where the question arose for the first time, whether the executor or administrator of the payee of a note could endorse it so as to transfer it to his indorsee, *Willes C. J.* and the Court of Common Pleas enquired of merchants the practice. *Stone v. Rawlinson*, Willes, 559. So, where the question was, whether a bill drawn by two drawers not partners, payable to their own order, required the indorsement of both, Lord *Mansfield* and the court held the evidence of usage among merchants properly received. *Carvick v. Vickery*, Dougl. 653. In *Edie v. East India Company*, 2 Burr. 1216. 1 Black. 295., where the evidence was held improper, it was only on the ground that the question had been previously settled by two decisions: and in a very late case, where the question was, whether a bill drawn abroad on a drawee residing at Liverpool, and made payable in London by the drawer, required a protest for non-payment at London or Liverpool, Lord *Tenterden C. J.* received the evidence of merchants and notaries as to the practice, *Mitchell v. Baring*, London Sittings, October, 1829; and that such evidence is receivable to explain the terms of a contract for seamen's wages, see *Cutter v. Powell*, 6 Term Rep. 520. *Birch v. Depeyster*, 4 Camp. 388.; or of a policy of insurance, 2 Salk. 443. *Noble v. Kennaway*, 3 Dougl. 510. *Vallance v. Dewar*, 1 Camp. 503. *Uhde v. Walters*, 5 Camp. 16. *Robertson v. Money*, 1 Ry. & Moo. 75. *Palmer v. Blackburn*, 1 Bing. 61. — But evidence of usage cannot be received to contradict the plain and express words of a contract. *Parkinson v. Collier*, 1797. Park, Ins. 416. *Yeates v. Pim*, 2 Marsh. R. 141. *Holt*, Ca. 95. and see Lord *Eldon's* observations on the exposition of contracts by evidence of usage. 2 Bos. & Pull. 168.||

- (A) Of Alien Merchants.
- (B) Of Principals ||and Agents,|| and Factors.
- (C) Of Partners and Joint-traders.
- (D) Of Owners and Masters of Ships.
- (E) Of Mariners.
- (F) Of Average.
- (G) Of Hypothecation.
- (H) Of Charter-parties.
- (I) Of Policies of Insurance: And herein,
 - [1. Of Marine Insurances.
 - 2. Of Insurances upon Lives.
 - 3. Of Insurances against Fire.]
- (K) Of Bottomry [and *Respondentia*].
- [(L) Of Bills of Lading.
- (M) Of Bills of Exchange.
- || (N) Of the Provisions for the Encouragement of Shipping and Navigation. ||

(A) Of

(A) Of Alien Merchants.

Vide tit. Alien ;
¶ and see 1 Chit.
 Commercial
 Law, 131. tit.
 Of Aliens. ¶

(a) The law of
 England

rather con-

tracts than extends the disability of aliens; because the shutting out of aliens tends to the loss of people, which, laboriously employed, are the true riches of any country. *Vent.* 427. *per Hale C. J.*—The king pardons his loving and obedient subjects; this extends to aliens, if here at the time, though not made denizens. *Per Hob.* 271. (b) For this *vide supra*, and 2 *Inst.* 57. *Molloy*, 417. (c) By the 2 E. 3. c. 9. merchant strangers and others shall go and come with their merchandize.—By 9 E. 3. c. 1. all merchant strangers and others may freely buy and sell their commodities from whencesoever they came, without interruption, notwithstanding charters or usage to the contrary, which charters or usage (if any be) the king, lords, and commons hold to be of no force, as being to the damage of the king and his great men, and to the oppression of the commons, &c.

Co. Lit.

129. b.

And. 25.

Dyer, 2. b.

¶ (d) But al-

though a

foreigner suing in our courts is entitled to equal justice with a subject, he has no claim to a greater measure of justice. *Duckworth v. Tucker*, 2 *Taunt.* 37. n. ¶

11 E. 3.

Rot. 87.

Dyer, 2 b.

in *margin.*

And as foreigners and aliens are allowed to trade amongst us, so are they allowed to maintain personal actions (d), because otherwise they would be incapacitated to merchandize: but they cannot maintain any real action, because it is not necessary that they should purchase lands, or settle amongst us.

An alien merchant may upon a statute extend lands, and upon office the king shall not have them; and upon ouster he shall have an assize; for the main end and design of both the statute staple and merchant was to promote and encourage trade, by providing a sure and speedy remedy for merchant strangers, as well as natives, to recover their debts at the day assigned for payment.

Co. Lit.

2. b.

(e) That he

must be a

merchant.

Poph. 36.

Roll. Abr.

194.—For

leases of any

dwell-

ing-

house or shop,

made to alien

artificer or

handicraftman,

are void by 32 H. 8. c. 16. § 15; and the

person taking such lease forfeits 100*l.*, and the person letting 100*l.*, for which *vide Sid.* 308,

309. 357. 2 *Keb.* 102. 116. 118. *Sand.* 6. 8. 2 *Keb.* 315. 3 *Mod.* 94. (g) But he cannot take

a lease for years of land, meadow, &c., not being necessary for his trade or traffic. *Co. Lit.* 2. b.

7 *Co.* 17. *Dyer*, 2 b. *cont.* *And.* 25. *Bendl.* 36. By 27 E. 3. c. 2. it is enacted, that all merchant

strangers, and not enemies, may safely dwell in the realm, &c.; upon which statute, at a reading

in *Lincoln's Inn*, 35 *Eliz.* it was agreed a merchant alien might take a lease of a house with

gardens at will, but not for years; *per Dyer*, 2. b. in *margin.* (h) Not if he goes beyond sea,

and leaves servants in his house during his absence. *Dyer*, 2. b.

So, an alien (e) merchant may take a lease of a (g) house for his habitation for years only, and this also is for the encouragement of commerce: for if an alien trade, he must have an abode amongst us; but if he (h) depart the kingdom, or die, it goes to the king, not to his executors or administrators, because it was only a personal privilege annexed to the alien as a merchant, for the encouragement of merchandize, and consequently must expire with him, without going to his executors or administrators.

Yelv. 198.

A merchant stranger shall have an action for saying he is

is a bankrupt, for by law he may have personal actions; and these words tend to impair his credit in his trade.

Also, by the 21 Jac. 1. c. 19. (a) it is provided, that that act, and all other acts heretofore made against bankrupts, shall extend to strangers born, as well aliens as denizens, as effectually as to natural-born subjects, both to make them subject to the laws as bankrupts, as also to make them capable of the benefit or contribution as creditors by these laws.

extends its provisions to aliens

The sons of an alien, though born here, being merchants, for the first generation shall pay alien (b) customs and duties: said to be the practice of the Exchequer.

But though alien merchants, in the payment of customs and otherwise (c), lie under some disadvantages different from natural subjects, yet in other respects are they said to have advantages above them; in that by the common law an action of account lay for a merchant stranger against executors; that a defendant could not wage his law to an action of debt brought by a merchant stranger; and that merchant strangers were not to be sworn in leets, &c. (d)

package and scavage, or other duties granted to them by charter. (d) But a commission of bankrupt founded on the petition of a British subject resident here, for a debt due to himself and partners resident and carrying on trade in an enemy's country, cannot be supported. *McConnell v. Hector*, 5 Bos. & Pul. 113.; and see *De Metton v. De Mello*, 12 East, 254. *Kensington v. Inglis*, 8 East, 275.¶

As to merchant strangers, whose prince is in war with the crown of *England*, if they are found within the realm at the beginning of the war, they shall be attached with a privilege and limitation without harm of body or goods, until it be known to the king how merchants of *England* are used and entreated in their country, and accordingly they shall be used in *England*, the same being *jus belli*; but for merchant strangers that come into the realm after war begun, they may be dealt withal as open enemies.

If an alien enemy comes here *sub salvo conductu*, he may maintain an action: so, if an alien amy comes hither in time of peace, *per licentiam domini regis*, as the *French* protestants did, and lives here *sub protectione*, and a war afterwards happens between the two nations, he may maintain an action; for suing is but a consequential right of protection; and therefore an alien enemy, that is here in peace under (e) protection, may sue upon a bond; *aliter* of one commorant in his own country. (g)

must plead it. 7 Mod. 150. *Sylvester's case*. Ld. Raym. 283. 853. 2 Stra. 1082. (g) By stat. 14 G. 3. c. 84. Persons naturalized shall not have British privileges of trade in foreign countries, unless they shall have resided *seven* years in British dominions, without being above two months absent at a time.

¶ And aliens having quitted *France* on account of the troubles were exempted from arrest for debts contracted out of the *British* dominions.¶

and see 38 G. 3. c. 50. § 9. *Sinclair v. Charles Philippe, Monsieur de France*, 2 Bos. & Pull. 365.

Bals. 134.
S. C.

(a) ¶ The
21 J. 1. c. 19.
is repealed by
the new bank-
rupt act, 6 G. 4.
c. 16. but
the new act,
§ 135. expressly
and denizens.¶

Lit. Rep.
140. Hard.
335. S. P.

(b) For this
vide Molloy, 305. 322.

Palm. 14.
¶ (c) The
24 Geo. 3.
sess. 2. c. 16.
repeals the
alien duty,
though not
the right of
the city of
London to

a commission of
bankrupt due to himself
cannot be supported.

7 E. 4.13, 14.
Bro.
tit. Pro-
perty, 38.
2 Inst. 58.
Molloy,
417, 418.
Skin. 204.

Salk. 46.
pl. 1. Ld.
Raym. 282.
Wells v.
Williams.
(e) But an
alien enemy
who has
such pro-
tection

(g) By stat.
41 Geo. 3.
c. 106.
43 Geo. 3.
c. 155. § 28.;
365.

Brandon
v. Nesbitt,
6 Term
Rep. 25.
¶ And see
Flindt v.
Waters,
15 East, 260.¶

[But no action can be maintained by or in favour of an alien enemy. Therefore it was adjudged, that alienage was pleadable to an action on a policy of insurance brought in the name of an *English* agent for his principal an alien enemy, such interest appearing on the record; and that a replication to such a plea, that the alien was indebted to the agent (the plaintiff) in more money than the value of the property insured, could not be supported.]

Willison v.
Pattison,
7 Taunt.
459. S. C.
1 Moore, 359.
Ex parte
Schmaling,
Buck. 93.
Ex parte
Boussmaker,
15 Ves. 71.

¶ A contract with an alien enemy made in time of war cannot be enforced in the courts here, although the plaintiff do not sue until the return of peace. Nor is the debt arising upon it provable under a commission of bankruptcy. But where at the time of the contract the two nations were at peace, Lord *Erskine* permitted a claim to be admitted, and a dividend reserved, on the ground that the right was only suspended by the subsequent war.

(a) Potts v.
Bell, 8 Term
Rep. 548. Al-
ciator v.
Smith,
5 Camp. 245.
Vandyck v. Whitmore, 1 East, 475. (b) *Usparicha v. Noble*, 15 East, 352. *Fenton v. Pearson*, 15 East, 419.

The crown may, however, license a trading with the enemy (a); and the legal effect of the king's licence to an alien enemy to trade is, that not only may he sue in respect of such licensed commerce in our courts, but the commerce itself is to be regarded as legalized for all purposes of its due prosecution. (b)

Antoine v.
Morshead,
6 Taunt. 237.
1 Maule, 558.
S. C.

And where one *British* subject, detained in an enemy's country in time of war, drew a bill on a drawee in *England* in favour of another *British* subject, also detained in the enemy's country, which was endorsed to an alien enemy; it was held, that after the return of peace the alien might sue on it in this country; for the contract was not void originally, being between *British* subjects, and the return of peace took off the plaintiff's disability to sue.

Daubuz
v. Morshead,
6 Taunt. 332.
and see *ante*, tit. *Aliens*.

And it is no defence that the plaintiff sues in trust for an alien enemy.¶

(B) Of Principals ¶ and Agents, ¶ and Factors.

Molloy,
421. ¶ See this
title in vol. 3.
Chit. on
Commercial
Law. Paley
on Princ. &
Agent, *passim*.

AS no one person, whose trade is extensive, can transact all his own affairs, so it is necessary for him to depute another in his place, on whose ability and honesty he can rely; and such person so deputed is called a factor, who is in nature of a servant, whose acts shall bind his master or principal, so far as he acts pursuant to the authority given him. (b)

(b) The character of factor differs materially from that of broker: the former, from its being usual for him to make advances upon the goods, has a special property in, as well as a general lien upon them, and may sell in his own name; but the latter is not trusted with the possession of the goods, nor ought he to sell in his own name. *Baring v. Corrie*, 2 Barn. & A. 157.¶

¶ **THE AGENT'S AUTHORITY.**—If the commission be general, as to *dispose, do, and deal therein as if it were your own*, hereby the factor is excused if a loss happens; but if the commission be to *sell and dispose*, hereby the factor is not enabled to sell upon tick, nor can he sell for an unreasonable time, as ten or twenty years, though there be the words *as if it were your own*, but he must sell according to the usual time for which credit is given for the commodities he disposes of. (a)

489. in which cases it was held that a factor may sell on credit although not particularly authorized by the terms of his commission so to do; he must, however, if employed generally to do any act, do it only in the usual way of business. *Wiltshire v. Sims*, 1 Camp. 258.; see also *Fenn v. Harrison*, 3 Term Rep. 757. S. C. 4 Term Rep. 177. *Olive v. Eames*, 2 Stark. 181. And in equity, under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. *De Bouchout v. Goldsmid*, 7 Ves. 21.; and that a factor cannot pledge, see *post*, p. 392.]]

¶ And where the power to the agent was a power for receiving money, and concluded with the general words, “to transact all business;” it was decided that the power to transact business did not authorize the agents to endorse a bill which they had received under it. (b)

But where an agent has been authorized to underwrite a policy, he may settle for a loss. And the authority to an agent to act may be implied from the circumstances. (c)

Pearson, 3 Barn. & C. 58. S. C. 4 Dow. & Ry. 648. *Todd v. Robinson*, 1 Ry. & Moo. 217. *Hicks v. Hankin*, 4 Esp. 114. *Whitehead v. Tuckett*, 15 East, 400.

So, if goods be delivered to an agent to sell at a particular place, he cannot send them elsewhere.

India Company v. Hensley, 1 Camp. 112.

But the liability incurred by the agent exceeding his commission may be discharged by the subsequent express or implied assent of the principal to the acts of his agent. (d)

The construction of mercantile commissions, like that of other mercantile instruments, is to be assisted by the usages (e) of trade; and for that purpose the evidence of persons conversant in mercantile affairs is resorted to. Therefore, a commission to a factor to sell is now held to give him a power to sell on credit in those trades where it is the usual course of dealing. (g)

An agent's authority is to be so construed as to include all necessary or usual means of executing it with effect. As an instance illustrative of this maxim, a general bailiff of a manor may make leases at will without any special authority; the reason assigned for which is, because great inconvenience would arise to the lord by absence, sickness, or other incapacity, if he had not that power. But he has no general power to make leases for years, to which the same reasons do not apply. And it seems that a receiver appointed by the Court of Chancery, with a general authority to let the

Molloy, 422.
Buls. 10
¶ (a) But see *Scott v. Surman*, Willes' Rep. 406, 407.
Houghton v. Matthews, 3 Bos. & Pull.

(b) *Hogg v. Snaith*, 1 Taunt. 347.
Murray v. The East India Company, 5 Barn. & A. 204.

Richardson v. Anderson, 1 Camp. 43. n.
(c) *Dyer v.*

Catlin v. Bell, 4 Camp. 185. East

(d) See *Prince v. Clark*, 1 Barn. & C. 186. 2 Dow. & Ry. 266.

(e) See *ante*, p. 383. as to evidence of usage of merchants.
(g) 12 Mod. 514. Willes, 1 Camp. 259.

2 H. Black. 618.

tit. Leases, 1. 8.

Doe v. Read, 12 East, 57.

lands to tenants from year to year, has also authority to determine such tenancies by regular notice to quit.

1 Roll. Rep.
300. Palm.
394.; and see
10 Ves. 441.
Murray v.
East India
Company, 5 Barn. & A. 209.; and see 1 H. Black. 155. 1 Taunt. 347. Attwood v. Munnings, 7 Barn. & C. 278.

So, a letter of attorney to sue for, and receive, and recover a debt, authorizes the attorney to arrest the debtor. But an authority to demand, sue for, recover, and receive monies, and to give sufficient discharges, does not authorize the agent to endorse bills for his principal.

1 Camp. 43.
Goodson v.
Brooke,
4 Camp. 163.

And a broker employed to get a policy effected may adjust the loss. And an agent who underwrites and settles losses for another has an implied authority to refer a dispute about a loss to arbitration.

Fenn v. Har-
rison, 3 Term
Rep. 757.

An agent employed to get a bill discounted may, unless expressly restricted, endorse it in the name of his employer, so as to bind him.

Ibid. and 5 Esp.
75.

So, a servant employed to sell a horse may warrant it, unless forbidden.

Paley on
Principal and
Agent, p. 164.
et seq.

3 Salk. 233.
1 Lord Raym.
225.

A principal is often bound by the acts of his agent, though contrary to the agent's instructions. This depends on whether the agent be a general, or a special agent. A general agent is one put in the place of his principal, to transact all his business of a particular kind; as to buy and sell certain wares, to negotiate certain contracts, and the like. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment; and that power cannot be limited by any private order or direction not known to the party dealing with the agent. But a special agent, who is employed about one specific act, or certain specific acts only, does not bind his employer, unless his authority be strictly pursued, for it is the business of the party dealing with him to examine his authority; and therefore, if there be any qualification or express restriction annexed to the commission, it must be observed, otherwise the principal is discharged. For instance, in case of sale of a horse, the distinction is, that if a person keeping livery stables entrust his servant with a horse to sell, and direct him not to warrant, and the servant does, nevertheless, warrant him, still the master will be liable on warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed cognizant of any private conversation between the master and the servant; but if the owner of a horse send a *stranger* (a) to a fair, with express directions *not to warrant* the horse, and he do warrant it, the purchaser can only have recourse to the person actually selling the horse, and the owner is not liable on the warranty.||

15 East, 400.
1 Holt, Ca.
278.

3 Term Rep.
760.; and see
per Lord
Eldon,
1 Dow. R.
45.; and *per*
Bayley J.
15 East, 45.
(a) However,
if a stranger
have no di-
rections *not to*
warrant, the
person em-
ploying him is

bound by his warranty. 5 Esp. Ca. 75. 3 Esp. Ca. 65. 2 Camp. 555.

2 Mod. 100.
adjudged.

If in account the defendant pleads before auditors, that the goods for which he is to account were *bona peritura*, and notwithstanding his care in keeping them, grew worse, and that they remained in his hands for want of buyers, and were in danger of

of growing worse, and that therefore he sold them upon credit to a man beyond sea; this is no good plea, for a factor cannot sell even *bona peritura*, upon (a) credit, without a particular commission so to do.

upon credit. Bulst. 101.; ¶and see *ante*, n. (a), p. 387.¶

¶AGENTS ACCOUNTING.¶— In favour of trade and merchandize, an action of account lies at common law against a factor as against a bailiff, in which he shall have all (b) reasonable allowances.

F. N. B. 117. 2 Roll. Abr. 161. ¶Topham v. Braddick, 1 Taunt. 572.¶ (b) Therefore it is a good discharge before auditors for a factor to say, that in a tempest, because the ship was surcharged, the goods were cast overboard into the sea. Roll. Abr. 124. Bro. tit. Account, 10. — So, that he was robbed of his goods without his default or negligence. Co. Lit. 89. — So, that he durst not buy for fear of loss. Roll. Abr. 124.

Also, if a man by obligation acknowledges that he has received money *ad proficiendum et computandum*, the obligee may either sue the (c) bond, or have an action of account, at his election.

nanted to render a true account, &c., and held that an action of covenant lay on the deed. Roll. Rep. 52. 2 Bulst. 256. — So, an *assumpsit* will lie on a promise to dispose of goods, and to give an account thereof. Salk. 9. pl. 1. Carth. 89. Comb. 149. — But where the demand is of consequence, and the matter of an intricate nature, it is most usual to resort to a court of equity, where matters of account are most commodiously adjusted, and more advantageously determined for both parties; the plaintiff being in that court entitled to a discovery of books, papers, the defendant's oath, &c. *Vide tit. Account.*

If goods are consigned to a factor, and upon arrival he makes a false entry at the custom-house, or lands them without paying the customs, whereby they become forfeited and are seized, whatever the principal hereby suffers the factor must inevitably make good, although his commission was general; but if the factor makes his entry according to the invoice, or his letter of advice, and it falls out the same are erroneous, though the goods are lost, yet is the factor excused.

If a home factor be brought to account, he shall not be allowed the customs, unless he swear that he hath paid them; because it were a matter of great scandal, that any thing should pass the allowance of a court of justice that is gotten by defrauding the government.

If a factor beyond sea be brought to account in equity, he shall be allowed the customs payable beyond sea, because he runs the venture; and if the goods had been lost by non-payment of such customs, he must have answered the value of them. certified the customs to be so against two others, who held that the benefit belonged to the principal. Chan. Ca. 76. S. P. and Skin. 149. S. P. so held to have been determined by Lord Clarendon. — But North L. K. said, he was not satisfied herewith, for that though in the saving the customs the factor ventured his own life, yet the principal's goods were ventured also.

It hath been ruled in equity, that if one employs a factor, and entrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's. But if the factor have the money, it shall be looked upon as the factor's estate, and

(a) It is the common practice to give factors power to sell
2 H. 4. 12. b.
Co. Lit. 90. b.
172. a.
11 Co. 90. a.
(b) Therefore it is
Co. Lit. 89. — So,
Roll. Abr. 119.
Dyer, 20.
Cro. Eliz. 644.
(c) Where a
man cove-
nanted to render a true account, &c., and held that an action of covenant lay on the deed.
Roll. Rep. 52. 2 Bulst. 256. — So, an *assumpsit* will lie on a promise to dispose of goods,
and to give an account thereof. Salk. 9. pl. 1. Carth. 89. Comb. 149. — But where the
demand is of consequence, and the matter of an intricate nature, it is most usual to resort to a
court of equity, where matters of account are most commodiously adjusted, and more advan-
tageously determined for both parties; the plaintiff being in that court entitled to a discovery
of books, papers, the defendant's oath, &c. *Vide tit. Account.*
Molloy, 423.
Cro. Jac. 265.
Lan. 65.
Chan. Ca. 30.
Boer v.
Landall.
Chan. Ca. 25.
Smith v.
Oxenden.
Two mer-
chants having
belonged to the
principal. Chan. Ca. 76. S. P. and Skin. 149. S. P. so held to have been determined by Lord
Clarendon. — But North L. K. said, he was not satisfied herewith, for that though in the
saving the customs the factor ventured his own life, yet the principal's goods were ventured
also.
Salk. 160.
pl. 15.
Whitcomb v.
Jacob.

must first answer the debts of superior creditors, &c.; for as money has no ear-mark, equity cannot follow that in behalf of him who employed the factor.

2 Vern. 658.
Burdett v.
Willett.

If *A.* employs *B.* as his factor to sell cloth, and *B.* sells the cloth on credit, and, before the money is paid, *B.* dies indebted by specialty more than his assets will pay; this money shall be paid to *A.*, and not to the administrator of *B.*, as part of his assets, but thereout must be deducted what was due to *B.* for commission; for a factor is in nature only of a trustee for his principal.

Godfrey v.
Saunders,
3 Wils. 114.

¶ If goods are consigned to joint factors, they are in the nature of co-obligors, and are answerable for one another for the whole.¶

2 Vern. 117.
Chapman v.
Derby.

The plaintiff, being a factor in *Blackwell Hall*, advanced money for his principal, relying, as was surmised, on the credit of cloths resting in his hands to reimburse himself: the clothier died, his administrator sued at law for the cloth, and the factor prayed that he might be allowed on account the monies he advanced; but his bill was dismissed; for if there are debts of a higher nature, it would be a *devastavit* in the administrator to pay or discount the plaintiff's debt.

Krutzer v.
Wilcox,
in Canc.
12th March,
1754.
¶ *Ambl.* 252.¶
Gardiner v.
Coleman,
2d June, 1755,
cited in *Godin*
v. London
Assurance
Company, 1 Burr. 493.

[But it has been long settled, that a factor has a lien on goods consigned to him, not only for incident charges, but as an *item* of mutual account for the general balance due to him. And though it be in general true, that by parting with the possession of the goods he parts with the lien, yet (*a*), if the factor sell the goods, he has still a lien on the price of them in the hands of the buyer; for though he has not the actual possession in such case, yet as he has the power of giving a discharge, or bringing an action for them, he must also have a right to retain the money for them.

¶ *S. C.* 1 W. Bl. 104. *per Buller J.* in *Lickbarrow v. Mason*, 6 East, 28. n. *S. P.* *Kinlock v. Craig*, 3 Term Rep. 119. 783.¶ (*a*) *Drinkwater v. Goodwin*, Cowp. 251.; [and see *Sweet v. Pyne*, 1 East, 4. *Hudson v. Granger*, 5 Barn. & A. 27.]

Walker v.
Birch, 6 Term
Rep. 258.;
¶ but see
McGillivray
v. Simpson,
9 Dow. & Ry.
55. *S. C.*
2 Car. & P.
320.¶

But though the general rule of law be, that a factor has a lien on the goods of his principal for the general balance, yet this, like other general rules, may be controlled by the agreement of the parties; as, if *A.* deposit goods with *B.* for sale, and *B.* promise to pay the proceeds to *A.* when sold, *B.* has no lien on these goods (if not sold), for the balance of his general account arising from other articles, the express stipulation in this case negating the general rule of law.

Molloy, 425.
et vide tit.
Master and
Servant.
¶ See the cases
in note,
p. 587. and
Taylor v.

¶ **PRINCIPAL'S RESPONSIBILITY FOR AGENT'S ACTS.**¶ — The principal shall answer for his factor in all cases where he is privy to the act of wrong; and so in contracts, if a factor buy goods on the account of the principal, especially where he has been used so to do, the contract of the factor will oblige the principal to a performance of the bargain.

Sir T. Plumer, 3 Maul. & S. 562., that though an agent departs from his authority so as to discharge the principal, yet the latter may in general adopt the contract, and sue for any breach of it. *S. C.* 3 Maul. & S. 562. *Grojan v. Wade*, 2 Stark. 443. See also *Norfolk (Duke of) v. Worthy*, 1 Camp. 537. An agent cannot dispute the right of his principal. *Dixon v. Hamond*, 2 Barn. & A. 310. *Roberts v. Ogilby*, 9 Price, 269.¶

¶ Thus,

¶ Thus, where a person had several times allowed an agent to subscribe policies in his name, he was held to be bound by such signature. *Neal v. Irving*, 1 Esp. 61.; and see *Goodson v. Brooke*, 4 Camp. 163. *Dickenson v. Lodge*, 1 Stark. 226. *Watkins v. Vince*, 2 Stark. 368.

And in equity, upon evidence of assent, a vendor has been held bound by the signature of the agent's clerk, though, in general, clerks have no authority to bind the principal. *Coles v. Trecothick*, 9 Ves. 234.

Where a party gives an order for another, and at the same time tells the tradesman for whose use he orders the goods, he is not personally liable unless the tradesman refuse to deliver them to the order of the person for whom they are directed, and will only give credit to the person ordering them. *Owen v. Gooch*, 2 Esp. 567.; and see *Rabone v. Williams*, 7 Term Rep. 360. n.

If, however, the goods, bought in the name and upon the credit of a third party unobjected to, be in reality on the pretended agent's own account, he will be liable for them. (a) And if a person, describing himself as agent for another residing abroad, enter into a contract here, he will be personally liable. (b) *(a) Railton v. Hodgson*, 15 East, 67. *Peele v. Hodgson*, *id.* *(b) De Gaillon v. L'Aigle*, 1 Bos. & P. 368. *Redhead v. Cator*, 1 Stark. 14.

The seller of goods dealing with an agent, and electing to give him credit in his own name, knowing him to be an agent, and knowing his principal, cannot afterwards recover against the known principal. But unless the seller know the name of the principal, he will not be precluded by merely debiting the agent with the price from afterwards suing the principal, when discovered. (d) *Paterson v. Gandasequi*, 15 East, 61. *Addison v. Gandasequi*, 4 Taunt. 574. *Bramah v. Lord Abingdon*, cited by *Barn. & C.* 73.

Lord Ellenborough. 15 East, 66. (d) *Thomson v. Davenport*, 9

If one take the security of the agent unknown to the principal, and give the agent a receipt as for the money due from principal, and on the faith of this receipt the principal deal differently with the agent, the principal is discharged. *Aliter*, if the principal do not shew that he was injured by reason of such receipt. *Wyatt v. Mayor of Hertford*, 3 East, 147.

If *A.*, being possessed of certain artificial and counterfeit jewels of the value of 168*l.*, and knowing them to be such delivers them to *B.* his servant, commanding him to transport the said jewels to *Barbary*, and to sell them to the king of *Barbary*, or to such other person as would buy them, but gives *B.* no charge to conceal their being counterfeit; and thereupon *B.* goes into *Barbary*, and, knowing these jewels to be counterfeit, shews them to *C.* for good and true jewels, and affirming to *C.* that they were worth 810*l.*, desires *C.* to sell them to the said king; whereupon *C.* does sell them to the said king for 810*l.*, which money *C.* pays *B.*, and *B.* thereupon immediately returns to *England*, and pays the 810*l.* to *A.* his master; and after the jewels being discovered to be counterfeit, *C.* is imprisoned by the said king till he repays the 810*l.* out of his own effects; of all which matter *C.* gives notice to *A.*, and demands satisfaction, &c., yet no action

lies against *A.*; for jewels are in themselves of an uncertain value, and *B.* was not by *A.* particularly directed to *C.*, and all that was done *quoad C.* was the voluntary act of the servant, for which the master is not bound to answer.

Paterson v. Tash, 2 Str. 1178.

||Newsom v. Thornton, 6 East, 17. Martini v. Coles, 1 Maul.

& S. 140. Shipley v. Kymer, 1 Maul. & S. 484. Queiroz v. Trueman, 5 Barn. & C. 542. S. C. 5 Dow. & Ry. 192. Kuchein v. Wilson, 4 Barn. & A. 443.; see also Solly v. Rathbone, 2 Maul. & S. 298. Cochran v. Irlam, 2 Maul. & S. 301. Jackson v. Clarke, 1 You. & Jer. 216. Gill v. Kymer, 5 Moore, 503. Fielding v. Kymer, 2 Brod. & B. 639. Graham v. Dyster, 6 Maul. & S. 1. S. C. 2 Stark. 24. Guichard v. Morgan, 4 Moo. 36. Boyson v. Coles, 6 Maul. & S. 14.|| (*a*) Daubigny v. Duval, 5 Term Rep. 606. *Per Buller* and *Grose Js.*, *hasitante Kenyon C. J.*, who inclined to think that the principal ought to tender to the pledgee the sum for which they are pledged, if under or to the amount of the money due from him to the factor, but not more; ||and see *McCombie v. Davies*, 7 East, 5.||

Gucreiro v. Peile, 3 Barn. & A. 616.

||So a factor, having an authority to sell for money, is not entitled to barter. If he do so, no property passes, and the principal may maintain trover against the party with whom the goods were bartered, although the latter was ignorant that he had been dealing with a factor.

(*b*) § 1. See also 7 Geo. 4. c. 7. An act to facilitate the advancing of money by the Governor and Company of the Bank of England upon deposits or pledges.

(*c*) § 2.

(*d*) § 3.

But by the 6 Geo. 4. c. 94., altering and amending the 4 Geo. 4. c. 83., factors or agents having goods, wares, and merchandize of *their principals* in their possession are to be deemed the owners, so as to give validity to their contracts with persons dealing *bonâ fide* upon the faith of such property. (*b*) And persons in possession of bills of lading, warrants, certificates, and orders, are to be deemed the owners of the goods and merchandize mentioned therein, so far as to make valid contracts, provided the parties contracting have not notice that the persons intrusted with the said bills of lading, &c. are not the *bonâ fide* owners, &c. of such goods and merchandize. (*c*) And provided that no person shall acquire a security upon goods in the hands of an agent, for an antecedent debt, beyond the amount of the agent's interest in the goods. (*d*)

(*e*) The bills of lading, &c. mentioned in § 2.

Fletcher v. Heath, 7 Barn. & C. 517.

And by § 5. of the same statute it is farther enacted, "That from and after the passing of the act, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares, or merchandize, or any such document as aforesaid (*e*), in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title, and interest (*g*) in or upon or to the said goods, wares, or merchandize, or any such document as aforesaid, for the delivery thereof, than was possessed or could

“ could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest, as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid:” Provided that nothing in the said act contained shall be deemed to prevent the true owner from following his goods while in the hands of the agent, or in the case of bankruptcy in the hands of his assignees, or to recover them from a third person, upon paying his advances secured upon them. And further provided, that in case of the bankruptcy of the factor, the owner of the goods so pledged and redeemed shall be held to have discharged, *pro tanto*, the debt due by him to the estate of such bankrupt. (a)

(a) See § 6.

And effectually to prevent the improper pledging of goods consigned to factors, the statute provides (b), that agents *fraudulently* pledging the goods of their principals shall be deemed to be guilty of a misdemeanor. And it is provided, that the acceptance of any bills of exchange by the factor on account of his principal, shall not be considered as constituting a part of the debt due from the principal within the meaning of the act, so as to excuse the consequence of such pledge, unless such bills be paid when due. (c) And that the penalty annexed by the act, as above mentioned, shall only extend to the partner or partners privy to the commission of the offence of fraudulently pledging. (d)¶

(b) § 7.

(c) § 8.

(d) § 9.

¶ WHERE FACTORS AND AGENTS MAY PERSONALLY BE SUED AND SUE.¶—Where a factor to one beyond the sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last, the promise will be presumed to be made to him; and the rather so, as it is so much for the benefit of trade. If a factor who receives cloths, and is authorized to sell them in his own name, makes the buyer debtor to himself (e); though he is not answerable for the debt, yet he has a right to receive the money. His receipt is a discharge to the buyer, and he has a right to bring an action against him to compel the payment; and it will be no defence for the buyer in that action to say, that, as between him and the principal, he (the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that but where the factor has nothing due to him.

Gonzales v. Sladen, Tr. 1 Ann. Guildhall, Salk. MSS. Bull. N. P. 130.; ¶and see Houghton v. Matthews, 5 Bos. & Pul. 490. Paterson v. Gandasequi, 15 East, 62. Seymour v. Pychlaw, 1 Barn. & A. 14. Thompson v. Davenport, 9 Barn. & C. 78.¶ (e) Cowp. 255, 256.

¶ Where an agent has a beneficial interest in the performance of a contract, as for commission, &c., he may bring the action in his own name, though the principal might sue.

Johnson v. Hudson, 11 East, 180. Shields v. Davis, 6 Taunt. 65.

But

Bickerton v. Burrell, 5 Maul. & S. 585.
Coxe v. Harden, 4 East, 211.
Spittle v. Lavender, 2 Brod. & B. 452.
5 Moo. 270. S. C.

But if a party enter into a written contract, expressly stating himself as agent for a third person, he cannot sue in his own name, at least without giving notice to the defendant that he is really intended. And the mere endorsement of a bill of lading to an agent, to enable him to receive the goods, without any consideration, will not enable the agent to sue in his own name. And so also, if after an agent has made a written contract the principal sign it, expressing his sanction and approbation, the agent is not personally responsible on the contract. ||

Bull, N.P. 150.
Cowp. 255.
(a) Scrimshire v. Alderton, 2 Stra. 1182.
A *del credere* commission is, where a factor, in consideration of an additional premium, acts as an insurer, and takes upon himself all risks. Thus, the common factorage between St. Petersburg and London is 2 per cent.; but in consideration of an additional 3 per cent., the factor engages to stand as the middle man, and to run the hazard of bad debts. Commissions *del credere* are more common in this country than perhaps in any other, the characters of the buyers being better known, and the risk of course less. || As to the effect of such a commission, see 1 Maul. & S. 494. 4 *id.* 566. Paley, p. 216. 6 Maul. & S. 166. ||

|| PAYMENT TO FACTORS, AND SET-OFF. ||—A factor's sale by the general rule of law creates a contract between the owner and the buyer; and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him and not the factor, the buyer will not be justified in afterwards paying the factor: and it is the same, notwithstanding the factor acts upon a *del credere* commission. (a)

(a) Strierneld v. Holden, 4 Barn. & C. 5.
Powell v. Nelson, 15 East, 65. n.

|| So the buyer will not be justified in paying the agent, if he knows that the agent has no authority to receive the proceeds of the sale. (a)

What will amount to a knowledge of the agency, see Manks v. Henderson, 1 East, 555. Moore v. Clementson, 2 Camp. 22. Escott v. Milward, 7 Term Rep. 561. (b). And see further as to payment to factors, Paley, Princ. & Ag. ch. 3. p. 1. § 8., and p. 2. § 5.

George v. Claget, 7 Term Rep. 359.; and see Morris v. Cleasby, 1 Maul. & S. 576. Blackburn v. Scholes, 2 Camp. 343. Waring v. Favenck, 1 Camp. 85. Carr v. Hinchcliffe, 4 Barn. & C. 547.

But where a factor, sells goods as his own, and the buyer does not know of any principal, the buyer may, in an action brought against him by the principal, set off a debt due to him from the factor.

Baring v. Corrie, 2 Barn. & A. 137.

Secus, if the circumstances were such as must have raised a presumption that the sale by the party was in the character of broker. ||

Escott v. Milward, Sitings at Guildhall, after Mich. Term, 1783.
Co. Bankrupt Laws, 456.
|| And see 7 Term Rep. 560. ||

The plaintiffs were merchants in London, and in June, 1783, had a quantity of wheat consigned to them from Ostend, the sale of which they intrusted to one Farrer, as their factor. The factors in the corn trade, like those in the linen trade, receive a *del credere* commission, besides their factorage, and never communicate the names of the purchasers to the owners, except in case of the factor's failure. Farrer, on the 9th June, 1783, sold 211 quarters of the plaintiff's wheat to the defendant Milward. On the 16th June, Farrer, being about to stop payment, gave up the wheat under his care to the plaintiffs, and sent them the names of the buyers. On the 20th June, Farrer stopt payment, and a short time afterwards his creditors executed a deed of composition. On the 21st June, the plaintiffs delivered the defendant a bill of parcels

parcels of the wheat sold to him by *Farrer*, as their factor, and desired him to accept a bill at a month for the amount, which he refused, insisting that he had a right to set off a debt due to him from *Farrer* against the price of the wheat. Mr. Justice *Buller*, in his charge to the jury, declared the doctrine laid down by Lord Chief Justice *Lee*, in *Scrimshire v. Alderton*, to be law, and the plaintiffs recovered a verdict.

Again, one *Murray of Belfast*, in 1782, consigned a quantity of linens to *Bate* and *Henkell* of *London*, to be disposed of by them as his factors, upon a *del credere* commission. *Bate* and *Henkell* sold the linens for 192*l.* 14*s.*, and before they received the money became bankrupts. The assignees afterwards received the money of the purchaser, which *Murray* demanded of the assignees, who refused to pay it, insisting, that *Murray* might come in as a creditor under the commission. *Murray* presented a petition to the Lord Chancellor, praying, that the assignees might be ordered to pay him the money his linen sold for, after deducting the commissions and charges, and a small sum due from *Murray* to the bankrupts, on another account. His Lordship, after hearing the point of law argued, was clearly of opinion, that the purchaser not being paid for the linens previous to the bankruptcy, *Murray* the consignor was entitled to receive the price of the linens, and accordingly ordered the assignees to pay him the money.

Upon this principle it has been determined, that goods of the principal, found in the possession of the factor at the time of his becoming bankrupt, though he have a *del credere* commission, will not pass by the assignment.

Wms. 185. *Ex parte Dumas*, 2 Ves. 586. 1 Atk. 232. *Ex parte Oursell*, Ambl. 297.

So, bills remitted by the principal to his factor, whilst unpaid, are in the nature of goods unsold, and if the factor become bankrupt, the principal may recover them in an action for money had and received, subject to such lien as the factor may have upon them.

ruptcy. *Hovill v. Lethwaite*, 5 Esp. 158. As to the other modes by which it may be determined, see Chit. on Commercial Law, 3d vol. p. 225.]

But a *del credere* commission will have the effect of enabling a policy-broker, under the clause in the 5 G. 2. c. 30., [(see 6 Geo. 4. c. 16. § 50.)] for setting mutual debts one against the other, to give in evidence upon the general issue a loss upon a policy happening before the bankruptcy, in an action by the assignees of the underwriter, for premiums upon policies underwritten by him.]

of enabling the policy broker to set off losses, unless the policies are effected in his own name (which was the case in *Grove v. Dubois*, and *Bize v. Dickason*). *Koster v. Eason*, 2 Maul. & S. 112.; and see 1 Maul. & S. 494.; and *Wienholt v. Roberts*, 2 Camp. 586. in which it does not appear whether the policy was in the broker's name or not. And if the policies are in his own name he may set off losses against the underwriters' assignees, although he have no *del credere* commission, provided he have a lien, as by accepting bills on credit of the consignment insured. *Parker v. Beasley*, 2 Maul. & S. 425. But unless there is a bankruptcy, *unadjusted* losses cannot be set off, though the broker have a *del credere* commission, and have accounted for the losses to his principal; for they are unliquidated damages, which, though they may be set off under the bankrupt laws as *mutual credit*, are not *mutual debts*, within

Ex parte Murray, Dec. 1783. Co. Bankrupt Laws, 457.

Garrett v. Cullum, Bull. N. P. 5th ed. 42. *Godfrey v. Furzo*, 3 P.

Zinck v. Walker, 2 Bl. Rep. 1154. [The agent's power is determined by his bank-

Grove v. Dubois, 1 Term Rep. 112. *Bize v. Dickason*, *ibid.* 285. [But the *del credere* commission will not have the effect

within the statutes of set-off. *Cumming v. Forrester*, 1 Maul. & S. 494.; and see further as to set-off between insurance brokers and underwriters, tit. *Set-off*.||

Goupy v.

Harden,
2 Marsh, 454.

S. C. 7 Taunt.

159. *S. C.* at

N. P. Holt,

542.; and see

Le Fevre v.

Lloyd,

1 Marsh, 518.

S. C. 5 Taunt.

749.

(a) *Simpson v.*

Swan, 5 Camp.

291. *Leadbitter*

v. Farrow, 5 Maul. & S. 345.

Morris v. Stacey, Holt, 153.

(b) *Varden v.*

Parker, 2 Esp.

710.

Dixon v. Ham-

mond, 5 Barn.

& A. 310.;

and see

9 Price, 269.

5 Taunt. 447.

Dufresne v.

Hutchinson,

3 Taunt. 117.

Schmaling v.

Tomlinson,

6 Taunt. 147.

|| **AGENT'S PERSONAL LIABILITY.** — It has been decided, that an agent purchasing foreign bills for his principal, and endorsing them to him *without qualification*, is liable to the principal on his endorsement, however small be the commission which he gets upon the purchase. And where a factor took a security payable to himself from a purchaser of goods, and gave his own security to his principal, without disclosing the name of the purchaser, it was held that he could not compel his principal to refund the money paid him on failure of the purchaser. (a) In these cases it is to be observed, the agent went beyond what was required of him in his capacity of agent, and volunteered his own liability.

Morris v. Stacey, Holt, 153.

But an agent selling goods on credit is not liable to his principal until he is paid by the vendee, unless the delay in payment is occasioned by his own neglect, or unless he act under a *del credere* commission. (b)

An agent cannot dispute the title of his principal; and therefore a person having, as agent to two partners, insured a ship and freight, and charged them with the premiums, and on a loss happening received the money from the underwriters, is estopped from shewing that the property in the ship was in one partner only, and holding himself accountable to him.

If a broker, being authorized to sell goods for a certain price, sell them at an inferior price, he is not liable in trover for the amount of the goods. The proper remedy is an action on the case.

If *A.* employ *B.* to ship goods, and *B.*, without *A.*'s knowledge, employ *C.*, who executes the business, there is no privity between *C.* and *A.*, and *C.* cannot sue *A.* for his charges, though *A.* has never paid them to *B.*||

(C) Of Partners and Joint-traders.

1 Ves. 242.;

||see *Gow*

on partner-

ship; *Mon-*

tagu on part-

nership; and

Chit. on Com-

mercial Law,

3d vol. p. 225.

tit. Of Part-

ners. ||

Fox v. Han-

bury, Cowp.

449.

12 Mod. 446.

|| **PARTNERSHIP HOW CONSTITUTED, AND ITS CONSEQUENCES.**|| — Partners are joint-tenants in all the stock and partnership effects; and they are so not only of the particular stock in being at the time of entering into the partnership, but they continue joint-tenants throughout, whatever changes may take place in the course of trade; for if it were otherwise it would be impossible to carry on partnership trade. Hence assignees, under a commission of bankrupt against one partner, can only be tenants in common of an undivided share, subject to all the rights of the other partner. And if a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner. So that one partner can have no right against the other, in his capacity of partner, but to what is due from him out of the joint-stock, after making all just allowances, let the fluctuations of trade be what they may. The whole of this doctrine

trine seems to arise out of the very principle upon which partnership is founded, namely, probable profit and the risk of loss; the advantages or disadvantages of which cannot, in common justice, be confined to one side only, but must be reciprocal throughout.

¶ From the unity of interest which each partner has in all the stock in trade of the partnership, he cannot, whatever share of the stock or profits he may be entitled to, or in whatever sum the firm may be indebted to him, exercise an *exclusive right* to enjoy or receive it, until a balance of accounts has been struck between him and his fellow-partner.

Holmes v. Higgins, 1 Barn. & C. 74. See Bovill v. Hammond, 6 Barn. & C. 149. Milburn v. Codd, 7 Barn. & C. 419.

Thus, one member of a company of partners, performing work for the partnership, cannot sue any of the subscribers to the partnership for his charges. And so, if one member of a company, as agent for the company, draw a bill on a stranger, in payment for goods sold by the company to the stranger, and endorse it to the actuary, who endorses it to the managing director, such director cannot sue the drawer on the bill being dishonoured by the acceptor.

Holmes v. Higgins, *supra*. Teague v. Hubbard, 8 Barn. & C. 345.; and see Neale v. Turton, 4 Bing. 149. Caster v. Drury, 18 Ves. 157.

But as soon as a balance is struck there is an implied promise in law, on the part of him against whom the balance is found, to pay his copartner, and an express promise to pay is not necessary.¶

2 Bing. 171. S. C. 9 Moore, 515. Rackstraw v. Imber, Holt, 368.; and see Wray, 6 Taunt. 597. S. C. 2 Marsh, 519. Brooke v. Enderby, 4 Moore, 501.

Foster v. Allanson, 2 Term Rep. 479. Fromont v. Coupland, v. Bosanquet v.

If two are partners as attornies and conveyancers, and one of them receives money to be laid out on mortgage, the other is liable for the amount, though his partner should even have given a separate receipt for it.

Willett v. Chambers, Cowp. 814. ¶ Rothwell v. Humphreys, 1 Esp. 406.¶

On a motion for a new trial, the following facts were disclosed: An action was brought against *Smith* alone as a secret partner with one *Robinson*, to whom the goods were delivered, and who became bankrupt in 1770. On the 30th of *March*, 1767, *Smith* and *Robinson* entered into partnership for seven years, but in *November* afterwards, some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled; but the dissolution was open and notorious, and was notified to the public on the 17th of *November*, 1767. The terms of the dissolution were, that all the stock in trade and debts due to the partnership should be carried to the account of *Robinson* only. *Smith* was to have back 4200*l.* which he brought into the trade, and 1000*l.* for the profits then accrued, since the commencement of the partnership. He was to lend *Robinson* 4000*l.*, part of this 5200*l.*, or let it remain in his hands for seven years, at five per cent. interest, and an annuity of 300*l.* per annum for the same seven years. For all this *Robinson* gave a bond to *Smith*. In *June*, 1768, *Robinson* advanced

Grace v. Smith, 2 Bl. Rep. 998.

advanced to *Smith* 600*l.* for two years' payment of the annuity, and other sums by way of interest, and gratuities, and other large sums at different times to enable him to pay the partnership debts; *Smith* having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of *Robinson*. On the 1st of *August*, 1768, the demands of *Smith* were all liquidated and consolidated into one; viz. 5200*l.* due to him on the dissolution of the partnership, 1500*l.* for the remaining five years of the annuity, and 300*l.* for *Smith's* share of a ship: in all 7000*l.*; for which *Robinson* gave a bond to *Smith*. On the 22d of *August*, 1769, an assignment was made of all *Robinson's* effects to secure the balance then due to *Smith*, which was stated to be 10,000*l.* Soon after the commission was awarded.

De Grey C. J. — The only question is, What constitutes a secret partnership? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trade relies for his payment. If any one advances or lends money to a trader, it is not lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment: and there is no difference whether that money be lent *de novo*, or left behind in the trade by one of the partners who retires: and whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is, to enquire whether *Smith* agreed to share the profits of the trade with *Robinson*, or whether he only relied on those profits as a fund of payment: a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial. *Blackstone J.*, concurring in opinion with the Chief Justice, said, I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a *loan* (whether usurious or not, is not material to the question), in the latter a *partnership*. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in trade to any amount.

Where the defendant had been partner with one *Brooke*, and they agreed to separate, and *Brooke* agreed to give him his bond for 2485*l.* with interest, which sum had been brought by the defendant into trade, and an annuity of 200*l.* for seven years, if *Brooke* so long lived, as in lieu of the profits of the trade; and the defendant had at all times liberty to inspect *Brooke's* books; he was adjudged to be a partner and liable; for the charge had reference to the profits; it was *casual* as depending on *Brooke's* life, and his right to inspect the books was that of a partner.

But, in order to constitute a partnership, and to make a person

Bloxam v. Pell, 2 Bl. Rep. 998; ||and see *Gilpin v. Enderby* (in error), 5 Barn. & A. 954. S. C. 1 Dow. & Ry. 570. ||

son liable as a partner, there must be an agreement between him and the ostensible person to *share in all risks of profit or loss*, or he must have permitted the other to use his credit, and to hold him out as jointly liable with himself. A man entering into an agreement, and afterwards subdividing his beneficial interest under it, among others, is alone liable to the performance, and the subcontract does not constitute a partnership. Thus, an action was brought by the plaintiffs, who were the owners of a *Greenland* ship, against the defendants, upon an agreement to purchase a cargo of oil. The declaration stated, that on the 29th of *August*, 1786, the plaintiffs sold the cargo to the defendants, at the rate of 20*l.* per ton, to be received as soon as it was boiled and ready. That by way of collateral security, two bills of exchange were deposited in the hands of the plaintiffs, one of which was accepted by the defendants, *Eyre*, *Atkinson*, and *Walton*. That the sale being so made, and it being expected that the defendants would not take away the oil pursuant to the terms of the sale, it was afterwards agreed between the plaintiffs and defendants, by the name of *Benjamin Eyre* and Co., that the plaintiffs should keep the oil in their possession, till the 1st of *January* following; and if the defendants did not pay for it on or before that day, the plaintiffs were to be at liberty to authorize the broker to resell it at the best price he could get; and if upon such resale the oil should not produce 20*l.* per ton, with all charges, the plaintiffs were to deduct the difference of the price out of the bills placed in their hands as a collateral security. The declaration then stated, that the defendants neither paid for the oil, nor took it away, and therefore the plaintiffs authorized the broker to resell it. That the deficiencies upon the resale amounted to 400*l.* besides brokerage, &c. 100*l.*, and that the bill of exchange accepted by the defendants was presented to them for payment, and refused. Before this action was brought, *Eyre* and Co. had become bankrupts. It appeared in evidence on the trial, that on the 24th of *August*, 1786, the defendants, *Eyre* for himself and partners, who were *Atkinson* and *Walton*, general merchants, *Hattersley* for himself and *Stephens*, who were oil-merchants, and *Pugh* for himself and son, who were also oil-merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise; that *Eyre* should be the ostensible buyer, and the others share in his purchase, at the same price which he might give. *Hattersley* and Co. were to have one fourth, *Pugh* one fourth, and *Eyre* and Co. the remaining moiety. That they bought large quantities of oil, belonging to other ships, and other traders, besides the plaintiffs, in the name of *Eyre* and Co. That *Hattersley* and *Pugh* occasionally came forwards, and gave directions as to the delivery of the oils, and otherwise interfered in the transaction; and also made many declarations, that they were all jointly interested in the different purchases, and that there was a general concern between them. On the part of the defendants it was insisted, that the contract of sale was made between the plain-

tiffs

Hoare v.
Dawes,
Dougl. 371.

Coope v.
Eyre, 1 H.
Bl. 37. ¶ And
see Young v.
Axtell, 2 H.
Bl. 242.
Morse v.
Wilson,
4 Term Rep.
353. Saville
v. Robertson,
4 Term Rep.
794. Leveck
v. Shaftoe,
1 Esp. 468.
Waugh v.
Carver, 2 H.
Bl. 235.
Benjamin v.
Porteus,
2 H. Bl. 590.
Swan v.
Steele, 7 East,
210. *Ex parte*
Gellar,
1 Rose's
Ca. 297.¶

tiffs and *Eyre* and Co. only; and that the agreement entered into between themselves was only a subcontract, and did not constitute a partnership; and the learned Judge who tried the cause being of the same opinion, directed a verdict to be found for the defendants, which was accordingly done. The plaintiffs therefore moved the court for a new trial, on the ground of misdirection; and after the case had been fully argued, the court refused to grant a new trial, being of opinion that the verdict was proper. For as this was an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership; in which case all the partners are liable as one individual. It was justly observed, that a secret partnership can be no consideration to the vendor, though, for reasons of policy and general expedience, the law is positive with respect to the secret partner, that when discovered he shall be liable to the whole extent. In many parts of *Europe* limited partnerships are allowed, provided they be entered on a register; but the law of *England* is otherwise, the rule being, that if a partner shares in advantages he also shares in all disadvantages. In order to constitute a partnership, a communion of profit and loss is essential; and the shares must be joint, though it is not necessary that they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale; otherwise they are not partners. In the present case *Eyre* was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them which is necessary to make them partners; their agreement was a subcontract, which may be executory, as it was to share in a purchase to be made. The seller looked to no other security than *Eyre* and Co. To them the credit was given, and they only were liable.]

Waugh v. Carver, 2 H. Bl. 235. Cheap v. Crummond, 4 Barn. & A. 663. and see Gouthwaite v. Duckworth, 12 East, 421. Wightman v. Townroe, 1 Maul. & S. 412. Gilpin v. Enderby (in error), 5 Barn. & A. 954. S. C. 1 Dow. & Ry. 570.

Hesketh v. Blanchard, 4 East, 144. Meyer v. Sharpe,

|| A participation of profits is sufficient to constitute a partnership, because an agreement to share profits alone cannot prevent the legal consequence of also sharing losses for the benefit of creditors. Thus *A.* and *B.*, ship agents at different ports, entering into an agreement to share in certain proportions the profits of their respective commissions, and the discount on traders' bills employed by them in repairing the ships consigned to them, &c. are liable as partners to all persons with whom either contracts as such agent, though the agreement provides, that neither shall be answerable for the acts or losses of the other, but each for his own.

So where *A.*, having neither money nor credit, offered to *B.*, that if he would order with him certain goods to be shipped on an adventure, *if any profit should arise from them B. should have half for his trouble*; *B.* having lent his credit on this contract, and ordered

ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by *B.* alone, the contract, though it was held not to constitute a partnership as between themselves, but only an agreement for a compensation for trouble, was held to make *B.* liable as a partner to third persons who were creditors.

4 Barn. & C. 867. *Peacock v. Peacock*, 2 Camp. 45. S. C. 16 Ves. 56. *De Berkum v. Smith*, 1 Esp. 29.

But an agreement, that a broker employed to sell goods shall keep for himself whatever he can obtain on the sales beyond a stated sum, does not render the broker a partner; nor does an agreement by a lighterman with the person employed to work the lighter, that he shall have half the *gross earnings*; *aliter*, if it be half the *profits*.

1 Camp. 351. note. *Meyer v. Sharpe*, 5 Taunt. 74.; but see *Reid v. Hollinshead*, 4 Barn. & C. 867.; and see Lord *Eldon's* disapprobation of the principle of the above cases, 17 Ves. 404.

A party may become liable as a partner, though not so in reality, by suffering his name to be held out to the world as a partner.||

2 Camp. 502. *Parsons v. Crosby*, 5 Esp. Ca. 199.

If two or more engage in a joint undertaking in the way of trade, or enter into copartnership, it is not necessary to provide against survivorship; for, by a maxim of the common law, *jus accrescendi inter mercatores locum non habet*; and this is for the benefit of trade and commerce, that the fruits of each person's labour and industry should descend to his children and family. (a)

ants in Common. (a) It has been determined, that upon a partnership *without articles* the good-will survives. *Hammond v. Douglas*, 5 Ves. 539.; but the authority of this case was doubted in *Crawshay v. Collins*, 15 Ves. 218. Though *semble* that, on a partnership between professional persons, the good-will of a business on the death of one survives. *Farr v. Pearce*, 5 Madd. 74.||

But if two joint merchants make *B.* their factor, and one dies, leaving an executor, this executor and the survivor cannot join in an action (b) against the factor; for though the duty does not survive, yet the remedy does; and therefore, on recovery, the survivor must be accountable to the executor for that.

executor and the surviving merchant be jointly sued, because the first is to be charged *de bonis testatoris*, and the other *de bonis propriis*. *Carth.* 170, 171. 5 Lev. 290. 2 Lev. 228. *Fortesc.* Rep. 181.

The plaintiff's husband (to whom she is administratrix) and the defendant were copartners for many years in the trade of a druggist; the plaintiff brought her bill for a discovery of the estate, and her proportion and dividend thereof, &c., the defendant answered; and it appearing that many debts owing to the joint trade stood out, it was moved on behalf of the plaintiff, that an able attorney might be appointed to sue for and recover those debts; it being alleged in the bill, that the defendant carrying on a distinct trade for himself with the persons that were debtors to the joint trade, to oblige them he forbore to call in

Vol. V.

D d

their

5 Taunt. 74. *Smith v. Watson*, 2 Barn. & C. 401. S. C. 5 Dow. & Ry. 751.; and see *Reid v. Hollinshead*,

Benjamin v. Porteus, 2 H. Blac. 590. *Dry v. Boswell*, 1 Camp. 529. and see 4 Esp. 182.; *Wish v. Small*,

Per Ld. Eldon, 18 Ves. 501. *Guidon v. Robson*, 5 Esp. Ca. 199.

Vern. 217. || 15 Ves. 227. and see *Devaynes v. Noble*, 1 Mer. 563.; and *vide tit. Joint-tenants and Tenants* in *Common*. *Farr v. Pearce*,

2 Salk. 444. pl. 3. *Ld. Raym.* 540. *Martin v. Crump*.

(b) Nor can an executor and the surviving merchant be jointly sued, because the first is to be charged *de bonis testatoris*, and the other *de bonis propriis*. *Carth.* 170, 171. 5 Lev. 290. 2 Lev. 228. *Fortesc.* Rep. 181.

Vern. 118. *Estwick v. Conninsby*. || The death of one partner is not a sufficient cause for the appointment of a receiver, though the death of both partners is sufficient. *Phil-*

lips v. Atkin- their debts; and it was ordered accordingly, unless the defendant,
son, 2 Bro. C.C. within a week, would give security to the plaintiff to answer her
272.; and see moiety of the debts that were standing out.
Dacie v. John,
1 McClel. Rep. 201. ||

Salk. 126. By the custom of *England*, where there are two joint traders,
pl. 3. Pinkney and one accepts a bill drawn on both, for him and partner, it
v. Hall, Ld. binds both if it concerns the trade; otherwise, if it concerns the
Raym. 175. acceptor only in a distinct interest and respect. (a)
|| Harrison v.

Jackson, 7 Term Rep. 207. One partner may bind his copartners by procuration. Wil-
liamson v. Johnson, 1 Barn. & C. 146. S. C. 2 Dow. & Ry. 281.; and see Lacy v. Woolcott,
2 Dow. & Ry. 458. Ridley v. Taylor, 15 East, 175. *Ex parte* Agace, 2 Cox, 312. *Ex parte*
Gardom, 15 Ves. 286. (a) Greenslade v. Dower, 7 Barn. & C. 655. Green v. Deakin, 2 Stark.
547. Arden v. Sharpe, 2 Esp. 524. Wells v. Masterman, 2 Esp. 731. Emly v. Lye, 15 East, 7.
Bond v. Gibson, 1 Camp. 185. ||

Lord Galloway || But the authority of one partner to bind another by signing
v. Matthew, bills and notes in their joint names is only an implied authority,
10 East, 264. and may be rebutted by express previous notice to the party
S. C. 1 Camp. taking such security from one of them, that the other would not
405.; and see be liable for it.
Shirreff v.

Wilks, 1 East, 48.

(b) Duncan v. And one partner cannot bind his copartners by signing the
Lowndes, partnership firm to a *guarantee*, without an authority from them to
5 Camp. 478. do so; for it is not incidental to the general power of a partner (b):
Ex parte Peale, nor can he bind his copartners by a submission to arbitration,
6 Ves. 602. even of matters arising out of the business of the firm (c); nor by
8 Ves. 540. deed. (d)
(c) Stead v.

Salt, 5 Bing. 101. (d) Harrison v. Jackson, 7 Term Rep. 207.

Denton v. Where, however, one of several partners, with the privity of
Rodie, 3 Camp. the others, drew bills in his own name in favour of persons who
493. advanced him the amount, which he applied to the use of the
partnership, it was held, that although the partners were not
jointly liable on the bills, yet that they might be jointly sued by
the payees for money lent.

Emly v. Lye, However, if one partner draw bills in his own name, and pro-
15 East, 7.; cure them to be discounted, the party discounting has no remedy,
and see 1 Rose, either on the bills or for money lent, against the other partners,
Ca. 61. though the proceeds are actually carried to the partnership ac-
count; for the money is advanced solely on the credit of the
names on the bills.

South Caro- But if a firm, consisting of several parties, carry on business in
lina Bank v. the name of one of them, the firm will be bound by the endorse-
Case, 8 Barn. ment of that individual on bills endorsed for the partnership ac-
& C. 427. count.

Sandilands And where one of two partners made a contract as to the
v. Marsh, terms on which some business was to be transacted by the firm,
2 Barn. & A. although such business was not in their usual course of dealing,
673. and even contrary to their arrangement with each other, and the
business was afterwards transacted with the knowledge of the
other partner, he was held bound by the contract made by his
partner.

Raba v. And a pledge by one partner of joint partnership property
will

will bind his copartners, although such pledge be made without their privity or consent, provided the pledgee had no notice that the property was partnership property, and there be no fraud in the transaction.

and see Hooper v. Lusby, 4 Camp. 66. Lacy v. McNeale, 4 Dow. & Ry. 7. Rapp v. Latham, 2 Barn. & A. 795. Lacy v. Woolcott, 2 Dow. & Ry. 458.

Ryland, Gow's Ca. 152. S. P. Tupper v. Heythorne, *ibid.* 135. n.;

But one of several partners in a contract with government cannot pledge goods consigned to him by another partner, for the purpose of performing the contract.

Snaith v. Burridge, 4 Taunt. 684.

And a firm cannot acquire property in goods obtained by the fraud of one partner, although the others are not privy to it.

Killer v. Willson, 1 Ry. & Moo. 178.

In bankruptcy it may be observed, one partner is allowed to act for another for various purposes; as to prove debts, to execute powers of attorney, to vote in the choice of assignees, sign the certificate, &c. ||

Ex parte Mitchell, 14 Ves. 597.

A. and B. were partners as woollen-draper, A. received money in the shop of S. S. and gave a note for it signed by himself and partner; A. and B. being both dead, and A. not leaving sufficient assets, it was held, on a bill brought by S. S. against the executors of both the partners, that this note being given by one of the partners, it should bind them both; and that though at law it binds only the executor of the surviving partner, yet in equity the creditor may follow the estate of the other, though no (a) proof was made that this money was brought into the stock, or used in trade.

2 Vern. 277. Lane v. Williams. (a) That the act of one partner shall be presumed the act of the other, and shall bind him, unless he can shew a disclaimer, and a refusal to be

concerned. Salk. 292. pl. 33.; ||and see Swan v. Heald, 7 East, 209. S. C. 3 Smith, 199. ||

[Two entered into articles of copartnership, and each brought in 1000*l.* stock. There was to be no benefit of survivorship, neither was to become indebted without the other, nor either to take out of the stock without the other. One became *indebted without the consent of his partner*, and made his wife executrix, and died. The wife *confessed judgment* for the debt. The other sues for an account and relief against the creditor and the wife. They confess the *articles*, and the obtaining judgment. Lord Chancellor granted an injunction against the judgment, because the debt related not to the partnership, saying, if this be suffered no trade could be in such case.

2 Chan. Ca. 58.

So, where three persons entered into partnership in the trade of sugar-boiling, and agreed that no sugars should be bought without the consent of the majority; one of them afterwards makes a protest that he would no longer be concerned in partnership with them: the two other persons after make a contract for sugars: the seller having notice that the third had disclaimed the partnership, he shall not be charged.]

Minnitt v. Whitney, Vin. Abr. tit. Partners (A), pl. 12.

A. and B. are copartners, and a judgment is had against A., and the goods of both are taken in execution: it was held *per Cur.* that the sheriff must seize all, because the moieties are undivided; for if he seize but a moiety and sell that, the other will have a

Salk. 592. pl. 1. Heydon v. Heydon; and *vide* Show. 173, 174.

Comb. 217.
 ¶ And see
 Chapman v.
 Hoops, 3 Bos.
 & Pul. 289.¶

Eddie v.
 Davidson,
 Dougl. 650.
 ¶ Smith v.
 Stokes, 1 East,
 363.¶

Jacky v. Butler,
 2 Ld.
 Raym. 871.;
 ¶ and see Taylor
 v. Fields,
 4 Ves. jun.
 596.¶

Richardson
 v. Goodwin,
 5 Vern. 293.
 ¶ West v. Skip,
 1 Ves. 232.
 12 Mod. 446.
 Smith v. De
 Silva, Cowp.
 469. Smith v.
 Stokes, 1 East,
 363. Smith v.
 Oriel, 1 East,
 368.¶

Goss v. Dufresney,
 Dav. Bankrupt
 Laws, 571.
 ¶ Ryal v.
 Rowles, 1 Ves.
 353. *Ex parte*
 Ruffin, 6 Ves.
 127. Montagu
 on Partnership,
 vol. i. p. 244.;
 and see *Ex parte*
 King, 17 Ves.
 jun. 115.

right to a moiety of that moiety; therefore he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.

[The *defendant* was partner with one *Bernie*, against whom a commission of bankrupt had issued, but, before the bankruptcy, the *plaintiff* had sued out execution on a bond of the *defendant's* for 700*l.*, and the sheriff had levied on the partnership effects. *Bernie's* assignees obtained this rule to shew cause why the sheriff should not pay them a moiety of the money arising from the sale of the goods so taken in execution, upon an affidavit of *Bernie's* that he was entitled to an equal share of the partnership effects, as partner with *Davidson*. The *plaintiff's* affidavit, on shewing cause, denied that *Bernie* had an equal share in the partnership effects, and stated that he had embezzled the joint stock to a considerable amount. The court directed that it should be referred to the master to take an account of the share of the partnership effects to which *Bernie* was entitled; and that the sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees.

Judgment was entered against one of two partners, and upon a *fiери facias*, all the goods, being undivided, were seized in execution. Upon application to the King's Bench by him against whom the judgment was not, the court held, that the sheriff could not sell more than a moiety; for the property of the other moiety was not affected by the judgment, nor by the execution.

Richardson's senior and junior and one *Janson* were partners together in trade, and *Janson* embezzled and wasted the joint stock, and, contracting private debts, became a bankrupt. The court seemed to think, that out of the produce of the goods the debts owing to the joint trade ought to be paid in the first place; and that, out of *Janson's* share, satisfaction must be made for what *Janson* had wasted or embezzled; and that the assignees could be in no better case than the bankrupt himself, and were entitled only to what his third part would amount unto, clear after debts paid, and deductions for his embezzlement.

A bill was brought, setting forth that *Goss*, *Neaulme*, *Gromvegan*, and *Prevost* became partners: that *Prevost* was intrusted with the goods in the shop and warehouse, but became profuse, and embezzled the partnership stock, and applied the same to his own use, and suffered the partnership debts to be unpaid; and having contracted private debts on his own account, became a bankrupt, and a separate commission was taken out against him. A question was raised, Whether *Prevost's* share of the partnership stock ought to be applied, in the first place, to pay what he was indebted to the partnership? Lord *Talbot* ordered an account of what *Prevost* had embezzled of the partnership estate, and that the partnership debts should in the first place be paid to the joint creditors in proportion to their debts, and as far as the partnership estate would extend; and that if any of

the

the partnership estate remained, after the joint debts were paid, then the same to be divided, and the partnership to be paid out of *Prevost's* share what he had embezzled.]

Although a moiety of a joint stock may be taken in execution on a judgment against one partner, yet if copartners become bankrupts, the joint estate is to discharge the joint debts in the first place, and the separate estate to pay the separate debts; and if there be no separate estate, then the residue of the joint estate, after the joint creditors are satisfied, to be applied among the separate creditors, and so *vice versa*; for the commissioners of bankrupts are entrusted both with a legal and equitable jurisdiction, and may therefore marshal (*a*) the different effects, and apply them in discharge of the different creditors according to equity and justice.

without an order. 1 Atk. 68. pl. 23.]

¶ OF DISSOLUTION. ¶—[*A.* and *B.*, goldsmiths and partners, were bound to *J. S.* in a bond for payment of 1000*l.* and interest, in 1693. Afterwards in the same year they dissolved the partnership, when *A.* by money and bond secured to *B.* his share of the stock, and took upon himself the partnership debts. Public notice was given to creditors of the joint stock to receive their money, or to look upon *A.* only as their paymaster. *J. S.* in 1708 called in his money from *A.*, but continued it on *A.*'s subscribing the bond at 6 per cent. *A.* was solvent till 1711, and till then *J. S.* might have had his money when he pleased; but then *A.* became a bankrupt. Lord Chancellor *Parker* held, that the executor of *B.* was still liable; that the notice was *res inter alios acta*, and could not bind *J. S.*: and that changing the interest did not alter the security; for still it was the bond of both; but *B.*'s executor could not be liable to more than 5*l.* per cent. interest; and *J. S.* was decreed his debt and costs.

them as partners, unless they have seen the Gazette; *Graham v. Hope, Peake*, 154.; or it has been sent to them. *Newsome v. Coles*, 2 Camp. 617. *Secus* as to those who have never dealt with them, 1 Esp. Ca. 371., and see 1 Stark. Ca. 420. A change of partners in a banking-house is sufficiently notified to the customers by a change in the printed checks. *Barfoot v. Goodall*, 3 Camp. 147.]

¶ So where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate debts of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills; it was held, that the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt.

And where one of four partners having retired, the other three continued the business, assuming the funds, and charging themselves with the partnership debts, and *A.*, a creditor of the old firm, was informed of this arrangement, and his account was

2 Chan. Rep. 228. 2 Vern. 293. 706. Pasch. 4 G. 2. Grace v. Hyam, Barnard. K. B. 469. || Taylor v. Fields, 4 Ves. 396. Ex parte Janson, 5 Madd. 229. || (*a*) But not

Heath v. Percival, 1 P. Wms. 682. || Smith v. Jameson, 5 Term Rep. 601.; and see Lodge v. Dicus, 5 Barn. & A. 611. David v. Ellice, 5 Barn. & C. 196. Notice of the dissolution of a partnership in the Gazette is not notice to persons who have trusted

Bedford v. Deakin, 2 Barn. & A. 210. S. C. 2 Stark. 178.

David v. Ellice, 5 Barn. & C. 196. and see Parkins v. Carru-

thers, 5 Esp.
248. Brown
v. Leonard,
2 Chit. 120.

Jacomb v.
Harwood,
2 Ves. 265.
|| And see De-
vaynes v.
Noble, 1 Mer.
587.; and
1 Montagu
on Partner-
ship, 142, 143. ||

with his consent transferred from the old firm to the new, with whom he continued to have dealings, drawing upon them and making them payments for above twelve months, when they failed in his debt; it was held, that the retired partner was still liable to *A.* for the balance due to him by the old firm, though if *A.* had drawn for that balance at any time during the solvency of the new firm it would have been paid. ||

Gibson and *Sutton* were partners in the business of a scrivener and banker. The mother of the plaintiff, Mrs. *Jacomb*, and the mother of the plaintiff, Mrs. *Long*, both kept cash in this shop; and each of them, out of the cash belonging to her, ordered a sum to be written off from her account, and that a note or security for each of these sums should be given to each of the plaintiffs; which was done, and signed by the cashier belonging to the partnership. *Gibson* survived this about a year, and made *Sutton* and another executors. The cashier, by his answer (there being no other evidence), believed, from entries in the books, that interest for this was paid to the death of *Gibson*, and mentioned payments of interest also for three years at four per cent. by *Sutton* after *Gibson's* death, when in point of law the partnership effects survived to *Sutton*; but after that the two plaintiffs separately called upon *Sutton* for a further security than those bare notes; and therefore judgment was entered up in an action against him, not as executor of *Gibson*, but as surviving partner, for a partnership debt. That judgment was defeasanced by an instrument signed by the plaintiffs as to their respective demands, agreeing that no execution should be taken on either of these judgments till such a time. In that agreement it was particularly inserted, that these judgments thus obtained by the two plaintiffs should not hinder either of them from any remedy they might be entitled to in a court of equity against *Gibson's* estate or effects, if they were not otherwise paid or discharged. Immediately before the respite of the execution expired, *Sutton* being called on, or knowing that the time was near, mortgaged part of a leasehold estate, which was confessedly part of the separate estate of *Gibson* his deceased partner. The plaintiffs filed their bill, as copartnership creditors, to subject the chattel interest in that mortgage to a satisfaction of both their demands, by a sale thereof. It did not appear, otherwise than from the two notes, in what manner the money that had been ordered by the mothers of the plaintiffs to be carried from their two accounts was left in the hands of the partners, whether as cash kept generally, or only those two sums. The Master of the Rolls strongly inclined to think, that the debt, notwithstanding the judgment, still continued a partnership debt, being obtained against defendant as surviving partner. But if not so, if it were his own debt, it was certain that the defendant, possessed as executor of the personal estate of *Gibson*, might apply any part thereof even to the satisfaction of his own demand, unless there was fraud or collusion, of which there was no evidence in the present case. The plaintiffs were most undoubtedly creditors unsatisfied;

unsatisfied; and therefore it was not an application of the separate estate of *Gibson* to demands which ought not to be countenanced in equity, but to that which the executor had a right to apply it, and which perhaps that estate of his without this act of *Sutton* must have been subject to have made satisfaction; for the partnership creditors would have a right to go against the separate estate of either of the partners after the partnership effects. But that this was nothing to the justice of the plaintiffs' demands, who had used diligence to get at their money in a lawful and honest way; that they were not to be blamed, supposing their demands were against *Sutton* on the judgment, in getting the best security they could for their money, which was this mortgage. His Honour therefore held them entitled to the relief they prayed.]

¶ Partnership between two is *ipso facto* dissolved by the death of one of the partners.

Roman law, even where the contract consisted of more than two, it was entirely dissolved by the death of one. Inst. lib. 3. tit. 26. § 5

Vulliamy v. Noble, 3 Meriv. 614. By the

And this notwithstanding the partnership is for a stipulated term of years, unless there is an agreement to the contrary.

Gillespie v. Hamilton, 3 Madd. 251.

But a partner may stipulate that his widow or children, or such person as he may appoint, shall, in case of his decease, be entitled to his share. In such case if the person appointed refuse the share, or do not comply with the stipulations of the articles, the partnership is dissolved.

Balmain v. Shore, 9 Ves. 500. *Kershaw v. Matthews*, 2 Russell, 62.

Lunacy of one partner does not *ipso facto* dissolve the partnership. It must be done, on consideration of all the circumstances, by decree of a court of equity.

Waters v. Taylor, 2 Ves. & B. 503.; and see

Wrexham v. Hudleston, 1 Swanst. R. 514. n. 1 Cox, Ca. 107.

Where no term is expressly limited for the duration of partnership, and there is nothing in the contract to fix its existence to any particular period, it is dissoluble at the will of either party.

Peacock v. Peacock, 16 Ves. 50. *Crawshaw v. Maule*,

1 Swanst. 508. 1 Wils. 181. S. C.

And such dissolution may be effected by a notice of either partner.

Ex parte Nokes, Gow on Part.

276.; and see *Jefferys v. Smith*, 3 Russell, 158.

A partnership formed by parol agreement may be dissolved by parol, and this notwithstanding the partnership agreement contain a stipulation for a partnership deed.

Rackstraw v. Imber, Holt, Ca. 368.

And though the partnership is by deed, a notice of dissolution, signed by the parties for the purpose of being inserted in the Gazette, is sufficient evidence of the dissolution against the parties signing it.

Doe v. Miles, 4 Camp. 573. 1 Stark. Ca. 181. and see *ante*, 405.

The effect of the marriage of a *feme sole* partner has never been decided expressly; but it would probably be held to operate a dissolution of the partnership.

Wats. on Part. 384. 1 Swanst. 517. n.

Although the misconduct of a partner in trifling circumstances seems not to be a sufficient cause for dissolving the partnership (*a*), yet if the conduct of partners has been such as to render it impossible to carry on the partnership on the terms on which it was entered into (*b*), or if one partner be entirely excluded from his interest in the partnership (*c*), or if there be a gross abuse of good faith between the parties (*d*), a dissolution will in such cases be decreed at the instance and on the complaint of a single partner, notwithstanding the other partners object to it. (*e*)

(*a*) Goodman v. Whitcomb, 1 Jac. & Walk. 593.
 (*b*) Waters v. Taylor, 2 Ves. & B. 299.
 (*c*) 1 Jac. & Walk. 593.
 (*d*) Chapman v. Beach, 1 Jac. & Walk. 594.
 (*e*) Baring v. Dix, 1 Cox, Ca. 215.

A society for relief in sickness by means of a fund raised by subscription of the members has been considered as a partnership, it having no corporate character; and where it has been found that the society has existed on erroneous principles, making the whole a bubble, it has been dissolved.

Beaumont v. Meredith, 3 Ves. & B. 180. 17 Ves. 15.; and see Reeve v. Parkins, 2 Jac. & Walk. 590.

The bankruptcy of one partner operates a dissolution: and it appears settled that the dissolution is not effected till the *adjudication* of bankruptcy; though, when that takes place, it has relation back to the act of bankruptcy.

Hague v. Rolleston, 4 Burr. 2174.
Ex parte Ruffin, 6 Ves. 126. *Ex parte* Williams, 11 Ves. 5. Wilson v. Greenwood, 1 Swanst. 480. *In re* Wait, 1 Jac. & Walk. 609. Smith v. Stokes, 1 East, 565. Dutton v. Morrison, 17 Ves. 204. Barker v. Goodair, 11 Ves. 78.

But if the commission be fraudulently taken out for the express object of working a dissolution, it will be superseded. ||

Ex parte Brown, 1 Rose, Ca. 151.; and see 2 Rose, 205. *Ibid.* 424. *Sed vide* 5 Madd. 1. As to the consequences of a dissolution of partnership. 1 Mont. on Part. 119. *et seq.* Gow on Part. ch. v. § 2.; and see Crawshaw v. Collins, 2 Russ. R. 525.

(D) Of Owners and Masters of Ships.

|| See *Abbott on Shipping*, 5th edit. (by J. H. Abbott). ||

Molloy, 202, 205.
 Skin. 250.
 pl. 9.
 2 Chan.
 Ca. 56.

|| **DISAGREEMENT AMONG PART-OWNERS.** || — If there are several part-owners of a ship, and some of them refuse to navigate the ship, or to send her to sea, those who are willing may compel the others in a Court of Admiralty, on giving security to answer for the ship in case she be lost. Also, if a partner dislikes the voyage, but does not expressly prohibit it, and the ship is lost in the voyage, he shall have no recompense for his part; but if the ship return, he shall have an account for what is earned, and it shall be intended a voyage with his consent, without an express prohibition proved.

But if the major part of the owners refuse to navigate the ship, there, says *Molloy*, by reason of the inequality, they cannot be compelled; but then such vessel is to be valued and sold, in like manner as where part of the owners become deficient, or unable to set out the ship.

If there are several part-owners of a ship, and the major part of them are for sending her a voyage to sea, to which the rest disagree; whereupon, according to the common usage in such cases,

Carth. 26.
 Knight v. Berry.

cases, the greater number suggest in the Admiralty Court the disagreement of their partners; and then, according to their usage there, they order certain persons to appraise the ship, who accordingly set a value thereon; and then the major part, who agreed to the voyage, enter into a recognizance, wherein they bind themselves jointly and severally, to the disagreeing parties, in a sum proportionable to their shares, according to the value set by the appraisers, to secure the shares in the ship of those who disagree to the voyage, against all adventures; though there can be no suit on this agreement or stipulation in the Admiralty Court (a), the contract being made on land, and therefore of common law consance, yet a special action on the case lies for the violation thereof at common law.

Holt, 470. *Lambert v. Aeretree*, 1 Ld. Raym. 225. *Blacket v. Ansley*, *Id.* 235. *Dimock v. Chandler*, 2 Stra. 890. *Fitzg.* 197. *S. C. Ouston v. Hebden*, 1 Wils. 101.] || But the Admiralty has no jurisdiction to compel a sale; see the last case, and *Abbott on Shipping*, 5th ed. 74. ||

|| This security (b) may be taken on a warrant obtained by the minority to arrest the ship, and it is the best means of protecting their interest; for one part-owner cannot sue another at law for deceitfully sending the ship to foreign parts where she was lost, and he has no redress in equity: since part-owners being tenants in common, no action lies by one against the other, except for the destruction of the ship. But if a part-owner expressly notify his dissent, the Court of Chancery will not compel him to contribute to a loss. If the minority happen to have possession of the ship, and refuse to employ it, the majority also, by a similar warrant, may obtain possession of it, and send it to sea upon giving such security. And the same thing may be effected by one part only in case of equality of partnership. But the Admiralty has only jurisdiction where the shares are ascertained; and where they are not ascertained the Court of Chancery will restrain the sailing of the ship by injunction till the shares are ascertained and security given.

Some foreign writers on maritime law have laid it down as a rule, that if a ship is in need of repair, and one part-owner is willing to repair it at their common expense, and if the other will not pay his quota within four months, he shall lose his share in the ship; and they found their doctrine on a passage in the Digest, in which the same opinion is delivered with regard to the repairs of a house. But this rule does not appear to be adopted in practice. And in case of poverty of the party it would be extremely cruel. ||

THE MASTER. — A master of a ship is one who, for his knowledge in navigation, fidelity, and discretion, hath the government of the ship committed to his care and management; but he hath no (c) property, either general or special, by the constituting of him a master; yet the law looks upon him as an officer who must render and give an account for the whole charge, when once committed to his care and custody, and upon failure to render satisfaction; and therefore if misfortunes happen, if they be either through

Hard. 473. S. P. 6 Mod. 162. S. P. [(a) That the Admiralty have jurisdiction upon such a stipulation, though once much disputed and denied by Lord Holt, is now settled; see *Grave v. Hedges*,

(b) See the form, *Abbott*, Appendix, No. 6. *Sir T. Raym.* 15. 1 Keb. 38. 1 Lev. 29. 1 Vern. 297. *Skin.* 250. *Barnardiston v. Chapman*, *Abbott on Shipping*, 72. *Amb.* 255. *Abbott*, 72. *ibid.* 75. *Haley v. Goodson*, 2 Meriv. 77.

Fig. 17. 2. 52. 10.

Abbott, 69.

Molloy, 208. *Hob.* 11. (c) But hath usually shares or parts in the vessel. *Molloy*, 203. — He is eligible by the

part-owners
in propor-
tion to their
shares, and not

through negligence, wilfulness, or ignorance of himself or his mariners, he must be responsible.

according to the majority. Molloy, 203.

Salk. 10.
pl. 4. Pitts
v. Gainee,
Ld Raym.
553.

But where a master of a ship brought an action on the case, and declared, that the ship was laden with corn in such a harbour, ready to sail for *Dantzick*, and that the defendant entered and seized the ship, and detained her, *per quod impeditus et obstructus fuit in viago*; it was held, that it well lay; for though the master has not the property of the ship, but the owners, and he is only a particular officer, and can only recover for his particular loss, yet he may bring trespass, as a bailiff of goods may; and then as bailiff he can only declare on his possession, which is sufficient to maintain trespass.

Morse v. Slue,
Vent. 190.
238.
Raym. 220.
3 Keb. 72.
112. 135.
Mod. 85.
2 Lev. 69.
3 Lev. 259.
S. C. cited.
2 Ld. Raym.
918.

If the master of the ship takes goods on board for hire, and is robbed in port, he must answer the damage; otherwise it is if he be robbed by pirates on the high sea, for then the owner must be the loser; for if he undertakes for hire to carry the goods, the common law cannot look upon him in a different aspect from a common carrier; for he cannot be looked upon as a mere servant to the owner, but rather as an officer of the ship, and to sell the *bona peritura*, which is beyond the condition of a servant: but the civil law of the Admiralty excuses the masters when robbed by pirates, or on losing the goods by any inevitable accident, for the dangers of the sea are so various and so formidable, that a master shall not be understood to undertake against them, unless it had been included in the express words of the contract; for where, in a well-ordered society, a man undertakes for the custody of another's property, he secures him against all loss; but where a man is bound to encounter dangers which civil society cannot guard against, he cannot be supposed to undertake farther than for his care; and by the general custom of commerce, the merchant is the person that runs the venture, and not the master of the ship; and it is the merchant that makes the gain of the venture.

Carth. 58.
2 Salk. 440.
pl. 1.
3 Lev. 258.
3 Mod. 522.
Boson v. Sandford.

And as the master himself is answerable in the cases *suprà*; so likewise hath it been held, that the owners are liable to the freighters, in respect of the freight, for the embezzlement, &c. of the master and mariners.

[This act
was made in
consequence
of the case
of Boucher
v. Lawson,
H. 5 Geo. 2,
where the
goods were
lost by the
negligence
or embezzle-
ment of the
master, and
the master

LIMITATION OF OWNER'S LIABILITY. — But this proving a great discouragement to trade, by the 7 G. 2. c. 15. reciting that, *Whereas it is of the greatest consequence and importance to this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein: and whereas it has been held, that in many cases owners of ships or vessels are answerable for goods and merchandize shipped or put on board the same, although the said goods and merchandize, after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners; by means whereof,*
merchants

merchants and others are greatly discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom; therefore for ascertaining and settling how far owners of ships and vessels shall be answerable for any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize which shall be made away with by the master or mariners, without the privity of the owners thereof, it is enacted, "That no person or persons, who is, are, or shall be owner or owners of any ship or vessel, shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage by reason of any embezzlement, secreting, or making away with (by the master or mariners, or any of them,) of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize, which, from and after the 24th of June, 1734, shall be shipped, taken in, or put on board any ship or vessel, or for any act, matter, or thing, damage or forfeiture done, occasioned, or incurred from and after the said 24th day of June, 1734, by the said master or mariners, or any of them, without the privity and knowledge of such owner or owners, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight, due or to grow due, for and during the voyage wherein such embezzlement, secreting, or making away with, as aforesaid, or other malversation of the master or mariners, shall be made, committed, or done; any law," &c.

And by § 2. it is further enacted, "That if several freighters or proprietors of any such gold, silver, diamonds, jewels, precious stones, or other goods or merchandize, shall suffer any loss or damage by any of the means aforesaid, in the same voyage, and the value of the ship or vessel, with all her appurtenances, and the amount of the freight, due or to grow due, during such voyage, shall not be sufficient to make full compensation to all and every of them, then such freighters or proprietors shall receive their satisfaction thereout in average, in proportion to their respective losses or damages; and in every such case it shall and may be lawful to and for such freighters or proprietors, or any of them, in behalf of himself, and all other such freighters or proprietors, or to or for the owners of such ship or vessel, or any of them, on behalf of himself, and all the other part-owners of such ship or vessel, to exhibit a bill in any court of equity for a discovery of the total amount of such losses or damages, and also of the value of such ship or vessel, appurtenances, and freight, and for an equal distribution and payment thereof amongst such freighters or proprietors, in proportion to their respective losses or damages, according to the rules of equity.

"Provided (by § 3.), that if any such bill shall be exhibited by or on the behalf of the part-owners of such ship, the plaintiff or plaintiffs shall annex an *affidavit* to such bill or bills, that he or they do not collude with any of the defendants thereto; and shall thereby offer to pay the value of such ship or vessel,

was entitled to the freight of those goods for his own benefit, and the action was brought against the owners.

The court thought that it was not to be distinguished from the common case of the carrier, and that the owner was liable for the act of the master where he acted within the compass of his employment.

1 Term Rep. 78.]

“ appurtenances and freight, as such court shall direct; and such
 “ court shall thereupon take such method for ascertaining such
 “ value as to them shall seem just, and shall direct the payment
 “ thereof in like manner as is now used and practised in cases
 “ of bills of interpleader.

“ Provided also (by § 4.), that nothing in this present act con-
 “ tained shall extend, or be construed to extend to impeach, lessen,
 “ or discharge any remedy which any person or persons now
 “ hath, or shall or may hereafter have, against all, every, or any
 “ the master or mariners of such ship or vessel, for or in respect
 “ of any embezzlement, secreting, or making away with any
 “ gold, silver, diamonds, jewels, precious stones, or merchandize,
 “ shipped or loaded on board such ship or vessel, or on account
 “ of any fraud, abuse, or malversation of and in such masters and
 “ mariners respectively; but that it shall and may be lawful to
 “ and for every person or persons, so injured or damaged, to
 “ pursue and take such remedy for the same, against the said
 “ master and mariners respectively, as he or they might have
 “ done before the making of this act.”

Sutton v.
 Mitchell,
 1 Term Rep.
 18.

[Upon this statute it hath been adjudged, that the owner of a ship is liable to the value of the ship and freight in the case of a robbery, in which one of the mariners is concerned, by giving intelligence, and afterwards sharing the spoil, the latter part of the first section being sufficiently comprehensive to include a transaction of this nature.

However, by stat. 26 G. 3. c. 86., which is explanatory and in amendment of the above act of 7 G. 2., the owners are not liable beyond the value of the ship and freight for any goods shipped without their privity, although the master or mariners be in no-wise concerned in or privy to the robbery, embezzlement, secreting, or making away therewith.

By § 2. no owners of any ship or vessel shall be liable to answer for any loss or damage which may happen by fire to any goods or merchandizes that may be shipped on board. Nor by § 3. for any loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones, that may be shipped on board, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, or owners of the ship or vessel, the true nature, quality, and value of such gold, &c.

By § 4. if the freighters or proprietors of any such gold, &c. or other merchandize, shall suffer any loss or damage by any of the means aforesaid, in the same voyage (fire only excepted), and the value of the ship or vessel, with all her appurtenances, and the amount of the freight due or to grow due during such voyage, shall not be sufficient to make compensation to all of them, then such freighters or proprietors shall receive their satisfaction thereout in average, in proportion to their respective losses or damages. And in such case the freighters or proprietors, or any of them, or on behalf of himself and all other the freighters or proprietors,

or

or the owners of such ship or vessel, or any of them, or on behalf of himself and all other the part-owners, may exhibit a bill in any court of equity, for a discovery of the total amount of such losses or damages, and also of the value of such ship or vessel, appurtenances, and freight, and for an equal distribution and payment thereof amongst such freighters or proprietors, in proportion to their respective losses or damages, according to the rules of equity: Provided, that if any such bill be exhibited on behalf of the part-owners of such ship, the plaintiff shall annex an affidavit to such bill, that he does not collude with any of the defendants thereto; and shall thereby offer to pay the value of the ship, appurtenances, and freight, as the court shall direct; and the court shall thereupon take such method for ascertaining the value as to them shall seem just, and shall direct the payment thereof, in like manner as is used and practised in cases of bills of interpleader.

By § 5. it is provided, that this act shall not lessen or discharge any remedy which any person now hath, or shall hereafter have, against any master or mariners for embezzlement, &c.

|| By the 53 Geo. 3. c. 159. this limitation of the responsibility of the owners has been still further extended, for it is enacted (a), "That no person or persons who is, are, or shall be (a) § 1.
"owner or owners, or part-owner or part-owners, of any ship or
"vessel, shall be subject or liable to answer for or make good
"any loss or damage arising or taking place by reason of any
"act, neglect, matter, or thing done, omitted, or occasioned with-
"out the fault or privity of such owner or owners, which may
"happen to any goods, wares, merchandize, or other thing laden (b) This is to
"or put on board the same ship or vessel after the 1st of Sep- be construed
"tember, 1813; or which after the said 1st of September may as if the words
"happen to any other ship or vessel, or to any goods, wares, "with all her
"merchandize, or other thing, being in or on board of any other "appurte-
"ship or vessel, further than the value of his or their ship or "nances" had
"vessel (b), and the freight due or to grow due for and during been inserted
"the voyage which may be in prosecution or contracted for at after "ship or
"the time of the happening of such loss or damage." vessel." See
Gale v. Laurie,
5 Barn. & C.
156.

By this statute it is also enacted, that the value of the carriage of goods belonging to any of the owners of the ship, and also the hire due or to grow due under any contract, except only such hire as in the case of a ship hired for time, may not begin to be earned until the expiration of six calendar months after the loss, shall be considered as freight within the meaning of this act, and also of the two prior acts. (c) It is also further enacted, that (c) 7 G. 2.
c. 15. and
26 G. 3. c. 86.
see § 2.
(d) § 3.
vessel

(a) § 5.

vessel used solely in rivers or inland navigation, or to any ship or vessel *not duly registered according to law.* (a)

(b) § 4.

(c) § 7, 8, 10.

12, 13, 14, 15.

(d) 7 G. 2. c. 15.

and 26 G. 3.

c. 86.

(e) § 16.

(g) Wilson v.

Dickson,

2 Barn. & A. 2.

(h) Cannan v.

Meabarn,

1 Bing. 465.

(i) Wilson v.

Dickson,

2 Barn. & A. 2.;

and see Abbott

on Shipping,

5th edit.

p. 269.

(k) Hunter v.

McGown,

1 Bligh, 573.

Parish v.

Crawford,

2 Stra. 1251.

|| More fully reported in Abbott on Shipping, 5th ed. p. 19.; probably this case is not now law.

See James v.

James, in note

3 Esp. N.P.R.

27. Mackenzie

v. Rowe,

2 Camp. 482.;

and Abbott,

21, 22.||

Rich v. Coe,

Cowp. 636.

|| Farmer v.

Davis,

1 Term Rep.

109.; and see

addition to note (b) *infra*.||

This act also contains a provision against taking away the responsibility of any master or mariner of any ship, notwithstanding he may be owner or part-owner thereof (b), and also provisions for equal distribution and relief in equity (c); and further enacts, "That all and every sum and sums of money which shall be paid for or towards, or on account of any loss or damage, in respect whereof the responsibility of the owners of any ship or vessel is limited by this act, or by the said acts or either of them (d), or any costs incurred in relation thereof, shall and may be brought into account among the part-owners of the same ship or vessel, in such and the like manner as money disbursed for the use thereof." (e) The value of the ship is to be calculated at the time of the loss or damage: in calculating the value of the freight, money actually paid in advance, is to be included (g); but the value is to be only the amount that the ship would have earned if she had completed her voyage, and not the amount estimated at the commencement of the voyage, if diminished by jettison or other losses. (h) If an action be brought against the several part-owners, one of whom happened to be master of the ship at the time of the loss, all the defendants are in that action entitled to the benefit of the statute. By the law of *England*, the damage to be recovered in an action brought against several persons must be one and the same sum, judgment cannot be given against one defendant for a sum differing from that for which it is given against another. (i) These acts do not extend to lighters and gabbets. (k)||

|| LIABILITIES OF OWNERS. || — The defendant was sole owner of a ship which he let to *J. S.* for a voyage, at a certain sum, and *J. S.* was to have the benefit of carrying the goods. The plaintiff had shipped a quantity of moidores, and the bills of lading were signed by the captain: the moidores being lost, an action was brought against the defendant as owner, to charge him under the stat. 7 G. 2. to the amount of the ship and freight. For the defendant it was insisted, that though the ship was his property, yet he was not *so* owner as to be liable to the plaintiff; and that *J. S.* was for this purpose the owner. But it appearing that the defendant had covenanted for the condition of the ship, and the behaviour of the master, the Chief Justice held, he was liable to the plaintiff, and the freight he had in general from *J. S.* was sufficient, though the identical freight for the gold belonged to the other, and *J. S.* had only the use of the ship, and no ownership.

The master of a vessel was lessee of her for a term of years by agreement with the owners, in which there were covenants on *their* part, that he should have the sole management of the ship, and employ her for his own sole benefit; and on *his* part, that he should repair her at his own sole cost and charge, &c. It was holden that, notwithstanding this agreement, the owners were liable

liable for necessaries furnished for the ship by order of the master, though without their knowledge, and though the owners were not known to the persons who supplied them.

In general, whoever supplies a ship with necessaries has a *treble* (a) security. 1. The person of the master. 2. The specific ship. 3. The personal security of the owners, whether they know of the supply or not. 1. The master is personally liable, as making the contract. 2. The owners are liable in consequence of the master's act, because they choose him: they run the risk, and they say whom they will trust with the appointment and office of master. Such is stated to be the general law, which, however, is liable to be varied by any private agreement between the master and owners. For if it appear that the person supplying the necessaries gave credit to the master individually as the responsible person, or on the other hand, that he considered the master merely as a servant, and gave the credit to the owners only, in either of those cases he can have his remedy against that party only to whom he originally looked for payment. (b)

The owner keeps the ship, he keeps her subject to the charge the master has brought upon her. If he relinquish the ship, he is not liable to the charge. — His keeping the ship is proof of his assent. Upon this ground, that learned judge dissented from the rest of the court, who held, that a promise by a captain on behalf of the owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, was binding upon the owners, although they abandoned the ship and cargo. *Yates v. Hall*, 1 Term Rep. 7; (b) *Hoskins v. Slayton*, Ca. temp. Hardw. 376. || The position that a person supplying a ship with necessaries has not only the personal security of the master and owners, but also the security of the *specific ship*, has been much modified; see *Westerdell v. Dale*, 7 Term Rep. 31; *Ex parte Bland*, 2 Rose, 91. *Franklin v. Hosier*, 4 Barn. & A. 341. *Raitt v. Mitchell*, 4 Camp 146.; and that a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not by law preferred to other creditors, nor have any particular claim or lien upon the ship itself for their demands, see *Ex parte Hill* 1 Madd. 61. *Hoare v. Clement*, 2 Show. 338. *Justin v. Ballam*, Salk. 34. S. C. 2 Ld. Raym 805. *Watkinson v. Barnardiston*, 2 P. Wms. 367., and Mr. Coxe's note thereon. *Hussey v. Christie*, 15 Ves. 594. S. C. 9 East, 426. *Buxton v. Snee*, 1 Ves. sen. 154.; and see *Wilkinson v. Carmichael*, Doug. 101., where Lord Mansfield said, "Work done for a ship in England is supposed to be on the personal credit of the employer. In foreign parts the master may hypothecate the ship." Also *Smith v. Plummer*, 1 Barn. & A. 581. *Wood v. Hamilton* in Dom. Proc. mentioned in *Abbott on Shipping*, 115.||

J. S. as master of the ship, of which the other defendants were part-owners, bought several goods of the plaintiffs; as beef, biscuit, sails, and cordage. *J. S.* the master failed. The bill was brought to compel the defendants, the part-owners, to pay. They insisted that *J. S.* only was liable; and, besides, that he had money from them to pay the plaintiffs. *Per Curiam*, — *J. S.* the master was but a servant to the owners; and where a servant buys, the master is liable. If the owners paid their servant, yet if he paid not the creditors, they must stand liable. It was decreed, that the owners should pay the plaintiffs their debts in proportion to their respective shares and interests in the ship.

Ibid.

(a) But according to Mr.

J. Buller, the creditor, when he advances his money, has only two securities; viz. the body of the ship, and the person of the master.

It is only in respect of the ship, that the master can bind the owners. If the

Speering v.

Degrave,
2 Vern. 643.;

||see also
Stewart v.

Hall,

2 Dow. 29.

Garnam v.

Bennet,

2 Stra. 816.

Evans v.

Williams,

mentioned in

Abbott on

Shipping, 103.,

note (p), and *Cary v. White*, 1 Bro. P. C. 284.||

|| "Soon

Verba Lord
Tenterden C.J.
 1 Ry. & Moo.
 43.

“ Soon after the passing of the Registry acts, the leaning of the courts of law in the construction of them was to say, that the registered owners of ships should at all events be liable for repairs. But the subject having become more accurately understood, a better and more correct principle now prevails; and the recent cases have decided, that the true question in matters of this description is,—upon whose credit was the work done? That question would, in most cases, be decided by the fact of legal ownership, the repairs being generally done for the legal owner. But it may so happen that the name of a person may be retained on the registry after he has ceased to be beneficially interested in the ship, or to interfere with its concerns.”

Jackson v.
 Vernon,
 1 H. Bl.
 114. Annett
 v. Carstairs,
 5 Camp. 354.
 Briggs v.
 Wilkinson,
 7 Barn. & C. 50.

Thus, a mortgagee of a ship or share in it, who is not in possession or management of the ship, but the mortgagor remaining in such possession and management, is not liable for repairs and disbursements, or for wages of the master, notwithstanding such mortgagee may have procured the transfer to him to be duly endorsed on the certificate of registry.

Young v.
 Brander,
 8 East, 10.;
 and see
Trewhella v.
Rose, 11 East,
 435. *Frazer* v. *Marsh*, 15 East, 238. *McIver* v. *Humble*, 16 East, 169.

So, where the purchaser of a ship, in the interval between the inception and completion of his conveyance, ordered the master to take her to a shipwright to be repaired; the seller, although deemed the legal owner at the time, was held not answerable to the shipwright for the repairs.

(a) Notwith-
 standing this
 clause, it is
 held, that
 accruing
 freight passes
 by the mort-
 gage to the
 mortgagee.
Dean v.
McGhie,
 4 Bing. 45.

The above decisions, in cases of mortgages, are now of less importance, since the late registry acts (4 G. 4. c. 41. § 43. and 6 G. 4. c. 110. § 45.) provide, that when a transfer is made only as a security for payment of debts by way of mortgage, or of assignment to trustees for sale, on a statement to that effect in the book of registry, and on the indorsement on the certificate of registry, the person to whom the transfer is made is *not to be deemed the owner* (a); nor is the person making such transfer to be deemed to have ceased to be owner, except so far as may be necessary for the purpose of rendering the ship available, by sale or otherwise, for payment of those debts to secure payment of which the transfer was made.

Abbott, p. 76.
Doe v.
Chippenden,
ibid. *Baldrey*
 v. *Richie*,
 1 Stark. Ca.
 338., which
 seems to over-
 rule *Dubois* v.
Ludert, 1 Marsh, 246. 5 Taunt. 610.

One part-owner may, by ordering repairs and other necessities for the ship, bind his companions to pay for them, unless their liability be expressly provided against. But if the person giving the credit does not at the time know of any other part-owners, he is not precluded from suing him only who gave the order; the non-joinder of the others cannot be pleaded in abatement.

Ogle v.
 Wrangham,
 Abbott, 76.
 Bell v.
 Humphries,
 2 Stark. 345.

But one part-owner has no authority to order an insurance without the assent of his companions, and cannot charge them with the premium; for each owner may insure his own share. It is otherwise, however, if the part-owners are in *partnership*. *Hooper* v. *Lusby*, 4 Camp. 67.

Nor can one part-owner, though he be the husband, pledge the other to the expenses of a lawsuit.

Campbell v. Stein, 6 Dow. 135.

If a tradesman who has repaired a ship take from some of the part-owners sums equivalent to their shares, they still remain responsible for the residue, unless the tradesman specially discharge them upon some good consideration, such as payment before the expiration of the usual credit; or release them by deed.||

Teed v. Baring, Abbott, 84.; and see Fitch v. Sutton, 5 East, 250.

[If the master borrow money to repair or victual the ship when there is no occasion for it, he alone is debtor, and not the owners.

Lex Mercat. 53. Hob. 11. Moor, 918.; and see

Rocher v. Busher, 1 Stark. Ca. 27. Palmer v. Gooch, 2 Stark. Ca. 428.||

By the law of nations the captain has a power to ransom. This is for the benefit of the owners: but it being doubted, whether it is for the benefit of the public, it is taken away by statute of 22 G. 3. c. 25.]

||See upon the subject of ransom *post*, tit. (F) Of Average.||

(E) Of Mariners.

MARINERS are persons chosen and appointed by the master to navigate the ship, for whose faults and miscarriages he must answer; and, as they are his servants, he may correct and punish them according as the usage is at sea.

Molloy, 209.

But though the master must answer for them, yet are the owners likewise answerable for their faults and miscarriages; as, if the owner of a ship victuals it, and furnishes it to sea with letters of reprisal, and the master and mariners, when they are at sea, commit piracy upon a friend of the king, without the notice or consent of the owner, the owner shall lose his ship by the admiral law, of which our law ought to take notice.

Roll. Abr. 530. *et vide* Roll. Rep. 285.

By the civil law and custom of merchants, if the ship be cast away, or perish through the mariners' default (*a*), they lose their wages. So, if taken by pirates (*b*), or if they run away; for, if it were not for this policy, they would forsake the ship in a storm, and yield her up to enemies in any danger. [So, if they refuse aid and assistance to their companions on the sea. So, if they do not help to save the goods, when the ship perishes. So, if they absent themselves when the ship is ready to sail.]

1 Sid. 179.
1 Mod. 95.
1 Ventr. 146.
[Moll. Bk. 2. c. 5. Com. Dig. tit. Navigation, I. 5.] (*a*) But whether the executors of

those mariners who died before the ship was cast away, may recover the wages due to their testators, *quære*, *et vide* Sid. 179. Keb. 684. (*b*) So, by 8 G. 1. c. 24.; ||*secus* if recaptured, and the ship arrives at her port of destination. Bergstrom v. Mills, 3 Esp. 36.||

|| But the wages are not lost by the hypothecation of the ship, nor even by the sale of it, unless the sale be made under the authority of a competent court; and they are preferred to the claim of the holder of an hypothecation bond.

Sydney Cove, *Fudge*, 2 Dodson, A. R. 11. Madonna

D'Ibra, *Papaghira*, 1 Dodson, 57.

Nor are the wages forfeited by a mariner's quitting the ship, and refusing to proceed in her on a voyage not designated by the articles.

Eliza, *Ireland*, 1 Hagg. A. R. 163.

The Pearl,
Denton,
5 Rob. A. R.
224. A forfeit-
ure may, how-
ever, be
waived by
the seaman's
returning, if
he be re-
ceived by the
master. See *Miller v. Brant*, 2 Camp. 590.

But where certain mariners, hired in the *Downs* for a run to the port of *Hull*, quitted the ship with the consent of the master, but against the positive orders of the owners, on the day after her arrival in the roadstead of that port in the river *Humber*, the port being so full that the vessel could not enter immediately; Lord *Stowell* decreed, that they had forfeited their wages, on the ground that they could not be entitled to their dismissal "till after some time of just expectation of the removal of the difficulty."

Neave v.
Pratt,
2 New Rep.
408.; and see
Abbott on Shipping, 465.

In the case of ships of war, the forfeiture of the seamen's wages depends upon the particular contract of the parties, and not upon any legislative enactment.||

By the 22 & 23 Car. 2. c. 11. § 7. it is enacted, "That if the mariners or inferior officers of an *English* ship, laden with goods and merchandize, shall decline or refuse to fight and defend the ship, when they shall be thereunto commanded by the master or commander thereof, or shall utter any words to discourage the other mariners from defending the ship, every mariner who shall be found guilty of declining or refusing as aforesaid shall lose all his wages due to him, together with such goods as he hath in the ship, and suffer imprisonment not exceeding the space of six months; and shall during such time be kept to hard labour for his or their maintenance."

And by § 9. of the said statute, "Every mariner who shall have laid violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, shall suffer death as a felon."

Edwards v.
Child, 2 Vern.
727.; ||and see
Buck v.
Rawlinson,
1 Bro. P. C.
102. but see
contra,
Appleby v.
Dods, 8 East, 300.||

[By the custom of merchants, mariners are entitled to wages at every delivering port; and it hath been holden that they are so, though an agreement was made with them, that they should not demand wages till the return of the ship to the port of *London*, when the freight was to be paid; and a provision was made before the voyage, that every six months wages should be paid for one month, during the voyage.

(a) Beale v.
Thompson,
3 Bos. & Pul.
405. S. C.
4 East, 546.
1 Dow. 299.
1 Smith, 144.;
see also
Johnson v.

||In the ordinary case of an embargo, a seaman hired by the month, and remaining with the vessel, has a right to his wages during the embargo, if the ship afterwards perform her voyage and earn her freight (a); and the master of a vessel which has been seized and restored seems entitled to his wages for the period of detention, notwithstanding during that time he has been separated from her. (b)||

Broderick, 4 East, 566. in which case the plaintiff was a *foreigner*. (b) Pratt v. Cuff, cited in Thompson v. Rowcroft, 4 East, 43.

1 Ld. Raym.
639. ||12 Mod.
408.||

It was said by *Holt* C. J. that if the ship be lost before the first port of delivery, the seamen lose all their wages; but, if after she has been at the first port of delivery, then they lose only those

those from the last port of delivery. But if they run away, although they have been at a port of delivery, yet they lose all their wages. It was also ruled by the same judge at *nisi prius*, that if a ship be bound for the *East Indies*, and thence to return to *England*, and the ship unlade at a port in the *East Indies*, and take freight to return to *England*, and in her return she be captured, the mariners shall have their wages for the voyage to the *East Indies*, and for half the time that they staid there to unlade, and no more. In an action brought for mariners' wages for a voyage from *Carolina* to *London*, it appeared, that the plaintiff served three or four months, and before the ship came to *London*, which was the delivering port, he was impressed into the queen's service; and afterwards the ship arrived at the delivering port. It was ruled by *Holt C. J.* that the plaintiff should recover *pro tanto* as he served, the ship coming safe to the delivering port. But when afterwards, in such an action between *Chandler* and *Meade*, it appeared, that the plaintiff was hired by the defendant at *Carolina* to serve on board the *Jane* sloop, whereof the defendant was master, from *Carolina* to *England*, at 3*l.* per month; that he served two months; that then the ship was taken by a *French* privateer, and ransomed; that just as she came off *Plymouth*, the plaintiff was impressed; and then the ship came safe into the *Thames*, where she disposed of her cargo; it was ruled by *Holt*, that the plaintiff could have no wages, the ship having been captured and ransomed. It was insisted by the plaintiff's counsel, that in that case he should recover *pro rata*, and that the usage among merchants was so; which, *Holt* said, if he could prove it would do; but wanting proof of it he was nonsuited.

1 *Ld. Raym.*
759.

Wiggins v.
Ingleton,
2 *Ld. Raym.*
1211.

§ A seaman who has engaged to serve on board a ship is bound to exert himself to the utmost in the service of the ship; and therefore a promise made by the master, *when the ship was in distress*, to pay an extra sum to a mariner, as an inducement to extraordinary exertion on his part, was at a trial before the late Lord *Kenyon* esteemed to be wholly void. (a) And a promise to pay to a sail-maker, serving in a ship belonging to the *East India* Company, a monthly sum beyond the wages mentioned in the ship's *articles*, which had been signed by him as sail-maker, has been held void. (b)

(a) *Harris v.*
Watson,
Peake's
N. P. C. 72.;
and see *Stilk*
v. Myrick,
2 *Camp.* 317.
Thompson v.
Havelock,
1 *Camp.* 527.
(b) *Elsworth*
v. Woolmore,
Abbott on

Shipping, 440., and 5 *Esp. N. P. C.* 84. note; and see *White v. Wilson*, 2 *Bos. & Pul.* 116. *Dofter v. Creswell*, 7 *Dow. & Ry.* 650. *Carter v. Hall*, 2 *Stark.* 361.

Since the former editions of this work, the doctrine of the earning and payment of wages has been much discussed, and the law has become more defined; it is now decided, that if a master, in violation of his contract, discharge a seaman from the ship during a voyage, the seaman will be entitled to his full wages up to the prosperous determination of the voyage, deducting, if the case require it, such sum as he may in the mean time have earned in another vessel (c); and it is the same whether the master actually discharge the seaman, or by inhuman treatment compel him to quit the ship. (d)

(c) *Robinet v.*
the ship
Exeter,
2 *Rob. A. R.*
261. The
Beaver,
Grierson,
3 *Rob. A. R.*
92.
(d) *Linlaud*
v. Stephens,
3 *Esp.* 269.

Abbott on
Shipping, 447.
5th ed.

The payment of wages is generally dependent upon the payment of freight: if the ship has earned its freight, the seamen who have served on board the ship have in like manner earned their wages; and in the case of shipwreck, if part of the cargo has been saved, and a proportion of the freight paid by the merchant in respect thereof, it seems upon principle that the seamen are also entitled to a proportion of their wages; but though the foreign ordinances have gone further, and directed the payment of wages out of the relicts and materials of the ship, in the event of no part of the cargo being saved sufficient for that purpose, there was not until very lately any known decision of a *British* court on this point. But the question having been brought before the Court of Admiralty, in a case where the parts of a stranded ship were sold for more than sufficient to pay the wages of the seamen, no part of the cargo having been saved, and the seamen having exerted themselves very laboriously to save the parts of the ship, and not having departed until they were dismissed by the master; the late learned judge of that court (Lord *Stowell*), after reviewing and commenting upon the several foreign authorities on the subject, admitted the claim of the seamen, who thereupon received their wages from the owners. (a) ||

(a) *Neptune*,
Clark, 1 Hag.
A. R. 227.
Abbott on
Shipping, 452.

Cutter v.
Powell,
6 Term Rep.
520. || On
this case it has
been remarked

(Abbott on Ship. 445.) that its facts were very particular, and the decision turned upon them. There is no general decision on the question, whether a seaman dying the course of a voyage, is entitled to wages. The legislature seems to have considered that *some* might be due in such a case. See 37 Geo. 5. c. 75. § 7. and 6 Geo. 4. c. 107. § 15.; and this was taken for granted in *Armstrong v. Smith*, 1 New R. 299.; and see *Chandler v. Grieves*, 2 H. Bl. 606. a. By the laws of *Oleron*, of *Wisbuy*, and of the *Hanse Towns*, the wages in such case were to be paid to the heirs, but what proportion does not appear. Abbott, 445. ||

Hernaman v.
Bawden,
5 Carr. 1844.

In a voyage from *England* to *Newfoundland*, and thence with fish to *Spain*, *Newfoundland* is not the delivering port, and if the ship is taken between *Newfoundland* and *Spain*, the mariner loses his wages.

Consolato
del Mare,
Moll. b. 2.
c. 5. § 7.
(b) For this
Molloy cites
1 Roll. Abr.
550.; but
nothing to
this effect
appears in
that page of the book. || As to the loss and forfeiture of wages, see Abbott, part 4. ch. 3. ||

If a ship be seized upon for debt, or otherwise become forfeited, the mariners must receive their wages, unless in some cases, where their wages are forfeited as well as the ship; or, if they have letters of marque, and instead of that they commit piracy, by reason of which there becomes a forfeiture of all. But (b) lading prohibited goods aboard a ship, as wool and the like, though it subjects the vessel to a forfeiture, yet it does not deprive the mariner of his wages, for the mariners having honestly performed their parts, the ship is tacitly obliged for their wages.

Minett v.
Robinson,
Bunb. 121.

A. B. libelled in the Admiralty Court, as administratrix to her husband, for his wages due as mariner on board the *Prince Frederick*. *Minett* and *Heys* moved for a prohibition, upon a suggestion that this ship was seized for importing wines from *Holland*,

Holland, not being *Rhenish* or *Hungarian* wines, and therefore forfeited by stat. 12 Car. 2.; that claim being put in by *Bowen* the master, an information was filed by the seizor, and *Bowen* pleaded the general issue, but before trial submitted, and compounded according to the course of the court; and upon payment of 136*l.* to the informer, there was judgment *quod vas deliberetur*, &c. It was likewise suggested, that the libel was for wages due before the seizure. Upon this motion it was insisted, that the act of parliament had so altered the property of the ship, that by the seizure, submission to a fine, and judgment *quod deliberetur*, upon it, all precedent encumbrances were discharged. But the court discharged the rule, though they admitted, if there had been a condemnation that would have been a good ground for a prohibition, and a discharge of all precedent encumbrances. But the reporter adds a *quære*, for the fine implies a condemnation, although not actually given but prevented by the submission.

By 2 G. 2. c. 36., made perpetual by 2 G. 3. c. 31., no masters of ships shall proceed on any voyage without first coming to an agreement (a) with the mariners for their wages, which agreement shall be made in writing, declaring what wages each seaman or mariner is to have respectively during the whole voyage, or for so long time as he shall ship himself for, and shall also express the voyage for which such seaman was shipped, upon pain of forfeiting 5*l.* to the use of *Greenwich Hospital*. (b)

in writing (which need not be stamped) is required to be signed by the master and mariners of vessels, of the burthen of one hundred tons or upwards, employed in the *coasting trade*, from any port or place in *Great Britain*, to any other port or place in *Great Britain*, and going to open sea; and by the terms of the statute, the contract is to specify for *what time*, or for *what voyage or voyages* the mariner shall contract.]]

This agreement every seaman shall sign within three days after he shall have entered himself; and, so signed, it shall be conclusive to all parties for the time contracted for.

entering on board a *foreign ship* in a *British port*. *Dickman v. Benson*?

And any seaman deserting before or during the voyage, or refusing to proceed on the voyage, after he has signed such agreement, shall forfeit his wages (c); and further, upon complaint to any justice of the peace by the master or other person having charge of the ship, may be committed to the house of correction for any time not exceeding thirty days, nor less than fourteen.

quits his ship after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of his whole wages, under § 3. of this latter statute. *Frontine v. Frost*, 5 Bos. & Pul. 502. If the owners defend a suit for wages, in the Admiralty, on the ground of desertion, they are bound to shew the articles, that the stipulated service may appear. 1 Hagg. A. R. 168.; and see 5 Rob. A. R. 224. *Neave v. Pratt*, 2 New R. 408. Absence occasioned by the power of a foreign country, in which the ship happens to be, without any fault of the seamen, does not work any forfeiture. *Beale v. Thompson*, 4 East, 546.; and see *ante*, p. 417, 418.]]

If any seaman absent himself from the ship without the leave of the master or other chief officer having charge of the ship, he shall forfeit for every day's absence two days' pay to the use of *Greenwich Hospital*.

|| (a) See the agreement usually signed, Abbott, appen. No. V.

(b) By the 31 Geo. 3. c. 59. § 1, 2. & 10. a similar agreement

agreement

§ 2. || This section does not apply to a *British seaman* 3 Camp. 290.]]

§ 3.

§ 4. || (c) See 11 & 12 W. 3. c. 7. § 17. 2 Geo. 2 c. 36. § 3. Aut a seaman who

§ 5.

§ 6. If any seaman, not entering into the king's service, leave the vessel before he shall have a discharge in writing from the master or other person having the charge of the ship, he shall forfeit one month's pay.

§ 7. ¶The
31 G. 3. c. 39.
§ 5. makes
a similar
enactment
with regard to
the masters
of ships em-
ployed in the
coasting trade,
except that
five instead of
thirty days
is the period mentioned within which the wages, if demanded, are to be paid.¶

On the arrival of any vessel in *Great Britain*, the master shall pay the seamen their wages, if demanded, in thirty days after the vessel's being entered at the custom-house (except when a covenant shall be entered into to the contrary), or at the time the seamen shall be discharged, which shall first happen, deducting out of the wages the penalties by this act imposed, under penalty of paying to such seamen that shall be unpaid 20s. over and above the wages, to be recovered as the wages may be recovered; and such payment shall be good in law, notwithstanding any action, bill of sale, attachment, or encumbrance whatsoever.

§ 8. ¶(a) See
Bowman v.
Mangelman,
2 Camp. 315.¶

No seaman, by signing such contract, shall be deprived of using any means for the recovery of wages which he may now lawfully use; and where it shall be requisite that the contract in writing shall be produced in court, no obligation shall be upon any seaman to produce it, but on the master or owner of the ship; and no seaman shall fail in any action or process for the recovery of wages for want of such contract being produced. (a)

§ 9.

The masters or owners of ships shall have power to deduct out of the wages of any seaman all penalties incurred by this act, and to enter them in a book, and to make oath, if required, to the truth thereof; which book shall be signed by the master and two principal officers, belonging to such ship, setting forth, that the penalties contained in such book are the whole penalties stopped from any seaman during the voyage; which penalties (except the forfeitures of wages to the owners, on the desertion of any seaman, or on refusing to proceed on the voyage,) shall go to the use of *Greenwich Hospital*, to be paid and accounted for by the masters of ships coming from beyond the seas, to the officer at any port who collects the 6d. per month deducted out of seamen's wages, for the use of the said hospital, which officer is empowered to administer an oath to the master touching the truth of such penalties.

§ 10.

Any master or owner deducting the penalties as above, and not paying them to the officer collecting the 6d. per month in the port where the deduction shall be made, within three months after the deduction, shall forfeit treble the value to the use of the hospital; which, together with the money deducted, shall be recovered by the same means as the penalties for not duly paying the 6d. per month.

¶The 13th section of this statute provides, that a seaman belonging to any merchant ship who enters into the service of his majesty, on board any of his majesty's ships, shall not for such entry forfeit the wages due to him during the term of his service in the merchant ship, nor shall such entry be deemed a desertion. And pursuant to the spirit of this statute it has been decided, that

a sea-

a seaman belonging to a privateer, who was to have a certain share of prizes in lieu of wages, and who had engaged to serve full six months, on pain of forfeiting such share, did not lose his share of a prize taken while he was in the privateer by being afterwards impressed, and then accepting the bounty, and entering on board one of his majesty's ships before the expiration of the six months. (a)

But entering or being impressed into the king's service does not give the mariner an *absolute* right to his wages up to the time, nor place him in a better situation as to such wages than he would be if he had remained on board the ship; and therefore if the ship be afterwards captured he loses his wages in common with those whom he leaves behind.

Ingleton, Ld. Raym. 1211. Dunkley v. Bulwer, 6 Esp. 56.

In the absence of an express decision on the subject, the legislature appears to have considered that some wages might be owing to seamen who died in the course of a voyage (b); and in one or two cases it seems to have been admitted, that the representatives of a seaman are entitled to a proportion of wages to the time of his death. (c)

Smith, 1 New R. 299. Abbott on Shipping, 445.

By 8 G. 1. c. 24. § 7., (made perpetual by 2 G. 2. c. 28. § 7.) and also by 12 G. 2. c. 30. § 12., no master or owner of any merchant ship shall pay to any seaman beyond the seas any money or effects on account of wages, exceeding one moiety of the wages due at the time of such payment, till such ship shall return to *Great Britain, Ireland*, or the Plantations, or to some other of his majesty's dominions, whereto she belongs, on forfeiture of double the money so paid, to be recovered in the high Court of Admiralty by any person who shall first inform for the same.

The cargo of a ship was lost by the capture of a *Swedish* privateer, who carried her into *Gottenburgh*: the master staid there three months to refit the ship, and take in new lading; and to prevent the seamen from going away, he agreed to pay them so much per month whilst they staid there. In an action for this, the master would have discharged himself, on the rule that freight is the mother of wages, and that none are ever paid whilst the ship is lading and unlading; which the Chief Justice agreed to be the general doctrine; but he held it not sufficient to control a special agreement, as there was in this case, and where too there was so long a stay at *Gottenburgh*.]

|| With regard to ships trading to the *West Indies*, it is by the 37 G. 3. c. 73. § 1. enacted, that after the 1st day of *July*, 1797, every seaman who shall desert at any time during the voyage, either out or home, from any *British* merchant ship trading to or from his majesty's colonies and plantations in the *West Indies*, shall, over and above all punishments, forfeitures, and penalties, to which he is now by law subject, forfeit all the wages he may have agreed for, or be entitled to during the voyage, from the

(a) Paul v. Eden, Abbott on Shipping, 444. S. P. Chandler v. Grieves, 2 H. Bl. 606. n.

Anon. 2 Camp. 520. note. Clements v. Mayborn, C. B. Trin. T. 24 G. 3. Wiggins v.

(b) 37 G. 3. c. 73. § 7.; and 6 G. 4. c. 107. § 15. (c) Cutter v. Powell, 6 Term Rep. 520. Armstrong v. Shipping, 445.

|| See Abbott on Shipping, 453.

Champion v. Nicholas, 1 Stra. 405. at N. P. in Middlesex.

master or owner of the ship, on board of which he should enter immediately after such desertion.

(a) From the general terms in which this clause is expressed, it seems not to be confined to the masters of ships engaged in the West India trade.

And by § 2. of the same statute it is enacted, "That all and every master or commander of any *British* merchant ship, who shall from and after the 1st day of *July*, 1797, hire or engage to serve on board his ship or vessel any seaman, mariner, or other person who shall, to the knowledge of such master, have deserted from any other ship or vessel, shall forfeit and pay the sum of 100*l*." (a)

See Abbott on Shipping, 456.

By § 3. of the same statute it is also enacted, "That no master or commander of any merchant ship or vessel, which shall from and after the 1st day of *July*, 1797, sail or proceed from any port or place in *Great Britain*, shall hire or engage, or cause or procure to be hired or engaged, any seaman, mariner, or other person, at any port or place within his majesty's colonies or plantations in the *West Indies*, to serve on board any such merchant ship or vessel, at or for greater or more wages or hire for such service than according to the rate of double monthly wages contracted for with the seamen, mariners, and other persons hired or engaged to serve on board such ship or vessel at the time of her then last departure from *Great Britain*, being in the same degree and station in which such seaman, mariner, or other person shall be so hired or engaged at any such part or place as aforesaid; unless the governor, chief magistrate, collector, or comptroller of such port or place in the said colonies or plantations shall think that greater or more wages or hire than double the monthly wages aforesaid should or ought to be given to such seaman, mariner, or other person as aforesaid, and do and shall accordingly authorize or direct the same to be given by writing under his hand; that then and in such case the master or commander of such ship or vessel shall and may be at liberty to pay, and the seaman, mariner, or other person on board such ship or vessel to receive, such greater or higher wages as such governor, chief magistrate, collector, or comptroller, shall direct as aforesaid;" and all contracts and securities entered into or given, contrary to the intent and meaning of this act, are made null and void, to all intents and purposes; and the master or other person who shall enter into or give, or procure to be made, entered into, or given, any such contract or security, or who shall hire or cause to be hired any seaman or other person to enter on board, contrary to the intent and meaning of this act, or who shall pay or cause to be paid any greater hire, wages, or other gratuity or advantage whatsoever than is allowed or directed by this act, shall for every such offence forfeit 100*l*. (a)

(a) The penalties imposed by this act are to be distributed one third to Greenwich Hospital, one third to the seamen's hospital or fund at the ship's port, and one third to the informer; and may be recovered by action in the courts at Westminster; or such as do not exceed 20*l*. before a justice of the peace.

It is provided, nevertheless, "That nothing in this act shall extend or be construed to extend to any contract or agreement which shall or may be made with any seaman, mariner, or other person hired or engaged to serve on board any merchant ship

“ ship or vessel, at any port or place within his majesty’s colonies
 “ or plantations in the *West Indies*, who shall, at the time of such
 “ hiring or engagement, produce and deliver to the master and
 “ commander of such ship or vessel a certificate under the hand
 “ of the master or commander of the ship or vessel on board of
 “ which such seaman, mariner, or other person had then last
 “ served, signed in the presence of one or more witness or wit-
 “ nesses, stating their usual place or places of abode, thereby de-
 “ claring or certifying that such seaman, mariner, or other person
 “ had been duly discharged from the ship or vessel on board of
 “ which he had so last served, and which certificate the said
 “ master or commander shall grant within three days next after
 “ application made to him by such seaman, mariner, or other per-
 “ son, before a witness, or in default thereof shall forfeit and pay
 “ the sum of *twenty pounds*, to be levied, recovered, and applied
 “ in manner hereinbefore directed; nor to any contract or agree-
 “ ment to be made with any seaman, mariner, or other person
 “ hired or engaged to serve on board any merchant ship or
 “ vessel which through necessity, or on account of very hazardous
 “ service or extraordinary duty, require such contract or agree-
 “ ment to be made, or more wages or hire given, and of which
 “ necessity, service, or extraordinary duty proof shall be made on
 “ oath before the chief magistrate or principal officer of any port
 “ or place, or before any justice or justices of the peace of the
 “ said colonies or plantations; and provided, also, that such sea-
 “ man, mariner, or other person so hired or engaged to serve on
 “ board any ship or vessel so requiring such service, shall not
 “ have deserted from the ship or vessel on board of which he had
 “ then last served; and provided, also, that no greater wages or
 “ hire shall be given by any master or commander, or taken or
 “ received by any seaman, mariner, or other person as afore-
 “ said, except in cases of such necessity, very hazardous service,
 “ extraordinary duty as aforesaid, than after the rate of double
 “ the monthly wages, or the wages to be settled or directed by
 “ any governor, chief magistrate, collector, or comptroller, as
 “ hereinbefore directed to be paid or received as aforesaid.” (a)

(a) See the ob-
 servations on
 this long and
 confused pro-
 viso in Abbott
 on Shipping,
 439.

It has been decided upon this statute, that a licence given by a
 magistrate in the *West Indies* to the master of a ship, “to procure
 “ men on such terms as he could to navigate the ship home,” is not a
 compliance with its prescribed regulation. (b) ||

(b) *Rodgers v.*
Lacy, 2 Bos.
 & Pul. 57.

The mariners may sue in the Admiralty Court for their wages,
 although the hiring was by the master on land; and this is allow-
 ed of in favour of navigation, for here they may all join in the
 same libel: also, by the law of the admiralty, they have remedy
 against the ship and owners, as well as against the master (a); and
 it would be a great discouragement to seafaring men to oblige
 them to bring separate actions, and those against a master who
 may happen to be insolvent.

Winch. 8.
 4 Inst. 141.
 Vent. 146. 343.
 3 Mod. 244.
 Salk. 33. pl. 4.
 and vide 4 &
 5 Ann. c. 16.
 || § 17, 18, &
 19. limiting
 the period

within which the suit must be commenced to six years. On a suggestion that the contract
 is *special* and under *seal*, and made on land, supported by proper affidavits, the courts of com-
 mon law will prohibit the Admiralty from proceeding, provided the suggestion be made be-
 fore

fore sentence, for the construction of a special contract is proper for the courts of common law. See Abbott, 480. *et seq.* and the cases there. (a) And their claim for wages is preferred before all other charges. The Favourite, *De Jersey*, 2 Rob. A. R. 232.||

Abbott, 485.
And as to the proper action where the seaman is wrongfully dismissed during the voyage, see 2 East, 145. Brown v. Milner,

||In suits at common law, if the articles or contract be under seal, and delivered as a deed, an action of debt or covenant must be brought; if it be not under seal, or not so delivered, an action of debt or *assumpsit*. And in order to enable the plaintiff to frame his declaration correctly, a judge will order the defendant to shew the articles to the attorney for the plaintiff, and if necessary to give him a copy. The plaintiff is not bound to shew that the ship earned freight; the defendant must prove the negative, if such proof will permit a defence.||

7 Taunt. 319. The earning of freight is not in all cases necessary to entitle seamen to their wages; as suppose a ship goes out in search of a cargo, and, not being able to procure one, returns empty, will the seamen be entitled to their wages, unless there be an agreement to the contrary? Judgment of Lord Stowell, 1 Hagg. A. R. 227.

Raym. 2. Salk. 53. pl. 5. Ld. Ramy. 397. 632. 2 Stra. 858.

So, of the other officers under the master, as the mate, purser, boatswain, &c.; for though they contract with the master, yet it is on the credit of the ship.

Jane and Matilda, 1 Hagg. A. R. 187.

||And the Court of Admiralty has decided the fact of the mariner being a woman to be no ground for resisting the payment of wages to her.||

Roll. Abr. 533. [So, a carpenter, 2 Stra. 707.] (a) So, for mending a ship. Cro. Car. 296.

So, a shipwright may sue in the admiralty for (a) making a ship.

6 Mod. 238. 2 Ld. Raym. 1044. S. C. [2 Wils. 265. S. C. cited, and approved of by the court.]

And if a contract be with seamen to go on a voyage, and they, in order thereunto, work in a harbour, and, after, the voyage be intercepted through the owner's fault, as, if the ship be arrested for his debt, &c. the seamen shall sue for their wages for the work done in the harbour, in pursuance of the contract to go on a voyage, in the admiralty, as much as if they had gone the voyage: *secus*, if the retainer of them had been only to do the work in the harbour.

Madonna D'Ibra, *Paghica*, 1 Dodson, A. R. 37. Wilhelm Frederick, *Noormaw*, 1 Hagg. Shipping, 477.

||In regard to *foreign* seamen, the Court of Admiralty has been in the habit of entertaining proceedings against ships in the ports of this country, at *their* suit for wages, as due by the general maritime law, with the consent of the accredited agent of the government of their country.||

A. R. 138. Maria Theresa, *Phillips*, 1 Dod. A. R. 303. See Abbott on

Ross v. Walker, 2 Wils. 264.

[But a pilot, though a mariner, who is sent for from *Gravesend*, and goes from thence on board a ship lying in *Sea-Reach*, and pilots her thence to her moorings at *Deptford*, cannot sue in the admiralty for the pilotage; for both the contract and the work are within the body of a county.]

Salk. 31. Opy v. Addison.

So, if there be any special agreement, by which the mariners are to receive their wages in any other manner than is usual, or

if

if the agreement be under seal the mariners cannot sue in the admiralty. [2 Stra. 958. Day v. Searle, S. P. 2 Barrard. K. B. 419. S. C. Howe v. Napier, 4 Burr. 1944. S. P. But see Bennis v. Parre, 2 Ld. Raym. 1206. and Roberts v. Cadd, Bunb. 247. Buggin v. Bennett, 4 Burr. 2055. Menetone v. Gibbons, 5 Term Rep. 267.] || See the cases cited in 2 Dod. A. R. p. 12. in support of the doctrine, that the Court of Admiralty has no jurisdiction in special contracts, and Abbott on Shipping, 480. 5th ed.||

Nor can the master sue in the Admiralty Court; for his contract is on the credit of the owners (*a*), and not like that of the mariners, which is on the credit of the ship. 4 Inst. 141. Raym. 3. Salk. 55. pl. 4. Carth. 518.

S. P. although the owner was beyond sea, and the ship lay here; and *vide* 2 Salk. 548. pl. 3. [(*a*) Hence, the master has no lien on the ship for wages, stores, or repairs done in England. Wilkins v. Carmichael, Dougl. 101.]

[Therefore, where a man went out mate, and upon the death of the master during the voyage, succeeded to the command of the ship; and upon his return sued in the Admiralty for his wages as mate, and for a further allowance after he became master; the court granted a prohibition *quoad* the time he was master, and refused it *quoad* the time he was mate.] Reed v. Chapman, 2 Stra. 957. || The Favourite, *De Jersey*, 2 Rob. A. R. 252.||

|| By the 59 Geo. 3. c. 58. § 1. authority is given to justices of the peace, on the complaint of persons who have served on board any vessel trading from any place in *England* to parts beyond the seas, or to any other place in *Great Britain*, and where the sum in question does not exceed 20*l.*, to summon the master or owner, &c. and to order payment, and cause the amount to be levied by distress and sale of the goods of the party, or of the vessel, or its tackle or furniture. The act gives a power of appeal to the Court of Admiralty under the restrictions therein mentioned (*a*), and appears to provide that seamen shall not deprive themselves of its benefit by any clause in their contract; and casts the burden of producing the written contract on the master or owners (*b*), and reserves all pre-existing remedies. (*c*) It does not extend to *Scotland*. (*d*) Its continuance was limited to seven years from the 2d *July*, 1819 (*e*), but it has by the 7 Geo. 4. c. 59. been continued for a further period of seven years.||

(*a*) § 2.

(*b*) § 3.

(*c*) § 4.

(*d*) § 5.

(*e*) § 7.

(F) Of Average.

WHENEVER a ship is in stress of weather, or in danger, or just fear of (*g*) enemies, and the master, to save part of the cargo, throws overboard some of the goods in the ship, those which are saved shall contribute in proportion; and this common calamity shall be equally borne by all the parties interested. This is called general or gross average, and is allowed by the civil law, the customs of merchants, and our law (*h*), || having been adopted into the *Roman* law from the ancient law of *Rhodes*, "*Lege Rhodiâ* cavetur, ut si levandæ navis gratiâ jactus mercium factus sit, omnium contributione sarciatur, quod pro omnibus datum est."|| Molloy, 246. &c. 2 Bulst. 290. (*g*) So likewise, goods coming from infected towns or places may be cast overboard. Molloy, 246. || (*h*) Dobson v. Wilson, 5 Campb. 480.; and see

Abbott on Shipping, 342. chap. "On General Average."||

[There

[There is another species of average, called small or petty averages. Petty average consists in such charges and disbursements as, according to occurrences, and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading, or on the voyage. These charges are lodemanage, or the hire of a pilot for conducting the vessel from one place to another; towage, pilotage, light money, beaconage, anchorage, bridge-toll, quarantine, river charges, signals, instructions, passage-money by castles, expenses for digging a ship out of ice when frozen up, that it may be brought into a proper harbour; and at *London*, by custom, the fee paid at *Dover* pier.

||This *third* species of average appears to include the charges mentioned in the last paragraph as forming a distinct species; for in *Abbott on Shipping*, p. 272. the word *average* in the *bill of lading* is said to "include several petty charges, as the expense of towing, beaconage," &c. And the learned author of that treatise, in his chapter on general average, so calls it to distinguish it from *special* or *particular* average, "a very incorrect expression, used to denote "every kind of partial loss happening either to the ship or cargo from any cause what-ever."||

A third species of average is that we are accustomed to meet with in bills of lading, "paying so much freight for the said "goods, with *primage* or *average* accustomed." In this sense it signifies a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention to the goods so entrusted to him.]

Molloy, 250. ||Ship's stores necessarily thrown overboard whilst the vessel was in the hands of an enemy are the subject of a general average.

In this contribution in general average, not only the master, owners, and freighters of the ship shall bear a proportionable share of the loss, but also passengers for such wares as they have in the ship. And passengers who have no wares or goods in the ship, yet, as they are a burden to the ship, estimate is to be made of their apparel, rings, and jewels, towards a contribution of the loss (*a*); and in general it is said, that every thing shall contribute, except the provisions of the ship, and the men who are necessary to work the ship.

Price v. Noble, 4 Taunt. 125. (*a*) But this is expressly denied in *Abbott on Shipping*, p. 356. 5th edit. where it is said that wearing apparel, jewels, &c. belonging to the persons of the passengers and crew, and taken on board for their private use, and not for traffic, do not contribute.||

Molloy, 247. ||It may, however, often happen, as was expressed by Lord

The master ought to be careful, that only those things of the least value and greatest weight be flung overboard: also, he and the crew (or most of them) must swear that the goods were cast overboard for no other cause but purely for the safety of the ship and lading.

Kenyon C. J. in *Birkley v. Presgrave*, 1 East, 223., that the danger is too urgent to admit of any deliberation as to the expediency of the sacrifice, or the object of it. Indeed, too close a compliance with forms at a period of supposed danger has often justly excited a suspicion of fraud. *Emerigon*, t. 1. p. 605. *Abbott*, 345.||

Molloy, 249. ||And a loss incurred by sacrificing the tackle belonging to a ship

If, to avoid the danger of a storm, the master cuts down the masts and sails, and they falling into the sea are lost, this damage is to be made good by ship and lading, *pro ratâ*: otherwise if the case happens by storm or other casualties.

for an unusual purpose, or on an extraordinary occasion of danger for the benefit

benefit of the whole concern, is the subject of general average. *Birkley v. Presgrave*, 1 East, 220.¶

Also, if through the rifling of the ship, casting overboard, and lightening the ship, any of the remaining goods are spoiled, either with wet or otherwise, those which are preserved must contribute towards the loss of the goods impaired, as well as to those which were entirely lost. Molloy, 248.

[Where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average.] Da Costa v. Newnham, 2 Term Rep. 407. ¶ 1 East, 220. Plumer v. Wildman, 5 Maul. & S. 482.; and see the *Copenhagen*, 1 Rob. A. R. 289.; the *Grati-tudine*, 2 Rob. A. R. 257. *Qu.* as to the wages and provisions of the crew during the repairs. Abbott, 350. and 8 Term Rep. 209.¶

¶ The rule as to average is not confined to goods, but extends to the ship and furniture. Where the master of a *French* vessel being pursued by privateers, by way of stratagem, at night hoisted his boat, with a mast and sail and a lantern at the mast-head, into the sea, and then changed his course and escaped, the value of the boat abandoned was made good by general contribution. And where stores were thrown overboard during a storm, the shippers were held liable to contribution. Emerigon, tom. 1. p. 622. Price v. Noble, 4 Taunt. 125.; the necessity of the jettison was proved by the mate.

And if the master, from necessity, cut his cable from the anchor to use it as a hawser; or if he cut away and abandon his masts, sails, or cables, to lighten and preserve the ship, they must be made good by contribution. Abbott, 349. and authorities there cited.

But it is otherwise as to a mainmast broken in a heavy gale by carrying an unusual press of sail, in order to escape an enemy to whom the ship had struck, and as to masts and sails broken by carrying press of sail to avoid being driven on shore and stranded. Covington v. Roberts, 2 New Rep. 378.

And the expenses of a ship (wages and provisions) in a port, in which she has taken refuge to repair the damage of a storm, must fall on the ship alone. Power v. Whitmore, 4 Maul. & S. 141. *Ibid.*

and see 5 Maul. & S. 482.

And it would rather seem that such is the case as to the wages and provisions of the crew during a detention by embargo of a foreign power, for this case does not appear within the principle of the *Rhodian* law, because the delay is not for the general benefit, though on this point writers have differed. Abbott, 351. and the authorities there cited, and 2 Term Rep. 407.

Whether the additional expense of wages and maintenance of the crew, incurred while the ship is waiting in port for convoy, is a subject of average contribution, has been agitated in three cases stated by *Bynkershoek*. (a) Where the delay of convoy is accidental, and the ship merely remains in port to avoid the ordinary dangers of a state of warfare, that learned writer, and the learned author of the treatise on shipping, consider the claim of contribution contrary to legal principles: an opinion supported by the judgment of the *Dutch* senate in last appeal in one of the cases (a) *Questiones Juris Privati*, lib. 4. c. 25. Abbott, 352. (b) For the sake of those who complain of delay in the administration of justice in England, it

may be proper to mention, that in one of these foreign cases nearly seven years elapsed between the first and last sentence; in another, a period of nearly ten years; and in the third of almost sixteen years.

Taylor v. Curtis, 2 Marsh R. 309.
6 Taunt. 608.
Code de Comm. art. 400. No. 6.

Simonds v. Loder,
2 Barn. & C. 805.
Molloy, 250. 251.

Leg. Wish. Art.
Maly. Lex Merc. 1st part, c. 26.
|| As to the mode of contribution, see Lord Tenterden's treatise on the Law of Merchant Ships, p. 357. 5th edit. where the subject is discussed with great learning and perspicuity.||

Williams v. London Insurance Company, Maul. & S. 318.; and see Abbott on Shipping, 357.

Molloy, tit. Average, § 4. 1 Mag. 62.
Peters v. Milligan, Sitings at Guildhall, 1787. coram Buller J.

Peters v. Milligan and others, at

cases stated by *Bynkershoek*, a member of the court; but where the master sailing with convoy was driven by an attack of privateers, who had captured other vessels in company, to put into *Lisbon*, where he waited six months before he could procure convoy for *Cadiz*, his port of destination, the four courts of *Holland* successively decreed (b) in favour of the claim; a decision approved by both *Bynkershoek* and Lord *Tenterden*, since the expense incurred by this imminent peril was analogous to cases of jettison, and fell within the principle of the *Rhodian* law.

In *England* it has been decided, that neither the damage to the ship, nor the ammunition expended, nor the expense of healing sailors wounded in an action with the enemy, is an item of general average. The latter item, however, is made so by the *French Code de Commerce*.

A loss by general average is to be calculated between the owner of the ship and the owner of the goods, according to the law of the port of discharge.||

The goods saved and lost are to be estimated according as the goods saved were sold for, freight and other necessary charges being first deducted, and in such proportion the goods saved are to contribute.

[This rule is agreeable to the marine laws of *Wisbuy*, which declare, that the goods thrown overboard shall be brought into a gross average, and shall be rated at the same price for which other merchandize of the same sort, preserved from the sea or enemy, was sold. This custom mentioned by *Molloy* was certainly new in *England* at the time he wrote; for it appears by *Malynes*, that in 1622 the distinction was observed of estimating the goods at prime cost, if the jettison happened before half the voyage was performed; and if after, at the price the rest of the goods sold for at the place of discharge. However, the authority of *Molloy* is confirmed by *Magens*, who says, that the prevailing mode of settling averages now adopted in *England* is conformable to that rule, which has abolished the distinction.

|| In the case of freight it has been held, that it should contribute in respect of a loss occurring on an outward voyage, in a case where a ship was chartered out and home, and the freight was payable according to the quantity of the homeward cargo, and upon the ship's safe arrival.||

In *England*, money and jewels fall into the general average at their full price.

A special action on the case was brought by the owners of a packet hired by government against defendants, who were the shippers

shippers of bullion from the *West Indies* to this country, for their proportion of general average arising from a loss by cutting away a mast. A bill of lading was given by the captain at the time he received the bullion. It appeared that merchant ships take less for the conveyance of this article than packets, and these than men of war. Packets are allowed by government to receive bullion on board, but captains of men-of-war are prohibited. Packets, however, are considered as king's ships; they are under martial law. It appeared, also, that bullion on board merchant ships always contributes to general average. But no particular instances were in proof of such an accident having happened to a packet with bullion on board, on which the general question could arise. But several witnesses declared that they never heard of such demand, and they were likely to have known if it ever had been made. — *Bearcroft* for plaintiff in his reply contended, that this being a new question in a court, it was as much in his favour as against him; for perhaps the demand was never before resisted. Wherever a bill of lading is given, it must be for *cargo*, and cargo is always subject to general average. This must be considered as cargo, and though packets are not allowed to carry cargo in general, yet *quoad* bullion they are. *Buller J.*, — There is a point arising in this cause, and it is the only one which I can leave to the jury, which is new in a court of justice; therefore it is necessary to state it precisely: the only question then is, Whether any usage in the particular case of packets has made an exception out of the general law with regard to general average? for as to the general law there can be no doubt but that bullion is subject to average like any other cargo paying freight. Before I come to the evidence on this subject, I shall lay two circumstances out of the case. 1st, That though a captain of a man-of-war takes bullion on board, yet he does not receive any freight for it as such, and if he does receive a reward for doing so, it is against positive orders. 2d, The difference of the premiums of insurance between packets and merchantmen with bullion on board, because the motive of the underwriter, in requiring less in the one than in the other case, is, because the former is more secure and better manned than the latter. There can be no doubt but that specie is liable to general average. The law upon this subject has been diligently and ably collected by a gentleman who has lately written on the subject of insurance. Every thing which pays freight must be liable to general average. A packet does carry bullion for freight; the captain gives bills of lading; government receives one third of the freight; the owner another third, and the captain the third share. The cargo of every vessel carrying for freight must equally be liable to general average, whether employed by government or a subject: there can be no difference. Then the question arises, whether there is any usage in this case to vary the general law. This is the material consideration. It has been said by the witnesses, that they never heard of any instance similar to the present, in which such a demand has been

Guildhall,
coram *Buller J.*
Dec. 19th,
1787.

Mr. now Mr.
Justice Park.

made.

made. Whether negative usage ought to weigh or not, depends very much upon the subject to which it is applied. In cases of this sort, where accidents must frequently have happened, negative usage of non-claim is very strong. Captain *Bull*, of one of the packets, has said, that very many instances have happened of packets cutting away their masts. Now it must frequently have happened that bullion was on board in such cases. There are now thirty packets employed every year by government, and many have been so at least from the time of Queen *Anne*, but I cannot now say at what time they were set up. Captain *Braithwaite* says, that they have larger freight for carrying bullion in the packets from *Lisbon* than the merchantmen have, because the packets are a safer mode of conveyance; but the reason given by Captain *Bull* for the difference is, because there is no general average allowed in that case. Then Mr. *Etherege*, who is clerk of the bullion office in the Bank, says, that he never knew of a demand of this sort in the case of a packet, and he thinks he must have known it if there had; but he has always known it done in the case of merchantmen. — Verdict for defendant by a special jury.]

Molloy, 250.

If a master of a ship lets out his ship to freight, and then receives his complement, and afterwards takes in goods without leave of the freighters, and a storm arises at sea, and part of the freighters' goods are cast overboard, the remaining goods are not subject to the average, but the master must make good the loss out of his own purse.

(a) Liv. 2.

tit. 8. du

Jet. art. 13.

(b) Myer v.

Vander Deyl,

Guildhall Sittings, before Lord *Ellenborough* C. J. Dec. 1803. *Backhouse v. Ripley*, cited in *Abbott on Shipping*, 355. 5th edit.

|| And in accordance with the *French* ordinance (a), goods stowed upon the deck of the ship are excluded from the benefit of general average, for in most cases goods so stowed obstruct the management of the vessel.||

Moor, 297.

|| And a party may by his agreement forfeit all right to call for contribution.

See *Jackson v. Charnock*, 8 Term Rep. 509.||

Also, average is not due unless the goods are lost in such a manner that thereby the residue in the ship are saved; as, if goods are thrown overboard to lighten the ship, or, by composition, part is given to a pirate to save the rest; but, if a pirate takes part by violence, average shall not be paid for them.

Show. Par.

Cases, 18, 19.
and affirmed
in parliament.

So where *A.*, being one of the owners of a ship, loaded on board her 210 tons of oil, and *B.* loaded on board her 80 bales of silk upon a freight, by contract, both to be delivered at *London*; the ship was pursued by enemies and forced into an harbour, &c., and the master ordered the silk on shore, being the most valuable commodity, though they lay under the oils, and took up a great deal of time to get at them; the ship and oils were afterwards taken, and the owner of the oils brought his bill in equity to have contribution from the owner of the silk; in this case,

case, as the loss of the oils did not save the silks, nor the saving the silks lose the oils, the bill was dismissed.

¶ And where a ship, being unable to escape from a privateer, resisted the attack, beat off the privateer, reached her port, and delivered her cargo in safety, the Court of Common Pleas decided that the expense of repairing the ship, of curing the wounds of the sailors, and the expenditure of ammunition, were not the subject of general average; on the ground, that though the measure of resisting the privateer was for the general benefit, it was still a part of the adventure, and that no particular part of the property was voluntarily sacrificed for the protection of the rest.¶

If a ship happens to be taken, and the master, to redeem the ship and lading out of the enemy's or pirate's hands, promises a certain sum of money, for performance whereof he himself becomes a pledge or captive in the custody of the captor; in this case he is to be redeemed at the costs and charges of the ship and lading, and all are to be contributory for his (a) ransom according to each man's interest.

tion, in the same manner as he may detain the goods for freight: but if he once suffers them out of his possession, he cannot afterwards retake them. 6 Mod. 12, 13. ¶ Even the mariners contribute in respect of their wages for the ransom of the ship; but it is the only instance in which they are so called upon. Abbott on Shipping, 357.¶

So, where a pirate takes part of the goods to spare the rest, contribution must be paid; but if a pirate takes by violence part of the goods, the rest are not subject to average, unless the merchant hath made an express agreement to pay it after the ship is robbed.

¶ But ransom in the case of capture by an enemy can hardly become the subject of general average in this country, for by the 22 G. 3. c. 25. the ransom of any ship, or merchandize on board the same, belonging to any subject of this country, and taken by "the subjects of any state at war with his majesty, or by any "persons committing hostilities against his majesty's subjects," was absolutely prohibited; and by a statute made at the commencement of the late war (b) such ransom was prohibited, "unless in the case of extreme necessity, to be allowed by the "Court of Admiralty;" and all contracts for ransom contrary to those statutes are made void, and the person entering into such contract is subjected to a penalty of *five hundred pounds*. (c)¶

55, 36. 45 G. 3. c. 72. § 16, 17, 18. (c) In consequence of this illegality, if the master ransom his ship, and bring her to England, the owner may take her from him without paying the price. Parsons v. Scott, 2 Taunt. 363. And if the master, to enable himself to pay the ransom, borrow money of a person acting with him in the transaction, he cannot be compelled to repay it. Webb v. Brooke, 3 Taunt. 6.

If A. and several others take their passage in a ferry-boat, and being upon the water, a tempest arises, so that they are in danger of being drowned; upon which, to preserve their lives, several of the goods are cast overboard, among which a pack of

Taylor v. Curtis, 6 Taunt. 608. S. C. 2 Marsh, 309.

Molloy, 249. Hard. 183. (a) And as he may ransom the ship and goods, so may he retain the goods for his satisfaction.

Moor, 297. Molloy, 249.

In the case of The Friends, Ball, 4 Rob. A. R. 143., Sir William Scott considered the payment of salvage upon a recapture as analogous to the payment of ransom.

(b) 45 G. 3. c. 160. § 34, the master ransom

Allen, 93. 2 Buls. 280. 12 Co. 62.

goods of *A.*'s of great value is thrown over; in this case there shall be no average, but the ferryman must answer for the goods, because, for his hire, he runs the venture of the voyage.

(*a*) *Shepherd v. Wright*, Show. P.C.18.
(*b*) *Marsham v. Dutrey*, Abbott, 562.
Berkley v. Presgrave, 1 East, 220.
Dobson v. Wilson, 5 Camp. 480.
(*c*) *Hallett v. Bousfield*, 18 Ves. 187.

||In case of dispute the average contribution is to be recovered, either by a suit in equity (*a*), or by an action at law (*b*), instituted by each individual entitled to recover, against each party that ought to pay, for the amount of his share. But a court of equity will not at the instance of the sufferer restrain the master from parting with the goods of the other merchants, if he thinks fit to do so (*c*); and in case of a general ship, where there are many consignees, it is usual for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted.||

(G) Of Hypothecation.

||See (K) Of Bottomry and Respondentia.||

Roll. Abr. 53.
Hob. 11.
Moor, 918.
That it is so by the laws of Oleron, of which our law takes notice. *Molloy*, 213.

IF a ship be at sea, and spring a leak, or be otherwise in danger of being lost, or the voyage be defeated for want of provisions or other necessities; in these cases of extremity, the master may pledge or hypothecate the ship and goods, or (*d*) either of them, for such necessities as are wanting, which power is implicitly given him in (*e*) constituting him master, and which he may exercise, rather than that the ship should be lost, or the voyage defeated.

(*d*) The master

may hypothecate either ship or goods, for the master is entrusted with both, and represents the traders as well as owners of the ship. *Salk.* 54. pl. 7. 2 *Ld. Raym.* 805. ||The *Gratitudine, Mazzola*, 3 *Rob. A. R.* 240. *Abbott on Shipping*, p. 129.|| (*e*) That he who is deputed master may do the same. *Noy*, 95.

Molloy, 213.
||*Abbott on Shipping*, p. 127. 5th ed.||

The master cannot hypothecate the ship or goods for any debt of his own, nor in any case but for the preservation of the ship and completing of the voyage.

Sid. 453. *per Hale*. (*g*) But if he cannot hypothecate, he may sell so much of the lading as is necessary, &c. *Molloy*, 214.

Also, the master cannot (*g*) sell the ship and broken tackle, though there is no probability of its being saved, partly in respect of the tempest, and partly in respect of the barbarity of the inhabitants, who took away every thing that was cast on the shore.

Molloy, 214.
||And in the case of capture and recapture the master may hypothecate the ship, for the purpose of paying the salvage to the recaptors. *Parmeter v. Todhunter*, 1 *Camp.* 541.||

If the vessel happens to be wrecked or cast away, and the mariners, by their great pains and care, recover some of the ruins and lading, the master in that case may pledge the same, and distribute the money among the mariners, or so much as shall be necessary to the defraying of their expenses to their own country: but if the mariners no way contributed to the salvage, then their reward is sunk and lost with the vessel; and if there be any considerable part of the lading preserved, he ought not to dismiss his mariners till advice from the laders or freighters.

But

But although hypothecation of ships be absolutely necessary for navigation, without which masters could not get credit abroad, yet a master cannot make the owner (a) personally liable by any contract of his; but (b) the ship and cargo shall be liable where he hypothecates for necessities, although such necessities were not actually employed or laid out in the service of the ship or voyage, and the owners and freighters must take their remedy against the master.

156., and the decision of the Master of the Rolls in *Samsun v. Braginton*, 1 Ves. 445., support the doctrine in the text.] (b) *Noy*, 25.

The master can only hypothecate where the calamity of want of necessities happened after the ship had put to sea; and therefore the Admiralty Court is allowed to have jurisdiction herein, so far as to subject the ship, but cannot proceed against the person otherwise than as it is necessary to make him party towards the condemnation of the ship.

And therefore where *A.* contracted with *B.* for a cable, which he delivered at *Ratcliff-upon-Thames*, and *B.* sued in the Admiralty, a prohibition was granted; though it was insisted, that the want of the cable was occasioned by the stress of the weather and sea; for here the contract was at land, and a remedy for the breach at common law; but had the hypothecation been at *Rotterdam*, or any other foreign port, the remedy had been proper in the Admiralty Court. [For that court has cognizance of an hypothecation bond given in the course of a voyage, though it be executed upon land, and under seal.]

¶ It is obvious that a loan of money upon bottomry, while it relieves the owner from many of the perils of a maritime adventure, deprives him also of a great part of the profits of a successful voyage; and therefore, in the place of the owners' residence where they may exercise their own judgment upon the propriety of borrowing money in this manner, the master of the ship is by the maritime law of all states precluded from doing it, so as to bind the interest of his owners without their consent. The meaning of the words "place of residence" (*la demeure des propriétaires*) has given occasion to some questions in *France*. With us the whole of *England* is considered for this purpose as the residence (c) of an *Englishman*, at least before the commencement of the voyage.

prà; but it may be doubted whether the incorporation of Ireland with this country, by the Act of Union, may not have the effect of altering the rule. See the judgment in the *Rhadamanthe*, *Major*, 1 Dodson, A. R. 201.; and Abbott on Shipping, 125. 5th ed.; and the *Barbara*, 4 Rob. A. R. 1. Lord *Stowell*, under the peculiar circumstances of the country, held a bond given by the master of a Spanish ship, bound from *Alicant* to *London*, at *Corunna* valid. *La Ysabel*, 1 Dodson, 275.

There is no settled form of contract in use on these occasions; sometimes a bond, at other times a bill of sale, and other forms are used.

But bills of exchange drawn by the master on the owner as security

(a) 6 Mod. 79.
2 Sid. 161.
Salk. 35. pl. 9.
Cont. [How-
ever, what is
said by *Ld.*
Hardwicke in
the case of
Buxton v.
Ince, 1 Ves.

Molloy, 214.
6 Mod. 70.
[2 P. Wms.
367. 2 Str.
695. 1 Atk.
254.] and *vide*
2 Vern. 645.

Salk. 34. pl. 7.
3 Mod. 244.
6 Mod. 12. 25.
79. [*Menetone*
v. Gibbons,
5 Term Rep.
267.]

Abbott, 125.
and authori-
ties there
cited.
(c) *Ireland*
has been held
to be a foreign
country in the
case of an
English ship,
hypothecated
by the master
there in the
course of a
voyage; see
Menetone v.
Gibbons, *su-*

2 *Ld. Raym.*
892. 5 Term
Rep. 267.
Abbott, Ap-
pendix.

5 Ves. & B.

135. 19 Ves.
474. 2 Rose,
Ca. 194. 229.

Abbott on
Shipping, 128.
(5th ed.) Bynk.
Quest. Jur.
Pub. lib. 1.
c. 19.

security for money advanced to the master, though accompanied with a verbal engagement that the ship shall be liable, cannot be considered as an instrument of hypothecation.

The last hypothecation bond in point of date is entitled to priority of payment, on the ground that the last loan furnished the means of preserving the ship, and that without it the former lenders would entirely have lost their security. ||

(H) Of Charter-parties. (a)

||(a) See this subject fully and learnedly discussed in Abbott on Shipping, part iii. chap. 1. tit. "Of the Contract of Affreightment by Charter-party." ||

(b) Molloy, 227., &c. 2 Vent. 196. Style, 133. 2 Show. 384. Palm. 599. 2 Roll. Abr. 248. pl. 10. Poph. 161. || But though the terms of a charter-party may be explained by usage, they cannot be altered, nor can any terms be introduced so as to vary the nature of the original contract. *Gibbon v. Young*, 2 B. Moo. 224. *Anderson v. Pitcher*, 2 Bos. & Pull. 164. ||

||Abbott on Shipping, 162.
2 Inst. 673.
2 Lev. 74.
S. C. cited, and admitted to be law.
||And see *Salter v. Kidgley*, Carthew, p. 76. Lord Ellenborough's judgment in *Storer v. Gordon*, 3 Maul. & S. 522., and *Barclay v. Hardy*, East. T. 7 G. 4. ||
(c) Lev. 235.

An indenture of charter-party was made between *Scudamore* and others, owners of the good ship called *B.*, whereof *Robert Pitman* was master of the one part, and *Vandestene* of the other part; in which indenture the plaintiff covenanted with the said *Vandestene* and *Robert Pitman*; and also *Vandestene* covenanted with the plaintiff and *Robert Pitman*, and bound themselves to the plaintiff and *Robert Pitman* for the performance of covenants in 600*l.*; and the conclusion of the said indenture was, *In witness whereof the parties aforesaid to these present indentures have put their seals*; and the said *Robert Pitman* to the said indenture put his hand and seal; and delivered the same: the defendant, in bar of the said action, pleaded the release of *Pitman*, &c. whereupon the plaintiff demurred; and it was adjudged, that the release of *Pitman* did not bar the plaintiff, because he was no (c) party to the indenture; and the diversity was taken and agreed between an indenture reciprocal between parties on one side, and parties on the other side as this was; for there no bond, covenant, or grant can be made to, or with any that is not party to the deed; but where the deed indented is not reciprocal, but is without a *between*, &c. as *omnibus Christi fidelibus*, &c. there a bond, covenant, or grant may be made to divers several persons.

2 Lev. 74.
5 Keb. 94. 115.
Cooker v. Child, 5 Lev. 139.
Gilby v. Copley, S. C. cited.
||(d) Unless, as

So, where an action was brought on a charter-party, which was in this manner: *This indented charter-party witnesseth, that Binley, master, and part owner of the ship, with consent of Cooker, the other part-owner, hath let (d) the ship to Child for such a voyage, and Child covenants with Binley, necnon with Cooker to pay 300*l.** *Cooker* brings the action, and the defendant *Child* pleads, that only he and *Binley* were the parties to and sealed the indenture; whereupon

whereupon the plaintiff demurred; *et per totam curiam*, though the deed be indented, yet, not being *inter partes*, there may be a covenant with a stranger, as if it were a deed poll, or in the first person, *Know ye that I, &c.*: otherwise, where the deed is between parties; then no one, that is a stranger, can take advantage thereof by way of action.

owner for the voyage; but the possession continues in the owner, who has lien on the cargo for his freight. See *Saville v. Campion*, 2 Barn. & A. 503.; and see *Christie v. Lewis*, 2 Bro. & B. 410. S.C. 5 Moore, 211. *Hutton v. Bragg*, 2 Marsh. 339. *Trinity House v. Clark*, 4 Maul. & S. 288. *Burley v. Gladstone*, 3 Maul. & S. 205. 2 Meriv. 401. See *Colvin v. Newberry*, 8 Barn. & C. 166.]]

|| But whether a charter-party be under seal or not, an action at law grounded upon it must be brought in the name of the party to it, and not in the name of another to whom he may have assigned his interest. (a)

2 Taunt. 407. *Moore v. Hopper*, 2

If a charter-party under seal is made for the delivery of goods at a stipulated freight, and the goods are carried and delivered under it, the action for freight must be on the charter-party, although the goods are delivered to the firm who are consignees in the bill of lading; and the person entering into the charter-party is one partner in such firm.]]

In an action on a charter-party a breach must be assigned, which the party may do in the very words of the agreement; and, if there be any thing to be done by the plaintiff, which in the nature of the thing is *necessary to enable the defendant to perform his part* of the agreement, if the plaintiff hath not done his part, this will excuse the defendant's omission.

[In covenant on a charter-party, whereby it was agreed to employ a ship of which the plaintiff was captor, as soon as sentence of condemnation should have passed, the sentence must be taken to mean a *legal* sentence, and the party who sues for the freight must aver, that the ship was condemned by a court having competent jurisdiction.]

If, in an action of covenant, the plaintiff declares upon a charter-party, by which the plaintiff, being master of a ship, was to pay two parts of the port charges, and the factor of the defendant the other part; and the plaintiff shews, that he sailed from *L.* to *C.* and there paid all the port charges, *viz.* two parts for himself, and the other part for the defendant; and that the defendant had not repaid him; this breach is well assigned; for when the plaintiff says he paid the third part, it shall not be intended the defendant did, but that the plaintiff was necessitated to pay it, otherwise his ship would be stayed in the port.

[If there be a covenant in a charter-party, that no claim shall be admitted or allowance made for short tonnage, unless such short tonnage be found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights to be indifferently chosen by both parties; this is not a condition precedent to the plaintiff's right of recovering for short tonnage, but is a matter

in this case, the charter-party contains express words of demise, the freighter does not thereby become the

consequently a

(a) *Splitt v.*

Bowles,

10 East, 279.

Morrison v.

Parsons,

New Rep. 411.

Shack

v. Anthony,

1 Maul. & S.

573.; but see

Leslie v.

Wilson,

3 Bro. & B.

171.

Vide tit.

Covenant,

letter (I),

and 2 Jon.

216.

Unwin v.

Wolsey,

1 Term Rep.

674.

2 Jon. 186.

Bellamy v.

Russel.

Hotham v.

East India

Company,

1 Term Rep.

638.

[(a) But where of defence to be taken advantage of by the defendant (a); and, by the charter-party a ship is consequently, the not averring performance can be no ground for described to be arresting the judgment.]

of a certain burden, and the freighter covenants to load a full and complete cargo; the loading of goods equal in number of tons to the tonnage described in the charter-party, is not a performance of the covenant; but the freighter is bound to put on board as much goods as the ship is capable of carrying with safety. *Hunter v. Fry*, 2 Barn. & A. 421. And where there is a custom in the country to compress cotton wool by machinery, to improve the stowage, "a full cargo" means a cargo so stowed. *Benson v. Schneider*, 7 Taunt. 272.¶

Smith v. Wilson, 8 East, 437.; and see *Gibbon v. Mendez*, 2 Barn. & A. 17. *Cook v. Jennings*, 7 Term Rep. 581. *Liddard v. Lopez*, 10 East, 526. *Hunter v. Prinsep*, 10 East, 376. ¶ So, where a ship was by charter-party let to freight at a certain sum per month, to be paid on her final discharge at the end of the voyage, and she was lost in the middle of the voyage, it was held that no action could be maintained for the freight, since the arrival and discharge were conditions precedent to the right to freight; and if the covenant be to pay for "goods delivered at "A.," freight cannot be recovered *on this covenant*, if the vessel be wrecked at B., before her arrival at A., notwithstanding the defendant accept his goods at B. (b) But if the plaintiff declare on the *assumpsit* implied from the receipt of the goods, it seems he may recover.

Christy v. Row, 1 Taunt. 500. (b) If the covenant in a charter-party by deed be, that the goods shall be delivered at London, and the freighters direct them by parol to be delivered at Liverpool, which is accordingly done, the master cannot recover *on the charter-party* freight for such delivery, since the contract by deed cannot be altered by parol. *Thomson v. Brown*, 1 B. Moo. 558.; and see *Leslie v. De la Torre*, cited *id.* pa. 371. *Heard v. Wadham*, 1 East, 619. *Gibbon v. Young*, 8 Taunt. 254. But if the subsequent agreement is not inconsistent with the prior deed, it may be sued on in *assumpsit*. *White v. Parkin*, 12 East, 578.; and see *Fletcher v. Gillespie*, 5 Bing. 635.

Mackrell v. Simmond, 2 Chitt. R. 666. S. C. *Abbott on Shipping*, p. 555.; and see *Ritchie v. Atkinson*, 10 East, 295. But where a ship employed by charter-party on both an outward and homeward voyage, at so much per month, was lost in the homeward voyage, she was held to have earned the freight due for the outward voyage.

Havelock v. Geddes, 10 East, 555.; and see *Hall v. Cazenove*, 4 East, 477. *Puller v. Staniforth*, 11 East, 252. A covenant by an owner *forthwith* to make the ship tight and strong, and for a twelvemonths' voyage, is not a condition precedent to the recovery of freight, after the freighter has actually taken the ship into his service and used her. But, if the neglect *immediately* to repair her had prevented the freighter making *any* use of her, that would have barred the action for freight.

Davidson v. Gwynne, 12 East, 581. So, a covenant by the master in a charter-party to sail with the *first convoy* was held not a condition precedent, and the master, having performed the voyage and delivered the cargo, though not having sailed with the first convoy, was held entitled to freight.

Constable v. Cloberie, *Palmer*, 397. And the same is held as to a covenant to sail with the *first wind*.

Bornmann v. Tooke, 1 Camp. 376. And so as to a covenant to sail *direct for the port* of destination.

Storer v. Gordon, And if the owner covenant to take on board and deliver an outward-bound cargo at N., and having so done, to receive a homeward

homeward cargo, and the freighter agree to supply a full return cargo at *N.*, and to pay 1750*l.* outward freight, on delivery of the outward cargo; the delivery of the outward cargo is not a condition precedent on the part of the owner to his right to sue the freighter for not providing a homeward cargo,—the covenants are independent; but the delivery of the outward cargo is a condition precedent to the payment of the 1750*l.*

5 Maul. & S. 308.; and see Fothergill v. Walton, 8 Taunt. 576. 2 Moo. 650. See further, as to conditions precedent,

1 Saunders' R. 320. b. c. d. *notis.*

If the freighter agree to find a full cargo for the ship, provided she be at *J.* before the 25th *June*, unless the ship arrive before that day, the freighter is discharged from his agreement.

Soames v. Lonergan, 2 Barn. & C. 564. Abbott, p. 195. and Deffell v. Brocklebank, 4 Price, 56.

Shadforth v. Higgin, 3 Camp. 383.; and see

The charterer of a ship, who agrees to send a cargo alongside at a foreign port, is not excused from sending it alongside, although, in consequence of an infectious disorder at the port, all public intercourse is prohibited by law there, and though he cannot communicate without danger of contracting and communicating the disorder.

Barker v. Hodgson, 3 Maul. & S. 267. See Abbott, part iii. ch. 11.

Nor is he excused by an embargo in the port, which prevents his loading the ship according to his contract.

Sjoerds v. Luscombe, 16 East, 201.

If the charterer of a ship agree to provide her a cargo at *Jamaica*, at 10*s.* 6*d.* per cwt. freight, and then tender a cargo, insisting on the captain signing bills of lading to deliver at 10*s.* per cwt., this is no tender at all, and the charterer is liable for dead freight.||

Hyde v. Willis, 3 Camp. 202.

If *A.* covenants to pay 3*l.* per ton for goods imported, and for performance thereof binds himself in a penalty, and in an action thereupon the plaintiff assigns for breach the nonpayment for so many tons, and a hogshead, which came to so much; this is naught (*a*), for the covenant is only to pay by the ton; though it was said *per cur.* to be otherwise, if the covenant had been to pay, *secundum ratam*, 3*l.* per ton.

Rea v. Burnis, 2 Lev. 124. Allen, 9. S. P. (*a*) If goods are sent abroad generally the freight must be according to freight for

the like accustomed voyage. Molloy, 252.—And if a ship be freighted for 200 tons or thereabouts, the addition of *thereabouts* is commonly reduced to be within five tons, more or less, as the moiety of the number *ten*, whereof the whole number is compounded. Molloy, 252. ||The owner is not bound to deliver the goods of the freighter without being satisfied as to the entire freight, payable according to the rates mentioned in the charter-party. Tate v. Meek, 2 B. Moo. 278. S. C. 3 Taunt. 280.||

(*b*) If a charter be so worded, that there can be no remedy thereon at law, yet the party having a just demand may be relieved in equity; as, where by the agreement there was no freight to be paid for the outward-bound cargo, and when the ship arrived beyond sea, the factor had no goods at all to load the ship with; the court decreed payment of the freight.

2 Vern. 210. 212. [(*b*) But Lord Mansfield, speaking of this very instrument, says, "In construing

"agreements, I know of no difference between a court of equity and a court of law. A court of equity cannot make an agreement for the parties; it can only explain what their true meaning was, and that is also the duty of a court of law." Dougl. 277.]

So, where the *East India* Company took bonds from the mariners and officers of a ship not to demand their wages, unless the ship returned to the port in *London*; and the ship arrived at

2 Vern. 727.

a delivering port, and was afterwards taken by the *French*; it was held by my Lord Chief Justice *Holt*, in an action tried by him, and likewise in Chancery, that the seamen and officers should have their wages, to the time of the arrival of the ship at the delivering port.

Ripley v.
Scaife, 5 Barn.
& C. 167. S. C.
7 Dow. & Ry.
818.

¶ By a charter-party on a voyage from *Liverpool* to the *West Indies*, and from thence to *London* or *Liverpool*, it was agreed, that a brig "should be made, and during the voyage kept tight, " staunch, &c. at the owners' expense, and that the freighter " should pay freight at the rate of 200*l.* per month, for any time " (beyond six months) that she might be employed; the pay to " commence from the day of sailing, until her arrival into dock " at the homeward port of discharge." The vessel was obliged to remain twenty-eight days at *St. Domingo*, for the purpose of repair; the repairs being done at the expense of the owner: it was held by Lord C. J. *Abbott*, and confirmed by the Court of King's Bench, that during those twenty-eight days the vessel was employed by the freighter, within the terms of this charter-party.

Beatson v.
Schank, 5 East,
235.

If by the terms of the charter-party an abatement in the freight is to be made, in case of the inability of the ship to proceed on the service in which she is employed, an inability arising from the want of hands, though without the master's default, is within the provision.¶

2 Vern. 242.
Draddy v.
Deacon.

The plaintiff, a merchant in *London*, hired the defendant's ship to freight for a voyage to *Bourdeaux*, at 3*l.* 10*s.* a ton: it happened that an embargo was laid on all merchant ships for six weeks: the ship afterwards proceeded on her voyage to *Bourdeaux*; and the defendant not discovering what agreement he had made with the plaintiff in *England*, the plaintiff's factors and correspondents there agreed to allow the defendant 6*l.* 10*s.* per ton, upon which latter agreement the defendant recovered at law. A bill being exhibited for relief against this second and underhand agreement, obtained, as was alleged, by fraud, was dismissed; for the defendant was at liberty to make a new agreement, by reason that the performance of the first was obstructed by the embargo after laid on all merchant ships.

2 Chan. Ca.
258. ¶ But
though these
are the usual
stipulations in
a charter-
party, other
special condi-
tions, equally
binding on the
master and
owner, may be
added. See
Beatson v.
Schank, 5 East,
235.¶

A master of a ship, without the owner, treated with the plaintiff, a merchant, for the freight of the ship at eighty tons, and accordingly entered into a charter-party with him to sail from *London* to *Falmouth*, and thence to *Barcelona*, without altering the voyage, and there to unlade at a certain rate per ton; and for performance, the master binds the ship, tackle, &c. valued at 300*l.*: the master deviates, and commits barratry, by which the merchant in effect loseth his voyage and goods. The merchant had a sentence against the master and ship in *Barcelona*, which was confirmed in a higher court in *Spain*; and the owner having brought trover for the ship, the merchant exhibited his bill to be relieved against this action, and likewise another action brought for freight: it was held by my Lord Chancellor, that the charter-party having valued the ship at a certain rate, the owner is not liable

liable further, and the master is liable for deviation and barratry ; for should it be otherwise, masters would be owners of all men's ships and estates.

If a charter-party be made in *England*, to do certain things in several places on the sea, though no act is to be done in *England*, but all upon the sea, yet no suit can be in the Admiralty Court for the non-performance of the agreement, for the contract is the original, without which no cause of suit can be; and this contract is out of their jurisdiction; for where a part is triable by the common law, and part by the admiral law, the common law shall be preferred.

[Freighters of ships under charter-parties with the *East India* Company are not answerable for *damage* or *loss* occasioned by the act of *God*. The expression *ship-damage* (a), in those charter-parties, means damage from negligence, insufficiency, or bad stowage in the ship.]

Shipping, 204. (a) In the printed form of a charter-party, used for the ship *Anna*, dated Nov. 1809, instead of the words, "ship damage," the following words are used, *viz.* "received after shipping the goods." See Abbott on Shipping, p. 204. note (t.), where also, at p. 201. *et seq.*, see the clauses usually introduced into the charter-parties of the *East India* Company.]

|| Under the common printed form of their charter-parties, the *East India* Company may send any chartered ship on a warlike expedition, conjointly with his majesty's government, under command of a king's officer placed on board; and the charter-party is not avoided by alterations being made in her upper works to increase the number of her guns, &c., and though a king's officer assume the command of her, and hoist the king's broad pendant. (b)

The words in a charter-party, "it is hereby covenanted and agreed by and between the said parties, that forty days shall be allowed for unloading and loading again," &c., raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading beyond the forty days.

If a ship is detained beyond the days of demurrage allowed by the charter-party, the stipulated demurrage is *primâ facie* the rate of compensation for the further time; but it is competent to the owner or freighter to shew that this is more or less than a fair compensation.||

Roll. Abr. 552.
Roll. Rep.
486. S. C.
4 Inst. 135.
159. 142.
Hob. 212.
Moor, 450.
like point.

Hotham v.
E. I. Company,
Doug. 272.
|| Tod v. The
E. I. Company,
Abbott on

(b) Dobree
v. The E. I.
Company,
13 East, 290.

Randall v.
Lynch,
12 East, 179.

Moorsom
v. Bell,
2 Camp. 616.

(I) Of Policies of Insurance ; [and herein,

1. Of Marine Insurances.]

|| See *Park on Insurance* (7th edit.), *Marshall* (3d edit.).||

[**A**SSURANCE or insurance signifies a contract or agreement, whereby one or more persons, called insurers or assurers, oblige themselves to answer for the loss of a ship, house, goods, &c. specified in an instrument subscribed by them, in consideration of a premium of a stipulated sum per cent. paid by the proprietors of the things insured.

The

2 Saund. 200.

Park, 1. 7th ed.
 || Marshall on
 Insurance, 1.
 3d edit.||

The instrument by which this contract of indemnity is effected is called a policy. It is signed only by the insurer, who, on that account, is denominated an underwriter. Notwithstanding this, there are certain conditions to be performed as well by the person not subscribing, as by the underwriter, else the policy will be void.

Lewis v.
 Rucker,
 2 Burr. 1171.

Of policies there seem to be two sorts, *valued* and *open* policies; and the only difference between them is, that in the former, goods or property insured are valued at prime cost, at the time of effecting the policy; in the latter the value is not mentioned: that in the case of an open policy the real value must be proved; in a valued policy it is agreed, and is just as if the parties had admitted it at the trial.

Park, 1.
 Skin. 54.
 (a) Bates v.
 Graham,
 2 Salk. 444.
 (b) Henkle v.
 Royal Ex-
 change As-
 surance
 Company,
 1 Ves. 517.

Although policies of insurance are not to be ranked with specialty contracts, not being under seal, yet they have always been holden as sacred agreements. The courts, therefore, will very reluctantly admit of any alteration in them. They may indeed be altered by the consent of the parties (a) after they are signed; but the courts will never vary or depart from the written words, but upon the strongest and most satisfactory evidence that the meaning of the parties has been mistaken. (b)
 Motteux v. Governor and Company of the London Assurance, 1 Atk. 545.

(c) Robinson
 v. Touray,
 5 Camp. 158.
 (d) Clapham
 v. Cologan,
 5 Camp. 382.;
 and see San-
 derson v.
 Symonds,
 1 Brod. & B.
 426. S. C.
 4 Moore, 42.
 Sanderson
 v. McCullom,
 4 Moore, 5.
 (e) Langhorn
 v. Cologan,
 4 Taunt. 530.

|| Alterations, if not material, may, however, be made in a policy after it is underwritten without the necessity of any assent on the part of the underwriters; as where in a policy on goods, to be thereafter declared by ship or ships, the brokers by mistake declared by a wrong ship, the blunder was allowed to be rectified. (c) So, where in a policy, "at and from *Cadiz* and "*Seville*," the broker added the words, "both or either," their insertion was held not to affect the legal operation of the instrument (d); and the same principle has been acted upon in several other cases. It follows from what has been said, that since no *material* alteration can be made in the policy after it is signed, unless by the consent of the parties, or the authority of a court of justice, that any *material* alteration of it without the assent of the underwriters will avoid it. (e)||

Forshaw v. Chabert, 5 Brod. & B. 158. S. C. 6 Moo. 369. Fairlie v. Christie, 7 Taunt. 412. S. C. 1 Moo. 114. Campbell v. Christie, 2 Stark. 64.

The projectors of these companies had been very industrious to bespeak the countenance of the House of Commons, for which they had caused two letters to be printed and given to the

|| PARTNERSHIPS PROHIBITED TO INSURE. || — By the common law and usage of merchants, any person might be an insurer. But the statute of 6 G. 1. c. 18. (by which the crown was authorized to create two distinct corporations for the purpose of insuring, which corporations are since known by the names of the *Royal Exchange Assurance Office*, and the *London Assurance Office*,) has somewhat restrained this common law right; for by § 12. of that statute it is enacted, "That from
 " and after the granting or making the said charters or inden-
 " tures for making the two corporations above mentioned, and
 " passing the same under the great seal, for and during the con-
 " tinuance of the said corporations respectively, or either of
 " them, all other corporations or bodies politic, before this
 " time

"time erected or established, or hereafter to be erected or established, whether such corporations or bodies politic, or any of them, be sole or aggregate, and all such societies and partnerships as now are, or hereafter shall or may be, entered into by any person or persons, for assuring ships or merchandizes at sea, or for lending money on bottomry, shall, by force and virtue of this act, be restrained from granting, signing, or underwriting any policy of assurance, or making any contracts for assurance of or upon any ship or ships, goods or merchandizes, at sea, or going to sea, and for lending any monies by way of bottomry as aforesaid; and if any corporation or body politic, or persons acting in such society or partnership, (other than the two corporations intended to be established by this act, or one of them,) shall presume to grant, sign, or underwrite, after the 24th day of June, 1720, any such policy or policies, or make any such contract or contracts for assurance of or upon any ship or ships, goods or merchandizes, at sea, or going to sea, or take or agree to take any premium or other reward for such policy or policies, every such policy or policies of assurance, of or upon any such ship or ships, goods or merchandizes, shall be *ipso facto* void; and all and every such sum or sums so signed and underwritten in such policy or policies shall be forfeited, and shall and may be recovered, one half to the use of his majesty, the other to that of the informer, by action; and if any corporation or bodies politic, or persons acting in such society or partnership, other than the two corporations intended to be erected by this act, or one of them, shall presume to lend, or agree to lend, or advance, by themselves or any others on their behalf, after the said 24th day of June, 1720, any money by way of bottomry, contrary to this act, the bond or other security for the same shall be *ipso facto* void, and such agreement shall be adjudged to be an usurious contract, and the offenders therein shall suffer as in cases of usury; nevertheless, it is intended and hereby declared, that any private or particular person or persons shall be at liberty to write or underwrite any policies, or engage himself or herself in any assurances of, for, or upon any ship or ships, goods or merchandizes, at sea or going to sea, or may lend money by way of bottomry, as fully and beneficially as if this act had never been made, so as the same be not on the account or risk of a corporation or body politic, or upon the account or risk of persons acting in a society or partnership for that purpose as aforesaid."

leading members of the House of Commons, Mr. Aislabie on the 4th of May, 1720, presented a message from the king, recommending the establishment of these companies; in pursuance of which this act was passed.

Upon this clause of the statute a question lately arose at *Guildhall*. It was an action brought to recover a sum of money received by the defendant from one *Bristow* to the plaintiff's use. The plaintiff was an underwriter, and the defendant was a broker, and a loss having happened upon a policy underwritten by the plaintiff,

members. But these and all other solicitations having proved ineffectual, they had recourse to other expedients; and, understanding that the civil list was considerably in arrears, (for which no provision had been or could be conveniently made by the parliament, because the grand committee of supply had been inadvertently dismissed,) they offered to the ministry 600,000*l.* towards the discharge of that debt, in case they might obtain the king's charter, with the parliamentary sanction, for the establishment of these companies. This offer the ministry, who were at a loss for means to pay the civil list debt, readily embraced; and Mr. Craggs having prepared the

Sullivan v. Greaves, Sittings after Easter, 1780. Park, 8. ||1 Marsh. on

Insur. 46. 3d edit. || No motion was ever made to set aside the nonsuit; but two or three days after Lord Kenyon mentioned to the bar, that he had stated the case to the other judges of the Court of King's Bench, who were un-

animously of the same opinion with him. And this opinion has been since farther confirmed by a decision of the Court of Common Pleas in the case of *Mitchel v. Cockburn*, 2 H. Bl. 379. and of the Court of King's Bench in *Booth v. Hodgson*, 6 Term Rep. 405. || *Aubert v. Maze*, 2 Bos. & Pul. 371. *Lees v. Smith*, 7 Term Rep. 338. *Branton v. Taddy*, 1 Taunt. 6. *Ex parte Bell*, 1 Maul. & S. 751.; but it must be observed, that *Sullivan v. Greaves* is distinguishable from all these last-cited cases, since in all these the plaintiff was compelled to go into the illegal transaction, in order to make out his case: whereas, in *Sullivan v. Greaves*, the plaintiff need only shew the money paid to the defendant's hands for his use; and in *Tennant v. Elliot*, 1 Bos. & Pul. 3. *Farmer v. Russell*, *ibid.* 296. it was decided that money paid by *A. to B.*, for the use of *C.*, might be recovered by *C.*, although paid on an illegal consideration. ||

plaintiff, he had been obliged to pay it: but *Bristow*, having agreed to take half the plaintiff's risk, had paid his moiety of the loss into the hands of the defendant, to recover it from whom this action was brought. Lord *Kenyon*, — I am of opinion that the plaintiff cannot recover, for this is clearly a partnership within the act of parliament. If a single name appears upon the policy, as in this case, the insurer shall never be allowed, if a loss happen, to defeat a *bona fide* insurance by saying to an innocent man, there was a secret partnership between another and myself, and therefore the policy is void. But here the plaintiff is himself the underwriter, who comes to enforce the contract: it is a partnership *pro hac vice*; and this party cannot apply to a court of justice to enforce a contract founded on a breach of the law.

|| It appears from the following case that insurances may be legally made upon a joint capital, provided each subscriber to it be only liable to the amount of his subscription, and not each for the whole. The plaintiff and defendant were members of the "*Whitby Association*," consisting of a number of owners of ships, each of whom, in proportion to his shipping, paid a certain sum, which formed the stock of the society. The policies were signed by all the members. They all became insurers for each other, according to the respective values of their ships; and when any loss happened, the treasurer paid it out of the joint stock. The defendant's share of the present loss was 14*l.* Each individual was only liable for the sum he had undertaken. Lord *Kenyon*, before whom the cause was tried, held the policies to be legal. He said, "This does not infringe on the act of parliament, as the members of the association have only underwritten in their individual characters: but they cannot underwrite for themselves and partners. If all of them were liable to the extent of their whole stock it would be illegal. At present the members of this association can only stand as individual underwriters for small sums. (a) ||

|| THE SUBJECT-MATTER OF THE INSURANCE. || — *With respect to the subjects of the policy*, the most frequent are ships, goods, merchandizes, the freight or hire of ships; also, houses, warehouses, and the goods laid up in them from danger by fire, and insurance upon lives. Bottomry and *respondentia* may also be the subject of insurance. But then it must be particularly expressed in the policy to be *respondentia* interest; for under a general insurance (b) on goods and merchandizes, the party insured cannot recover money lent upon bottomry. Not (c) but

(a) *Harrison v. Millar*, 7 Term Rep. 340. n. *Dowell v. Moon*, 4 Camp. 166.; and see Lord *Kenyon's* observations on *Harrison v. Millar* in *Lees v. Smith*, 7 Term Rep. 338.

Park, 12. 7th edit. || *Marshall on Insurance*, 325. ||

(b) *Glover v. Black*, 5 Burr. 1394. 1 Bl. Rep. 405. S.C. (c) *Gregory v.*

that

that money expended by the captain for the use of the ship, and for which *respondentia* interest is charged, may be recovered under an insurance upon goods, specie, and effects, provided the usage of the trade, which in matters of insurance is always of great weight, sanctions it. Christie, *B. R.*
Tr. 24 G. 5.
Park, 14.
7th edit.

¶ Profits expected to arise upon a cargo of goods may also be insured (a); but the insured must shew that he would have made profit, if the loss had not happened (b); if, however, it appear that profit would have arisen, the insured, on the principle that *id certum est quod certum reddi potest*, may recover on an open policy as well as on a valued one. (c)¶ (a) Grant v.
Parkinson,
Marshall on
Insurance, 95.
Barelay v.
Cousins,
2 East, 544.;
see Routh v.
Thompson, 15 East, 274.
Craufurd v. Hunter, 8 Term Rep. 13.
Hagedorn v. Oliverson,
2 Maul. & S. 485.
Lucena v. Craufurd, 5 Bos. & Pul. 75.
Hill v. Secretan, 1 Bos. & Pul. 315.
(b) Hodgson v. Glover, 6 East, 316.
(c) Eyre v. Glover, 3 Camp. 276.

Although insurances upon the wages of mariners are in general, for very wise reasons, forbidden, yet this regulation does not mean to prevent them from insuring those wages which they are entitled to receive abroad, or goods which they have purchased with those wages in order to bring home; for in such a case they are to be considered in the same light with other men. 1 Mag. 19.
¶ Marshall on
Insurance, 89.
3d edit.¶

In an action upon a policy of insurance upon *Fort Marlborough*, otherwise *Bencoolen*, in the *East Indies*, for twelve calendar months, from the first of *October*, 1759, to the first of *October*, 1760, against any *European* enemy, for the benefit of the governor, it was doubted by Lord *Mansfield*, who tried that cause, whether a policy against the loss of *Fort Marlborough* for the benefit of the governor was good, upon the principle which does not allow a sailor to insure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cause, after mentioning this doubt, which had occurred to his mind, he went on thus: "But, considering that this place, though called a fort, was really but a factory or settlement for trade; and that he, though called a governor, was really but a merchant; considering, too, that the law allows a captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part owner; and the captain of a privateer, if he be a part owner, to insure his share; considering, too, that the objection could not, upon any ground of justice, be made by the insurer, who knew him to be the governor, at the time he took the premium; and as with regard to principles of public convenience, the case so seldom happens (I never knew one before), any danger from the example is little to be apprehended, I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially, too, as the objection did not come from the bar. Though this point was mentioned, it was not insisted upon at the last trial; nor has it been seriously argued, upon this motion, as sufficient alone to vacate the policy: and if it had, we are all of opinion, that we are not warranted to say that it is void upon that account."

¶ Money lent to the captain, payable out of the freight, is not Carter v.
Boehm,
5 Burr. 1905.
and 1 Bl. Rep.
593.

Per Lord El-
an

lenborough in an insurable interest; and the policy being illegal on the face of
Wilson v. Roy, it, the insured is not entitled to a return of premium.||
 Ex. Ass.
 2 Camp. 626.; and see *Siffken v. Allnutt*, 1 Maul. & S. 59.

Kewley v. An insurance generally "*upon any ship or ships*" expected
 Ryan, 2 H. from a particular place is valid; and the insured has a right to
 Bl. 343. cover any ship he may think proper that falls within the terms
Henchman v. of it.
Offley, ibid.
 345. note. || 1 *Marshall on Ins.* 168.||

Plantamour Nor do the owners of goods insured preclude themselves by
 v. Staples, shifting the goods from one ship to another from recovering an
 1 Term Rep. average loss arising from the capture of the second ship, if they
 611. note. acted from necessity, and for the benefit of all concerned.
 || *Milles v.*
Fletcher, Doug. 251. *Marsh.* 161.||

Ross v. An action was brought upon a policy of insurance of the cap-
 Thwaite, tain's goods for six months certain. The loss proved was chiefly
 Sittings after for goods lashed on deck, and the captain's clothes, and the ship's
 Hil. 16 G. 5. provisions. It was proved by an underwriter and a broker, that
 at Guildhall, none of those things are within a general policy on goods; for the
 Park, 26. (7th risk was greater as to goods lashed on deck than other goods:
 edit.) and a policy on goods means only such goods as are merchant-
 able, and a part of the cargo. They also swore, that when goods
 like the present are meant to be insured, they are always insured
 by name; and the premium is greater.

Lord *Mansfield* said, he thought it consistent with reason; and
 understood the usage to be so: therefore he advised the plaintiff
 to withdraw a juror, the premium having been paid into court, to
 which he consented.

Da Costa v. || But where the insurance was on forty carboys of vitriol,
 Edmunds, which were carefully lashed on the deck (as it was proved was
 4 Camp. 142. frequently done, though they would have been safer below), and
 some of the vitriol having caught fire, it was necessary to throw
 the whole overboard; Lord *Ellenborough* held, that the under-
 writers were bound to know this usage, and therefore were
 liable.||

Fletcher v. When a man insures one species of property, he cannot re-
 Poole, Sittings cover damage, occasioned by the loss of a species of property
 after Easter, different from that named in the policy. Thus, under a policy
 1769, before upon *the ship*, or upon *the goods*, the insured cannot recover
 Lord *Mans- extraordinary wages* paid to the seamen, or *provisions* expended,
 field at during a detention to repair, or a detention by an embargo.
 Guildhall,
 Park, 55.
 Robertson v. Ewer, 1 Term Rep. 127.; || and see *Hunter v. Prinsep*, *Marsh. on Insur.* 523.||

Baillie v. Nor is the underwriter on goods liable for the freight paid by
 Modigliani, the owner of the goods to the proprietors of the ship, where the
 B. R. Hil. goods were partially lost.
 25 G. 3.

Eden v. Neither is an underwriter upon ship and goods liable for the
 Poole, Sitt. charge of demurrage.
 after Hil. 1785.

Powell v. || Nor is he on a policy upon goods liable, where the ship is
 Gudgeon, disabled from pursuing her voyage by perils of the sea, and
 obliged

obliged to put in port to repair, and the master, having no other means of raising money to defray the expenses of such repairs, sells part of the goods, and applies the proceeds in payment of these expenses.||

5 Maul. & S. 431. Sarquy v. Hobson, 2 Barn. & C. 7. S. C.

5 Dow. & Ry. 192. 4 Bing. 131.

Nor in an insurance upon a *Greenland* ship, is the underwriter in a policy *on the ship, tackle, and furniture*, &c. liable for the *lines and tackle* employed in the fishery in those seas.

Hoskins v. Pickersgill, B. R. East. 23 Geo. 3. ;

|| and see Gale v. Laurie, 3 Barn. & C. 159.||

|| And if on a common policy on ship and goods there be a written memorandum, that it is *on goods*, the effect is the same as if goods only had been mentioned.

Houghton v. Ewbank, 4 Camp. 89.

A policy on ship and *outfit*, on a voyage to the *Southern Whale Fishery*, cannot be altered to ship and goods, after the risk attaches, without a fresh stamp; for outfit is very different in such a voyage from goods.||

Hill v. Patten, 8 East, 373.

But provisions sent out in a ship for the use of the crew, are protected by a policy *on the ship and furniture*.

Brough v. Whitmore, 4 Term Rep. 206.

|| THE INTEREST OF THE INSURED. || — It is enacted by stat. 28 G. 3. c. 56. "That it shall not be lawful for any person or persons to make or effect, or cause to be made or effected, any policy of assurance on any ship or vessel, or upon any goods, merchandizes, effects, or other property whatsoever, without first *inserting or causing to be inserted in such policy the name or names, or the usual style and firm of dealing of one or more of the persons interested in such assurance, or without instead thereof first inserting the name or names, or the usual style and firm of dealing of the consignor, or consignors, consignee or consignees, of the goods or property so to be inserted, or the name or names, or the usual style and firm of dealing of the person or persons residing in Great Britain who shall receive the order for and effect such policy, or of the person or persons who shall give the order or direction, the agent or agents immediately employed to negotiate or effect such policy.*" The statute further declares, "that every policy made or underwritten contrary to the true intent and meaning of this act shall be null and void, to all intents and purposes."

|| If the name of the broker effecting the policy be inserted in it, it is a sufficient compliance with this statute; and though the agent named in the policy be not the general agent, but only for that particular purpose, his name may be inserted.

De Vignier v. Swanson, 1 Bos. & Pul. 346. n. Bell v. Gilson, 1 Bos. & Pul. 345.

The insured may be described "the trustees of *A. B.*," they being so.

Hibbert v. Martin, 1 Camp. 538.

A foreign letter (post-marked) to *A. B.* here, directing a policy, is proof that he received the order, and effected the policy.||

Arcangelo v. Thompson, 2 Camp. 620.

and see Wolff v. Horncastle, 1 Bos. & Pul. 516. Mellish v. Bell, 15 East, 416. 1 Maul. & S. 201. Dickson v. Lodge, 1 Stark. Ca. 226.

Bell v. Janson,

|| STAMP

By § 2. the duty imposed by this act is not to extend to insurances on lives, or insurances from losses by fire.

§ STAMP ON INSURANCES. — By 35 Geo. 3. c. 63., which repeals all former duties upon policies of insurance, it is enacted, “ That for every skin or piece of vellum or parchment, or sheet of paper, on which any insurance upon any ship or ships, goods or merchandize, or upon any other property or interest whereon insurances may lawfully be made, shall be engrossed, written, or stamped, the stamp duties following upon the sums insured; that is to say, where the sum to be insured shall amount to 100*l.*, a stamp duty of 2*s.* 6*d.*, and so progressively for every sum of 100*l.* insured; and where the sum to be insured shall not amount to 100*l.*, a like stamp duty of 2*s.* 6*d.*; and where the sum to be insured shall exceed 100*l.*, or any progressive sums of 100*l.* each, by any fractional part of 100*l.*, a like stamp duty of 2*s.* 6*d.* for each fractional part of 100*l.*; and that upon all and every insurances or insurance, where the premium, or consideration in the nature of a premium, actually and *bonâ fide* paid, given, or contracted for, shall not exceed the rate of 10*s.*, there shall be paid the following duties; that is to say, where the sum so to be insured shall amount to 100*l.* a stamp duty of 1*s.* 3*d.*, and so progressively for every sum of 100*l.* so insured; and where the sum so to be insured shall not amount to 100*l.*, a like stamp duty of 1*s.* 3*d.*; and where the sum so to be insured shall exceed 100*l.*, or any progressive sums of 100*l.* each, by any fractional part of 100*l.*, a like stamp duty of 1*s.* 3*d.* for such fractional part of 100*l.*, which several sums shall be payable and paid by the assured in such insurances respectively.”

§ 4. “ Provided, that upon every such insurance, where the premium, or consideration in the nature of a premium, actually and *bonâ fide* paid, given, or contracted for shall not exceed the rate of 10*s.* per centum on the sum insured, it shall be lawful, where the sum insured shall amount to 200*l.* or upwards, to use stamps of 2*s.* 6*d.* for every 200*l.* of the sum insured, instead of stamps of 1*s.* 3*d.* for every 100*l.* of the like sum insured.”

§ 11. “ Every contract or agreement which shall be made or entered into for any insurance, in respect whereof any duty is by this act made payable, shall be engrossed, printed, or written, and shall be deemed and called a *policy of insurance*; and the premium, or consideration in the nature of a premium, paid, given, or contracted for, upon such insurance, and the particular risk or adventure insured against, together with the names of the subscribers and underwriters, and sums insured, shall be respectively expressed or specified in or upon such policy, and in default thereof every such insurance shall be null and void, to all intents and purposes whatever.”

§ 12. “ And no policy of insurance upon any ship, or upon any share or interest therein, shall be made for any certain term longer than twelve calendar months; and every policy which shall be made for any longer term shall be null and void to all intents and purposes.”

The

The 10th section provides for an allowance to be made under certain circumstances by the commissioners, where the sums insured on homeward voyages shall exceed the interest of the assured.

The 13th section provides, that nothing contained in the act shall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance, duly stamped as aforesaid, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10s. per cent. on the sum insured, and so that the thing insured shall remain the property of the same person or persons, and so that such alteration shall not prolong the term insured beyond the period allowed by § 12. of this act, and so that no additional or further sum shall be insured by reason or means of such alteration.

A penalty of 500*l.* is imposed both upon the persons procuring and the brokers effecting insurances on policies not duly stamped; and the latter can neither demand their brokerage, nor the money expended for premiums; and every underwriter subscribing such illegal policy, is liable to a like penalty of 500*l.*

||COMMENCEMENT AND DURATION OF THE RISK.|| — Where the owner of the goods insured brought down *his own lighter*, received the goods out of the ship, and before they reached land an accident happened, whereby the goods were damaged, a special jury of merchants, under the express direction of Lord Chief Justice *Lee*, found that the insurer was discharged, although the insurance was upon goods to *London*, and *till the same should be safely landed there*.

considered as part of the ship and voyage.

||But if the goods had been put into a *public lighter* for the purpose of being landed, the risk would have continued, “for public lighters have a *stamp of authority*: they are entered at “Watermen’s Hall; and lightermen appointed by the Watermen’s Company are *public officers*, and have a public credit.” and see *Hurry v. Roy*, Ex. Assur. 2 Bos. & Pul. 450. 5 Esp. Ca. 289. *Matthie & Pul.* 23.

If, however, while the goods are in a public lighter, the insured take charge of them himself, he discharges the underwriters. (a) And if they be once landed in the usual course of business the risk is at an end, even though the goods have never been in the possession of the consignees. (c)

Sometimes the risk on goods is made to commence from the loading thereof at a particular place; in which case the policy will attach only upon such goods as are there put on board, and not upon goods shipped elsewhere, though they were the very goods meant to be insured, and were on board at the place specified.

Thus, goods were insured, at and from *Gottenburgh* to the ship’s port of discharge in the *Baltic*, beginning the adventure on

§ 15.
§ 16.
§ 17.

Sparrow v. Carruthers, 2 Stra. 1256. The case turned upon the goods not being sent by the ship’s boat, which is considered as part of the ship and voyage.

Per Buller J. in *Rucker v. London Assur. Marshall on Ins.* 253. (3d edit.); *v. Potts*, 5 Bos.

(a) *Strong v. Nataly*, 1 New R. 16.

(c) *Brown v. Carstairs*, 5 Camp. 161.

Spitta v. Woodman,

2 Taunt. 416.
S. C. 16 East,
188. n.
Horneyer v.
Lushington,
15 East, 46.;
and see Ro-
bertson v.
French, 4 East,
130. Langhorn
v. Hardy,
4 Taunt. 628.
Constable v.
Noble,
2 Taunt. 403.
(a) But if the
adventure had

the goods from "the loading thereof on board the said ship," without saying where. The ship received at *London* the goods insured, sailed to *Gottenburgh*, from whence, without landing any part of the cargo, she proceeded to *Pilau Roads*, where she was captured. The defendant knew that the goods insured were the same which had been shipped at *London*, having himself insured them from thence to *Gottenburgh*. The court, after considerable discussion, determined that it must be intended, from the words of the policy, that the goods were loaded at *Gottenburgh*; for if that were not the true interpretation, and the adventure were to commence from the loading, a risk would be incurred which was not in the policy, namely, from *London* to *Gottenburgh*. (a)

been to commence "from the loading thereof on board the said ship, *wheresoever*," &c., *semble* that the policy would have attached. *Gladstone v. Clay*, 1 Maul. & S. 418. So the risk may be properly commenced, though under circumstances unforeseen at the time of the contract. See *Driscoll v. Passmore*, 1 Bos. & Pul. 200. If an insurance on freight be from several places of departure, the risk will not commence till the ship sails for her port of destination. *Sellar v. M'Vicar*, 1 New R. 23.

(b) *Per Lord Ellenborough*
in *Bell v.*
Hobson,

But if the policy be declared to be in continuation of other policies from the real port of loading, the objection is removed (b); or if part of the cargo be landed, and reloaded at the specified port, so as to enable the whole to be inspected, this will satisfy the policy. (c) And a policy on goods from the ship's port of loading in *Amelia Island*, in the river *St. Mary's*, in *Spanish America*, in which there is no port, has been held to cover a loading at a port higher up in the same river, the ship having cleared out at the island, this being the usage of trade (d); for every underwriter is bound by the usage of the trade which he insures. (e) ||

(c) *Nonnen v.*
Reid, Nonnen,
v. Kettlewell,
16 East, 176.
(d) *Moxon v.*
Atkins,
3 Camp. 200.
and see *Ougier*
v. Jennings,

cor. Lord Eldon C. J. *Vallance v. Dewar*, *cor. Lord Ellenborough*, 1 Camp. 503. (e) *Kingston v. Knibbs*, 1 Camp. 508. n.

Anon. Skin.
243.

A policy of insurance shall be construed to run until the ship shall have ended, and be discharged of her voyage; for arrival at the port, to which she was bound, is not a discharge *till she is unloaded*: and it was so adjudged by the whole court, upon a demurrer.

Lockyer v.
Offley,
1 Term Rep.
252.
|| *Angerstein v.*
Bell, Park, 55.
(7th edit.) ||

But although this construction may be perfectly right, where the policy is general from *A*. to *B.*, yet if it contain the words usually inserted, "*and till the ship shall have moored at anchor twenty-four hours in good safety*," the underwriter is not liable for any loss, arising from seizure after she has been twenty-four hours in port; though such seizure was in consequence of an act of barratry of the master *during the voyage*; for, if it were extended beyond the time limited in the policy, it would be impossible to lay down any fixed rule, and all would be uncertainty and confusion.

Lethulier's
case, 2 Salk.
445. || *Gordon*
v. Morley,
Stra. 1265.

In an action upon a policy of insurance by the defendant at *London*, insuring a ship from thence to the *East Indies*, warranted to depart with convoy, the declaration shewed, that the ship went from *London* to the *Downs*, and from thence with convoy, and was

lost. After a frivolous plea and demurrer, the case stood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clause "warranted" "to depart with convoy," must be construed according to the usage among merchants, that is, from such place where convoys are to be had, *as the Downs*.

Case upon a policy of insurance, which was to insure the *William* galley in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy. The case was, the galley set sail from *Bremen*, under convoy of a *Dutch* man-of-war, to the *Elbe*, where they were joined by two other *Dutch* men-of-war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men-of-war and an admiral. After a stay of nine weeks, they set sail from the *Texel*; the galley was separated in a storm, taken by a *French* privateer, and retaken by a *Dutch* privateer, and paid eighty pounds salvage. It was ruled by *Holt* Chief Justice, that the voyage ought to be according to *usage*, and that their going to the *Elbe*, though out of the way, was no deviation; for till after the year 1703 (prior to which time this policy was made), there was no convoy for ships directly from *Bremen* to *London*. Verdict for the plaintiff.

The ship *Success* was insured "at and from *Leghorn* to the port of *London*, and till there moored twenty-four hours in good safety." She arrived the 8th of *July* at *Fresh Wharf* and moored, but was the same day served with an order to go back to the *Hope* to perform a fourteen days' quarantine. The men upon this deserted her, and on the 12th of the month the captain applied to be excused going back, which petition was adjourned to the 28th, when the regency ordered her back; and on the 30th she went back, performed the quarantine, and then sent up for orders to air the goods; but before she returned, the ship was burnt on the 23d of *August*. The question was, therefore, whether the insurer was liable? Lord Chief Justice *Lee* ruled, that though the ship was so long at her moorings, yet she could not be said to be there in *good safety*, which must mean the opportunity of unloading and discharging; whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the regency taken time to consider the petition, there was no default in the master or owners: and it was proved that till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plaintiff.

In an insurance upon *freight*, if an accident happens to the ship before any goods are put on board, which prevents her from sailing, the insured upon the policy cannot recover the freight which he would have earned, if she had sailed. The circumstances of the case were these:—

The plaintiff insured on ship and freight, at and from *Jamaica* to *Bristol*. A cargo was ready to put on board; but the ship being careening, in order for the voyage, a sudden tempest arose, and she and many others were lost. The rigging and parts of

Warwick v. Scott,
4 Camp. 62. ||

Bond v. Gonsales, 2 Salk. 445.; ||and see Bond v. Nutt, Cowp. 601. Audley v. Duff, 2 Bos. & Pul. 111. ||

Waples v. Eames, 2 Stra. 1243.; ||and see Parkinson v. Collier, Park, 470. (7th ed.) Minnett v. Anderson, Peake, 211. Horneyer v. Lushington, 15 East, 46. Mackenzie v. Shedden, 2 Camp. 431. ||

Tonge v. Watts, 2 Stra. 1251

her were recovered and sold, and the defendant paid into court as much as, upon an average, he was liable to for the loss of the ship: but the plaintiff insisted to be allowed six hundred pounds for the freight the ship *would have earned* in the voyage, if the accident had not happened. But as the goods were not *actually* on board, so as to make the plaintiff's right to freight commence; Lord Chief Justice *Lee* held, he could not be allowed it, and he was nonsuited.

Montgomery v. Eginton, 3 Term Rep. 562. || This decision has been much shaken, if not overruled, by Forbes v. Cowie, 1 Camp. 520. and Forbes v. Aspinall, 13 East, 323. the result of which cases is, that the insured can only recover,

whether on an open or a valued policy, for the freight of goods actually put on board, or of which the shipment has been contracted for: and see Patrick v. Eames, 3 Camp. 441.; *sed vide* Truscott v. Christie, 2 Bro. & B. 320. and Palmer v. Blackburn, 1 Bing. 61. ||

Thompson v. Taylor, 6 Term Rep. 478. || Horncastle and others v. Stuart, 7 East, 400. Davidson v. Willasey, 1 Maul. & S. 513.; *sed vide* Everth v. Smith, 2 Maul. & S. 278. ||

Barclay v. Stirling, 5 Maul. & S. 6. (a) Phillips v. Champion, 6 Taunt. 3. 1 Marsh. Rep. 402. S.C.

So also, in an *open* policy on freight, *at and from London and Teneriffe to any of the West Indian isles (Jamaica excepted)*, the underwriters were held liable to pay the insurance, though the ship sailed from *London* in ballast, and was captured before her arrival at *Teneriffe*, where the cargo was to be put on board. But as the ship was under a charter-party to *depart out of the river Thames, and proceed to Teneriffe, and there to load and receive on board from the freighters 500 pipes of wine, to deliver in the West Indies, for the freight of which 500 pipes, the freighters covenanted to pay 35s. per pipe*; the court held, that the instant the ship departed from the *Thames* the contract for freight had its inception, and the plaintiff was entitled to recover.

|| A policy of insurance on freight from the port of loading to the port of discharge, with leave to call at any intermediate ports, covers the freight of goods loaded at such intermediate port. And the risk on freight continues till the goods are safely landed. (a)

Taylor v. Wilson, 15 East, 234. over-ruling Murdock v. Potts, 2 Park's Ins. 451. So freight may be insured for part of a voyage only. ||

Gordon v. Morley. Campbell v.

On an insurance from *London to Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger*, having tried for convoy

convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The insurers resisted the demand of indemnity, alleging, that as there was a *French* war, the ship should not have ventured through the *Channel*, but have waited for occasional convoy. Lord Chief Justice *Lee*, however, was of opinion, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words, *warranted to depart with convoy*, Salk. 443. 445.; and if the parties meant to vary the insurance from what is commonly understood, they should have stated it. Two special juries of merchants found their verdicts agreeably to that direction.

A bill was filed in the Court of Chancery, which stated, that the ship *Eyles*, late in the *East India* Company's service, was, in the year 1732, at *Bengal*, at which time the owner employed *I. H.* to insure the ship in the *London* Assurance Office for five hundred pounds. The adventure thereon was to commence from her arrival at *Fort Saint George*, and thence to continue till the said ship should arrive at *London*, and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice, and the ship was and should be rated at interest or no interest, without farther account; in consideration whereof *I. H.* paid fifteen pounds premium. The *Eyles* came to *Fort St. George* in *February* 1733, in her way to *England*; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c. she sailed to *Bengal* to be refitted, and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the *Engilee* sands and was lost. Evidence was read on the part of the plaintiffs to prove, that *Bengal* was the most proper place to refit, and that she went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provision, and ballast. Lord Chancellor *Hardwicke*,—As to the question, whether there has been a breach, or, in other terms, a loss, within the meaning of this policy, the general principles laid down by the plaintiff's counsel are right, that stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition, are to be considered. In such a case, if she went to the nearest place, I should consider it equally the same as if she had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to shew the necessity of the ship's being repaired, but there is not a syllable of proof why she might not have been equally well repaired at *Fort Saint George*. There is one part of this case which distinguishes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ship was lost in *July* 1733, three weeks before the time of making this policy, so that clearly the ship

Bordieu,
2 *Stra.* 1265.

Motteux and
others v. the
Gov. and
Comp. of
Lond. Assur.
1 *Atk.* 545.;
||and see
Bird v.
Appleton,
8 *Term Rep.*
562.||

was not at *Fort Saint George* at the time the agreement was made; and therefore it is a material question, whether it comes within the agreement. His Lordship directed an issue to try, whether the loss in *July 1733* was a loss during the voyage, and according to the adventure agreed upon; which issue was afterwards found for the plaintiffs upon a trial in the Common Pleas.

1 Atk. 548.

¶(a) The ship must, however, have been once at the place in good safety, otherwise the policy does not attach. *Parmeter v. Cousins*, 2 Camp. 235.; but the safety intended is *physical*, not *political*. *Bell v. Bell*, 2 Camp. 475.¶

Chitty v.

Selwin,

2 Atk. 559.

¶*Cruikshank*

v. Janson,

2 Taunt. 301.¶

In an action upon a policy of insurance, before Lord Chief Justice *Hardwicke*, it has been held, that the words "at and from *Bengal to England*," meant *the first arrival at Bengal*; and it was agreed, that when such words are used in policies, *first arrival* is always implied and understood. (a)

It has likewise been held, that when a ship is insured *at and from a place*, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable: but if all thoughts of the voyage be laid aside, and the ship lie there five, six, or seven years, with the owner's privity, it shall never be said the insurer is liable; for it would be to subject him to the whim and caprice of the owner.

Camden v.

Cowley,

1 Bl. Rep.

417.

This was an action on a policy of insurance on a ship, at and from *Jamaica to London*. The ship had also been insured from *London to Jamaica* generally, and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island. This was an action on the homeward policy; and in order to shew when the homeward-bound risk commenced, it was necessary to shew at what time the outward-bound risk determined; and the jury, which was special, after an examination of merchants as to the custom, by their verdict decided, that the outward risk ended when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery.

In the *Trinity* term following, a motion was made for a new trial, but it was refused; because it had been thoroughly tried, and no new light could be thrown upon it, although Lord *Mansfield* said, the inclination of his opinion at the trial was the contrary way. Mr. Justice *Wilmot* thought the construction put upon the policy by the jury was the right one.

Barrass v.
the London
Assurance,
Sittings
after Hilary
1782, at
Guildhall.

In a similar case, Lord *Mansfield* laid down the same doctrine to the jury, namely, that the outward risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island, to which it was destined; but that the outward policy *upon goods* continued till they were landed.

Leigh v.
Mather,
Sittings at
Guildhall,
after Mich.
1795. ¶1 Esp.

The doctrine stated in the two last cases has been confirmed in a late decision. It was an action on a policy of assurance of *the ship Palliser*, and on goods on board thereof, on a voyage at and from *Georgia to Jamaica*. The ship arrived at *Montego Bay*, and moored at anchor, and there also the plaintiff's agent sold and delivered

delivered the greatest part of the cargo to Messrs. *Adams and Hatton*, merchants there. The captain then entered into a charter-party with *Adams and Hatton* to proceed from thence to *Saint Anne's*, and there to take in a cargo for *London*. After unloading the greatest part of the cargo at *Montego Bay*, and remaining there a month, it was verbally agreed, that the remainder of the cargo, which was lumber, should be carried as ballast to *Saint Anne's*; and accordingly the vessel, after taking in some fustick, proceeded towards *Saint Anne's*, but was wrecked in her passage. For the plaintiff it was insisted, that in such an insurance the ship might go from port to port; and that, in all events, the goods were protected by the policy till they were all discharged and safely landed. Lord *Kenyon* was clearly of opinion, and that opinion was confirmed by a special jury, to whom he particularly referred on this occasion, that the risk on the ship ceased after she had been moored at anchor twenty-four hours in the first port of the island for the purpose of unloading; and the facts disclosed in this case having manifested that *Montego Bay* was also the original destination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement, the goods could not be recovered under this policy. A ship insured to *Jamaica* generally cannot be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of the ship and goods is the same person. The plaintiff was nonsuited.

Rep. 412.
As to what shall be considered a ship's port of discharge, see *Brown v. Vigne*, 12 East, 285.
Dagleish v. Brooke, 15 East, 295. ||

|| But where the policy was on freight of a ship *at and from Grenada to London*, and it appeared that there was only one custom-house for the whole island of *Grenada*, and that the vessel arrived safely at *Grenada*, and discharged part of her outward cargo at three different bays, and was proceeding to a fourth to discharge the residue of her outward cargo and take in part of her homeward cargo, when she was lost by perils of the sea; it was held that the vessel was proceeding to the fourth bay for a purpose of the voyage, and that the underwriter was liable.

Warre v. Miller, 4 Barn. & C. 538.

But a policy on a specific voyage cannot be extended to another, though undertaken from necessity, and inability to enter the port of destination:—As, where a ship insured to the river *Plate* was ordered away upon her arrival by the *British* commander, and wanting repairs, made for the nearest friendly port. This new voyage, though undertaken from necessity, was held not to be protected by the policy. ||

Parkin v. Tunno, 11 East, 22.

In construing policies, the *strictum jus*, or *apex juris*, is not to be the rule, but a liberal construction is to be adopted, and the usage of trade called in to explain any doubts.

Thus, in an assurance of goods from *Malaga to Gibraltar*, and from thence to *England* or *Holland*, the parties having agreed that the goods might be unloaded at *Gibraltar*, and re-shipped in one or more *British* ship or ships, and it appearing in evidence that there was no *British* ship at *Gibraltar*, but the

Tierney v. Etherington, before *Lee C. J.*, 5th March, 1745. 1 Burr. 548.

¶ See *Matthie v. Bell*,
3 Bos. & Pull.
25.¶

Pelly v. Governor and Company of the Royal Exchange Assurance,
1 Burr. 341.
Brough v. Whitmore,
4 Term Rep. 206. S.P.
¶ *Fletcher v. Inglis*, 3 Barn. & A. 515.;
but see
Phillips v. Barber, 5 Barn. & A. 161.¶

Bishop v. Pentland,
7 Barn. & C. 219.; and see
Hodgson v. Malcolm, 2 New R. 536.

Noble v. Kennoway,
Dougl. 510.
¶ *Vallance v. Dewar*,
1 Camp. 503.
Ougier v. Jennings, *id.*
504. *Kingston v. Knibbs*, *id.*
508.¶

Salvador v. Hopkins,
3 Burr. 1707.

goods had been unloaded and put into a *store-ship* (which was always considered as a warehouse), the insurers were held to be liable for the loss of these goods in the *store-ship*.

A ship was insured from *London* to any place beyond the *Cape of Good Hope*. The ship arrived in the river *Canton* in *China*, where, in order to be heeled and refitted, the sails, &c. were taken out, and lodged in a *bank saul*, on an island in the river (which was proved to be *usual*, and beneficial to all concerned). The underwriter was held liable for the loss of the sails by fire, while in this *bank saul*; for the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it. What is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy. If a ship be driven a mile on shore by a hurricane, or be burnt in a dry dock, while repairing, the insurer is liable.

¶ And where the vessel fell over by the breaking of a rope, it was held to be a stranding within the meaning of that word in the policy.¶

The goods on board the ships, the *Hope* and the *Anne*, were insured at and from *Dartmouth* to *Waterford*, and from thence to the port or ports of discharge, on the coast of *Labrador*, with leave to touch at *Newfoundland*, till the goods should be safely discharged and landed. From the time of their arrival, the crew were chiefly employed in fishing, and took out their cargo only at leisure times (which was fully proved to be the usage), and the ships were taken by a privateer, before they were unloaded. The court held, that the insurers were liable; for that according to the usage there was no delay.

With respect to *East India* voyages, the usage of trade has been more notorious than in any other, the question having more frequently occurred.

The charter-parties of the *India* Company give leave to prolong the ship's stay in *India* for a year, and it is common, by a new agreement, to detain her a year longer. The words of the policy, too, are very general, without limitation of time or place.

These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship may be sent, while in *India*, though not expressly mentioned in the policy.

Thus, where the insurance was "at and from *Bengal* to any ports or places whatsoever, in the *East Indies*, *China*, *Persia*, or elsewhere beyond the *Cape of Good Hope*, forwards and backwards, and during her stay at each place, until her arrival in *London*, &c." and the captain, when in *Bengal*, entered into a new agreement for prolonging the ship's stay, and went several intermediate or country voyages, in the last of which she was lost; the insurers were held liable.

¶ But

|| But where goods are insured from the loading thereof at the ship's port of departure, the policy, though worded in the most comprehensive terms, will not protect goods shipped at any other place.

See Grant v. Paxton,
1 Marsh. on Ins. 259.
(3d ed.)
1 Taunt. 463.

On an *India* voyage out and home, if the policy contain the words *forwards* and *backwards*, it will apply to all goods put on board in the course of the voyage.||

Ibid.; and see Norville v. St. Barbe,
2 New R. 454.

In an assurance "from *London* to *Madras* and *China*, with liberty to touch, stay, and trade at any ports or places whatsoever," the facts were; that when the ship arrived at *Madras*, she was too late to go to *China* that year, upon which she was sent by the council to *Bengal* to fetch rice, which voyage she performed once, but in the second attempt she was lost. The insurers are answerable on account of the usage.

Gregory v. Christie,
B. R. Tr. 24 G. 3.
Park, 14.,
7th ed.

In an insurance on a ship "at and from *London* to *Bengal*, beginning the risk upon the ship at *London*, and so to continue till the arrival of the said ship at *Madras* and *Bengal*, with liberty to touch and stay at any port or place in this voyage (a);" the underwriters were held to be answerable for a loss, which happened in an intermediate voyage from *Madras* to *Visagipatnam* for rice, by order of the council.

Farquharson v. Hunter,
B. R. Hil. 25 G. 3.
Park, 84.,
(7th ed.);
||and see Grant v. Delacour,

1 Taunt. 465. (a) In *Rucker v. Allnutt*, 15 East, 278., liberty to touch and stay at, was held not to be abridged by a subsequent leave to wait off any ports, &c.||

However, the parties may, by their own agreement, prevent such latitude of construction.

Nor need this be done by express words of exclusion; but if from the terms used, it can be collected that the parties meant so, that construction shall prevail.

Thus, where the general words were restrained by the expressions, "*in the outward or homeward bound voyage*;" and "*in this voyage*;" the court held that the policy only meant places in the usual course of the voyage "to and from the places named."

Lavabre v. Wilson,
Douglt. 284.

|| A policy in the common form upon goods to the *East Indies* ceases when the ship has delivered the Company's outward cargo at a port in the *East Indies*, and will not protect the goods to a market in an intermediate voyage made by the ship before her final departure for *Europe*.||

Richardson v. London Assurance Company,
4 Camp. 94.

THE LOSS. — In the construction of policies, the loss must be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the insured to recover.

Thus, in an action upon a policy to recover the value of some negroes, who perished by *mutiny*, which was one of the risks insured against; it was held, that the underwriters were liable for all those who were killed in the mutiny, or who died of their wounds: that all those who died of the bruises which they received in the mutiny, though accompanied with other causes, were to be paid for by the underwriters. But they were not liable for those who had swallowed salt-water, and died in consequence

Jones v. Schmoll,
Guildhall,
Tr. Vac. 1785.
1 Term Rep. 150. note.
||(a) Since the decision of this case, the African slave

trade has
been abol-
ished by
the statute
47 Geo. 3.

c. 36.; and (by § 5.) all insurances upon any trading in slaves are prohibited and declared unlawful, and a penalty of 100*l.*, and treble the premium, imposed upon any of his majesty's subjects who shall subscribe, effect, or make any such unlawful insurances.||

Livie v.
Janson,
12 East, 648.

quence thereof, or who leaped' into the sea, and hung upon the sides of the ship, without being otherwise bruised, or who died of chagrin; all these having been lost by too remote a consequence. (a)

||So, where a ship insured from *New York* to *London* was warranted free from *American* condemnation; and having, for the purpose of eluding the *American* embargo, slipped away in the night, and been driven on shore by force of the ice, wind, and tide, and thus suffered a *partial* damage, but was seized the next day, and finally condemned by the *American* government for breach of the embargo; it was held, that as there was ultimately a total loss by a peril excepted out of the policy, the assured could not recover for the total loss, nor for the previous partial loss arising from the stranding, which, in the event, became wholly immaterial.

Hahn v.
Corbett,
2 Bing. 205.

But where, in case of a policy warranted free of capture and seizure, the ship was stranded on a shoal, and lost, and while in that situation seized by the commander of the place, and confiscated, it was held, that there was a complete loss by perils of the seas.

Buck v. Royal
Exchange As-
surance Com-
pany, 2 Barn.
& A. 73.

On a policy on ship insuring against fire, and barratry of the master and mariners, the insurers are liable for loss by fire, though occasioned by the *negligence* of the master and mariners, which by *English* law is not barratry; for the fire is the proximate cause of the damage.

Hagedorn v.
Whitmore,
1 Stark. Ca.
157.

Where a merchant vessel was taken in tow by a ship of war, and was thereby exposed to a tempestuous sea, which injured the goods; this was held a peril of the sea.

Hodgson v.
Malcolm,
2 New R.
336. *Mans-
field* C. J. diss.

So also, where a press-gang seized two of the mariners who had been despatched to cast off a rope while the ship was moving from port to port in a harbour, and the vessel in consequence ran ashore.

Cullen v.
Butter,
4 Camp. 289.
1 Stark. 158.
5 Maule & S.
461.

But where a merchant vessel was fired upon by a ship of war, which mistook her for an enemy, and the goods by this means were sunk, Lord *Ellenborough* C. J. held, that the loss was not properly described as a peril of the sea, though it was a loss for which the underwriters were liable, under the words, "all other perils, losses, &c."||

Syers v.
Bridge, Dougl.
527.

||Cockey v.
Atkinson,
2 Barn. & A.
460.||

In the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. Hence, in an insurance at and from *Liverpool* to *Antigua*, with liberty to cruise six weeks; it was held, that this meant a connected portion of time, and not a desultory cruising for six weeks at any time.

1 Show. 523.
||Gabe v.
Lloyd, 8Barn.

With respect to perils of the sea, it is to be observed, that every accident happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding

stranding of the ship, may be considered as a peril of the sea; and for such losses the underwriter is answerable. (a) 5 Barn. & A. 107. Shaw v. Felton, 2 East, 109. (a) Although the remote reason of the loss were the negligence of the master and mariners. Walker v. Maitland, 5 Barn. & A. 171.; and see Smith v. Scott, 4 Taunt. 126. Holt, 149.]]

But a ship driven on an enemy's coast by the wind, and there captured, shall be said to be lost by capture, and not by perils of the sea. Hahn v. Corbett, 2 Bing. 205. S. C. 9 Moore, 390.]]

||And if a ship hove down on a beach, within the tide-way, to repair, be thereby bilged and damaged, it is not a loss occasioned by perils of the sea.|| Thompson v. Whitmore, 5 Taunt. 227.; and see 4 Maul. & S. 88. Phillips v. Barber, 5 Barn. & A. 161.

An action was brought to recover the value of certain slaves insured by the policy. The facts were, that the captain missed the island for which he was bound, and the water running short, some of the slaves were thrown overboard to preserve the rest; and the declaration stated the loss to have happened by perils of the sea. But it was held, that *the mistake* of the captain could not be called *a peril of the sea*. Gregson v. Gilbert, B. R. East. 25 G. 5. 1 Park. 103.

||However, it has since been held in a late case, that the underwriters are answerable for a loss arising *immediately* from a peril of the sea, though remotely from the negligence of the master and mariners. Walker v. Maitland, 5 Barn. & A. 171.; and see Buck v. Royal Exchange Assurance Company, 2 Barn. & A. 75.

And where the captain was guilty of gross misconduct, amounting to barratry, in cutting the ship's cable, and allowing her to drift on the rocks, this was held a loss by perils of the seas.]] Heyman v. Parish, 2 Camp. 150.

A ship which is never heard of, after her departure, shall be presumed to have perished at sea.

This was held in an action on a policy upon the ship from *North Carolina to London*, and the loss was stated to be by sinking at sea; the evidence to support this averment was, that after sailing from port she had never been heard of. Green v. Brown, 2 Str. 1199. ||See Koster v. Reed, 6 Barn. & C. 19. S. C. 9 Dow. & Ry. 2.]]

The same was held in a case where a ship had been captured and ransomed at sea, but was never afterwards heard of, and never arrived at her port of destination. Newby v. Read, Sitt. after Mich. 5 Geo. 3.

Park, 10.; ||and see Koster v. Reed, 6 Barn. & C. 19. S. C. 9 Dow. & Ry. 2.]]

In *England* no time is fixed within which payment of a loss may be demanded from the underwriter, in case the ship is not heard of. A practice, however, prevails among merchants, that a ship shall be deemed lost if not heard of within six months after her departure for any part of *Europe*, or within twelve, if for a place at a greater distance. (b) Park, 106. ||See Cohen v. Hinckley, 2 Camp. 51. S. C. 1 Taunt. 249. (b) But *semble* that witnesses

should be called from her port of destination, to shew that she never arrived there. Twemlow v. Oswin, 2 Camp. 85.]]

||Loss

2 Burr. 694.
1st point in
Goss v. Wi-
thers. ¶Pond
v. King,
1 Wils. 191.
Rotch v.
Edie, 6 Term
Rep. 415.
M'Iver v.
Henderson,
4 Maul. & S.
576. Cologan
v. London
Assurance
Company,
5 Maul. & S.
447.¶
(a) 2 Burr.
696.
29 G. 2. c. 34.
§ 24. 34 G. 3.
c. 66. § 42.

¶LOSS BY CAPTURE OR DETENTION.¶ — As to losses by capture, the rule is, that as between the insurer and the insured, the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy; and the insurer must pay the value. If, after a condemnation, the owner recover or retake her, the insurer can be in no other condition than if she had been retaken or recovered before condemnation. The insurer runs the risk of the insured, and undertakes to indemnify; he must, therefore, bear the *loss* actually sustained, and can be liable, to no more. So that if, after condemnation, the owner recovers the ship in her complete condition, but has paid salvage, or been at any expense in getting her back, the insurer must pay the loss so actually sustained. No capture by the enemy can be so total a loss, as to leave no possibility of a recovery. (a) If the owner himself should retake at any time, he will be entitled; and by a late act of parliament, if an *English* ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution upon stated salvage. This chance does not, however, suspend the demand for a total loss upon the insurer: but justice is done, by putting him in the place of the insured, in case of a recapture.

Berens v.
Rucker,
1 Bl. Rep.
313.; ¶and
see Arcangelo
v. Thompson, 2

It has likewise been held, that where a capture has been made, whether it be legal or not, the insurers are liable for the charges of a compromise made, *bonâ fide*, to prevent the ship from being condemned as prize.

By the marine law of *England*, as practised in the Court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or recaptor, till there had been a sentence of condemnation. Unless the transaction amount to a ransom, in which case the insurers are not liable. Havelock v. Rockwood, 8 Term Rep. 268. Parsons v. Scott, 2 Taunt. 263.; and see Wilson v. Forster, 6 Taunt. 25.¶

But now by statute this right of the original owner, in case of a recapture, is preserved to him for ever, upon payment of stated salvage to the recaptors.

Before the stat. of 19 G. 2. c. 37. several cases were determined upon the question of recapture in the *English* courts; but the same question can never again arise between an insurer and an insured.

Park, 777.

If the ship be recovered before a demand for indemnity is made, the insurer is only liable for the amount of the loss actually sustained at the time of the demand. Or, if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits resulting from such restitution.

The underwriter, by the express terms of his contract, is answerable for all loss or damage arising to the insured "*by the arrests, restraints, and detentions of all kings, princes, and people, of what nation, condition, or quality soever.*"

Nesbitt v.
Lushington,

In a late case, the declaration claimed a loss of corn, occasioned by the *unlawful arrest, restraint, and detention of people to the plaintiffs*

plaintiffs unknown. The facts upon this part of the case were, that the ship being forced into *Elly Harbour* in *Ireland*, and a great scarcity of corn prevailing there at that time, the people came on board in a tumultuous manner, took the government of the vessel from the captain and crew, weighed her anchor, by which she drove upon a reef of rocks, and would not leave her till they had compelled the captain to sell all the corn considerably below the invoice price. The word *people*, it was contended, at the bar, meant individuals of a nation as opposed to magistrates or rulers. But the court held, that it meant "*the ruling power of the country.*"

4 Term Rep.
783.

|| If underwriters subscribe a policy agreeing to pay a total loss in case the ship should not be allowed by the *Russian* government to load a cargo at *Petersburgh*, and the *Russian* government refuse to permit her to unload her outward cargo, this is a refusal to allow her to load a cargo within the meaning of the policy, and a total loss is payable. And it is no answer for the underwriters to say that the seizure and detention are unjustifiable, and that the insured have a remedy against the aggressors.

Puller v.
Staniforth,
11 East, 252.
Mullett v.
Shedden,
13 East, 304.
6 Term Rep.
424.

To support an averment that the ship and goods, when at *A.*, were arrested by the persons exercising the powers of government there, and the goods were then and there by the said persons seized, detained, and confiscated; it is enough to shew that the goods were forcibly taken from the ship by the officers of government, without putting in any sentence of condemnation.||

Carruthers v.
Gray, 3 Camp.
141.

In case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the insurer.

2 Burr. 696.
|| Mellish v.
Andrews, 15 East, 13.||

|| But where a *British* ship insured from *Hull* to *St. Petersburg*, having sailed under convoy to the *Sound*, was afterwards stopped in her course by a king's ship in the *Baltic*, from an apprehension of hostilities, for eleven days; and then proceeded to a place of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy, till the king's officer received intelligence that a hostile embargo was laid on *British* ships at *St. Petersburg*, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to *Hull*; it was held that this loss of the voyage was not attributable to the arrest or detainment of kings, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy; though if the ship had not been detained in the first instance by the king's officers, she would have arrived in time at *St. Petersburg*, to have delivered her cargo before the embargo.||

Forster v.
Christie,
11 East, 205.

If the ship be detained by a foreign power, which, in time of war, may have seized a neutral ship, in order to search her for enemy's property, the charges consequent thereupon must be borne by the underwriter.

Saloucci v.
Johnson,
B. R. Hil.
25 G. 3.
Park, 125.;

|| see also *Schroeder v. Thompson*, 7 Taunt. 462. And this right of search is allowed by the law of nations, see 8 Term Rep. 254. 1 Rob. A. R. 340.||

But though an underwriter is liable for all damage arising to the owner of the ship or goods from the restraint or detention of princes,

2 Vern. 176.

||(a) Earle v.
Rowcroft,
8 East, 126.
Goldschmidt
v. Whitmore,
5 Taunt. 508.||

Bell v.
Carstairs,
14 East, 574.;
and see Bell
v. Broomfield,
15 East, 364.
Nonnen v.
Reid,
16 East, 176.

Hobbs v.
Hannam,
5 Camp. 93.

Horneyer v.
Lushington,
5 Camp. 85.;
and see

Pipon v. Cope, 1 Camp. 434.

Rotch v.
Edie,
6 Term Rep.
413.

Gamba v.
Le Mesurier,
4 East, 407.
S. C.
1 Smith, 81.
Brandon v.
Curling,
4 East, 410.
S. C.
1 Smith, 85.
Furtado v.
Rodgers, 3 Bos. & Pul. 191.

princes, yet that rule shall not be extended to cases where the insured shall navigate against the laws of those countries, in the ports of which he may chance to be detained, or to cases where there shall be a seizure for nonpayment of customs. This was so ruled by Lord Commissioner *Hutchins* in Chancery, in the year 1690: and the reason of it is obvious, because there is a gross fraud on the part of the owner of the property insured; and no man shall take advantage of his own misconduct. If, indeed, any of those acts were committed by the master of the ship, without the knowledge of the insured, the underwriter would be liable, if not for losses by detention, at least for a loss by the barratry (a) of the master, to which such conduct would most certainly amount.

|| And according to the principle of the above case, in 2 Vernon, where a neutral *American* ship insured in this country was captured and condemned by a *French* prize court as prize, on the express ground that the ship was not properly documented, according to treaties between *France* and the *United States*, the neutral assured could not recover against the *British* underwriter, although there was no warranty or representation that the ship was *American*; for the neglect of the ship-owners, who were bound to provide proper national documents, was the efficient cause of the loss. But it is otherwise in case of a mere assured of *goods*.

And if a chartered ship be lost by reason of the captain engaging in an illegal trade in obedience to the orders of the charterer, this is not a loss by barratry, for which the owner of the ship can recover against the underwriters.

And if the ship be condemned for carrying simulated papers, contrary to the law of nations, without having any liberty by the policy to do so, the underwriters are discharged.||

It is now settled, that under a policy on a ship and stores, "at and from a port" in a foreign country, the insurers are liable for the payment of damage occasioned by the detention or seizure of the ship by the government of the country in the loading port.

|| Every insurance on alien property by a *British* subject must be understood with this implied exception, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer. Thus an underwriter on *French* property in time of peace is not liable for a loss occasioned by capture by the king's ships during hostilities, which commenced between *Great Britain* and *France* subsequent to the policy being effected, and terminated prior to the action brought.||

LOSS BY BARRATRY.—Another of the risks insured against is the barratry of the master or mariners.

It appears from the cases upon this subject, that any act of the master,

master, or of the mariners, which is of a criminal nature, or which is grossly negligent (*a*), tending to their own benefit, to the prejudice of the owners of the ship, without their consent or privity, is barratry.

1 Term Rep. 525. (*a*) Barratry in English policies means only wilful misconduct. 2 Barn. & A. 82.; and see 8 East, 156. 3 Camp 620. 539. 3 Taunt. 508. 6 Taunt. 375. 8 Taunt. 688. ||

It is not necessary, in order to entitle the insured to recover for barratry, that the loss should happen *in the act of barratry*; that is, it is immaterial whether it take place *during the fraudulent voyage*, or *after* the ship has returned to the regular course; for the moment the ship is carried from its right track with an evil intent, barratry is committed.

But the loss, in consequence of the act of barratry, must happen *during the voyage insured*, and within the time limited by the policy, otherwise the underwriters are discharged. Thus, if the captain be guilty of barratry by smuggling, and the ship afterwards arrive at the port of destination, and *be there moored at anchor twenty-four hours in good safety*; the underwriters are not liable, if, after this, she should be seized for that act of smuggling.

From the above descriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private interest, no barratry is committed. To constitute barratry, it must be without the knowledge or consent of the owners (*a*); because nothing can be so clear as this, that no man can complain of an act done to which he himself is a party. It is material to consider, in what sense the word owner is to be understood, in this definition. It has been argued, that if *A.* be the owner of a ship, and let it out to *B.* as freighter, who insures it for the voyage; and if the deviation be with the knowledge of *A.*, though unknown to *B.*, the insurer is discharged. But the court over-ruled that argument, and said, that, in order to discharge the insurer from the loss by barratry, it must appear, that the act done was by the consent or with the privity of the owner *pro hac vice*; that is, the freighter, the person insured.

|| And where the ship is let out to freight by a charter-party, and a policy is effected for the benefit of the several owners, an act done by consent of the freighter is not barratry, since the consent of the freighter is the consent of the owners.

And on the principle that the consent of the ship-owner will negative the charge of barratry, if the crew are guilty of repeated acts of smuggling, and the owner through gross negligence omit to prevent them, the insurers are not liable for a loss by seizure for forfeiture. ||

If a declaration state a ship to have been lost by the *fraud and negligence* of the master, that is a sufficient averment of a loss by *barratry*.

1 Str. 581. S. C.; || and see Boehm v. Combe, 2 Maul. & S. 172. ||

But where a ship sailed a different course from that first intended, which alteration was publicly notified before the ship sailed,

1 Str. 581.
2 Str. 1175.
Cowp. 143.
|| Nutt v.
Bourdicu,
2 Barn. & A.
8 Taunt. 688. ||
Cowp. 155.

Lockyer v.
Offley,
1 Term Rep.
252.; || and see
Hibbert v.
Martin,
1 Camp. 538. ||

|| (*a*) See
3 Camp. 95. ||
Vallejo v.
Wheeler,
Cowper, 154.
|| Soares v.
Thornton,
1 Moo. 575.
7 Taunt. 627. ||

Hobbs v.
Hannam,
3 Camp. 94.;
and see
1 Camp. 454.
Pipon v.
Cope,
1 Camp. 434.

Knight v.
Cambridge,
2 Ld. Raym.
1349.

Stamma v.
Brown,
2 Str. 1175.

sailed, and where the master was to have no benefit by the change, it was held not to be barratry.

Elton v.
Brogden,
2 Stra. 1264.

So, if a ship take a prize, and instead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity; and it is not barratry, because not done to defraud the owners.

Phynn v.
Royal
Exchange
Assurance
Company,
7 Term Rep. 505.

|| So, a deviation of a vessel from the voyage insured, through the ignorance of the captain, or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry.

Hucks v.
Thornton,
Holt, Ca. 30.;
and see
Toulmin v. Inglis, 1 Camp. 411.

But if the crew, in conjunction with prisoners of war on board, run away with the ship, this is an act for which the underwriters are answerable.

Toulmin v.
Anderson,
1 Taunt. 227.

So, if the crew are all imprisoned by the prisoners, except one sailor, who is heard on deck in conversation with them, this is evidence to go to the jury to shew barratry.||

Vallejo v.
Wheeler,
Cowp. 143.;
|| see also
Dixon v.
Reid, 5 Barn.
& A. 597. S. C.
1 Dow. & Ry.
207. Roscow
v. Corson, 8 Taunt. 684.||

A ship was insured from *London* to *Seville*; she was let to freight for the voyage; she sailed from *London* to the *Downs*, from whence she sailed to *Guernsey*, which was out of the course of the voyage. The captain went there to take in brandy on his own account, with the knowledge of the original owner of the ship, but not of the freighter for that voyage. This was held to be barratry.

Roberts v.
Ewer, 1 Term
Rep. 127.

A breach of an embargo is, it seems, an act of barratry in the master. (a)

||(a) If without

the assent and privity of the owner. Everth v. Hannam, 6 Taunt. 375. S. C. 2 Marsh. 72.||

Ross v.
Hunter,
4 Term Rep.
33.

In an action on a policy on goods on board the *Live Oak*, whereof *Joseph Rati* was master, at and from *Jamaica* to *New Orleans*, it appeared, that the ship was put up as a general ship in *Jamaica* in 1783; that she sailed on the voyage insured in *May* 1783, and arrived in *June* following at the mouth of the river *Misissippi*, which leads up to *New Orleans* in *Spanish America*, at the distance of about thirty-five leagues. When the captain had gotten thus far, he dropped anchor, and on his return, without carrying the ship to her port of destination, stood away for the *Havannah*, after which he was never heard of. It appeared, that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at *New Orleans*; but finding it difficult to do so, on account of a prohibition to import them into the *Spanish* government, he went to the *Havannah*. The jury found for the plaintiff, on the count in the declaration charging the barratry of the master; and the whole Court of King's Bench, upon a motion for a new trial, were of opinion, that the facts stated amounted clearly to the crime of barratry.

So,

So, it has been holden, that if the captain of a ship, contrary to the instructions of his owner, cruize for and take a prize, and the vessel be afterwards lost in consequence of it, he is guilty of barratry, even though he libel his prize in the Court of Admiralty in the name of himself and his owner; and though the owner had procured a letter of marque, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising; for whatever is done by the captain to defeat or delay the performance of the voyage is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that what he did was for the benefit of his owners, yet if he acted contrary to his duty to them, it is barratry.

Moss v. Byrom, 6 Term Rep. 379.

||So, where a master had general instructions to make the best purchases with despatch, it was held that it would not warrant him in going into an enemy's settlement to trade (which was permitted by the enemy), though his cargo could be more speedily and cheaply completed there; and that such act, in consequence of which the ship was seized and confiscated, was barratrous.||

Earle v. Rowcroft, 8 East, 126.

An act of the captain, *with the knowledge of the owners of the ship*, though without the privity of the owner of the goods, who happened to be the person insured, is not barratry.

Nutt v. Bourdieu, 1 Term Rep. 323.; ||and

see Pipon v. Cope, 1 Camp. 434.||

If the master of the ship be also the owner, he cannot be guilty of barratry. (a) ||(a) Unless he have chartered the ship,

7 Taunt. 627. The master being supercargo does not prevent the underwriter from being liable for his barratry, 8 East, 139.||

It is clear, that if the owner be also the master of the ship, any act, which in another master would be construed barratry, cannot be so in him; because such doctrine would militate against one of the rules above laid down; namely, that no man shall be allowed to derive a benefit from his own crime, which he would do, were he to recover against the insurers for a loss occasioned by his own act. But where it was proved, that the person who was described in the policy as master, and who was treated with as such, carried the ship out of course for fraudulent purposes, it was holden to be *prima facie* evidence of barratry, and that it lay upon the insurer, in order to discharge himself, to shew that the person so acting as master was also the owner or freighter of the vessel.

Ross v. Hunter, 4 Term Rep 53.; and see Soares v. Thornton, 1 Moore, 373.||

This rule, respecting the same person being both owner and master, has been extended in the Court of Chancery to a case where such an owner and master, after mortgaging his ship, had committed barratry; and when the mortgagee brought an action at law against the insurer to recover damages for the loss which he had sustained by this act of barratry, the court, still considering the mortgagor as the owner, granted an injunction.

Lewin v. Suasso, in Can. 16 G. 2 Postlethw. Dict. vol. i. p. 147.

Even if the parties insert in the policy, that the insurance shall be upon the ship *in any lawful trade*, if the captain commit barratry by smuggling, the underwriters are answerable. For

Havelock v. Hancil, 3 Term Rep. 277.

otherwise the word *barratry* should be struck out of the policy; and most clearly, the stipulation in the policy respecting the employment of the ship in a lawful trade, must mean the *trade* on which she is sent by the owners.

¶(a) Re-
enacted by
7 & 8 G. 4:
c. 50. § 9.¶

If any captain or mariner belonging to any ship shall wilfully burn or destroy her, to the prejudice of any merchant loading goods thereon, *or of any person underwriting any policy thereon*, or to the prejudice of the owner of the ship, he shall suffer death as a felon, without benefit of clergy. (a)

If the offence be committed within the body of a county, the offender shall be tried in a court of common law; if upon the high seas, it shall be tried according to the directions of the 28 H. 8. c. 15.

PARTIAL LOSS. — Partial, or, as it is sometimes called, average loss, *ex vi termini*, implies a damage, which the ship may have sustained in the course of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it also means the damage which goods may have received, without any fault of the master, by storm, capture, stranding, or shipwreck, although the whole, or the greater part thereof, may arrive in port. These partial losses fall upon the owners of the property so damaged, who must be indemnified by the underwriter. For if the goods arrive, but lessened in value through damage received at sea, the nature of an indemnity speaks demonstrably that it can only be effected by putting the merchant in the same condition in which he would have been, if the goods had arrived free from damage.

2 Burr. 1172.

2 Burr. 1170.
Lewis v.
Rucker,
2 Burr. 1167.
Dick v. Allen,
at Guild, after
Mich. 1785.
coram Buller J.
¶ See Puller
v. Glover,
12 East, 124.
Hurry v.
Roy. Ex. Ass.
3 Bos. & Pul.
308. Elsher
v. Noble,
12 East, 659.;
and see the
rule as to the
calculation of
loss, ably laid
down by Mr.
Justice Law-
rence in Johnson v. Sheddon, 2 East, 581.¶ 1 Magens, 57.

The proportion of damage the merchant may have suffered is ascertained in this way. Where an entire thing, as one hog-head of sugar, happens to be spoiled, if you can fix whether it be a third, a fourth, or a fifth worse, then the damage is ascertained to a mathematical certainty. This is found out, not by any price at the port of discharge, but by the price at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the same thing; for in either case it equally shews, whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound: consequently, whether the injury sustained be a third, fourth, or fifth of the value of the thing. And as the insurer pays the whole prime cost if the thing be wholly lost; so, if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth, not of the value for which it sold, but of the value stated in the policy. And when no valuation is stated in the policy, the invoice of the cost, with the addition of all charges, and the premium of insurance, shall be the foundation upon which the loss shall be computed.

Le Cras v.
Hughes, *B. R.*
East. 22 G. 3.
Park, 111.

This rule of ascertaining the damage will hold wherever there is a specific description of casks or goods: but in *Le Cras v. Hughes*, the property, which consisted of various goods taken from an enemy, was valued at the sum insured, and part was lost

by perils at sea; consequently, the same rule could not be adopted, on account of the nature of the thing insured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that sum as the amount of the goods lost.

Since the 19th of G. 2. the constant usage has been to let the valuation fixed in the policy remain, in case of a total loss, unless the defendant can shew that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods: but a partial loss opens the policy. This custom, said Lord *Mansfield*, was introduced by Lord Chief Justice *Lee*, in a case of *Erasmus v. Banks*; and in another case of *Smith v. Flexney*, which happened about the same period, the same rule of decision was adopted. M. 21 G. 2.

The underwriters of *London* have, by express words inserted in their policy, declared, that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, or in consequence of the ship being stranded. (a) This clause was introduced to prevent the vexation of trifling demands, which must have arisen in every voyage, on account of the very perishable nature of the above commodities. This form was formerly used by the two insurance companies, as well as by the private insurers, till the year 1754, when a ship having been stranded, and got off again, the insured recovered a small partial loss against the *London Assurance Company*, since which period the companies have left out the words, "*or the ship be stranded;*" and are now only liable in cases of a general average: but the old form is still retained by private insurers.

[(a) *Bowring v. Elmslie*, at N. P., cited 7 Term Rep. 216. As to the meaning of the word "*stranding*," see *Dobson v. Bolton*, Marsh. on Ins. 251. 3d ed. *Carruthers v. Sidebotham*, 4 Maul & S. 77. || *Cantillon v. the London*

Assurance Company, cited in 3 Burr. 1555. || See Marsh. on Ins. 216. 3d ed. ||

Upon this clause there have been several determinations, in all of which it has been uniformly held, that the underwriters can in no case be answerable for a partial loss to such commodities: and that no loss shall be deemed a total one, but the absolute destruction of the thing insured; for that while it specifically remains, though perhaps wholly unfit for use, no loss has happened within the meaning of this memorandum.

the meaning of the word. *Mason v. Skurray*, Sittings after Hil. 1780, at Guildhall. But in a late trial at Guildhall, in the Court of Common Pleas, Mr. J. *Wilson* was of opinion, that the term salt used in the memorandum did not include saltpetre. *Jouram v. Bourdieu*, Sittings after Easter Term, 27 Geo. 3.; || and in *Scott v. Bourdillon*, 2 New Rep. 213. the term corn was held not to include rice. ||

Corn is a general term, and includes many particulars; peas and beans have been holden to come within

This was held with respect to a cargo of wheat, which was partially damaged in a storm.

Wilson v. Smith, 3 Burr. 1550.

The same with respect to a cargo of fish, which was stinking, and of no value when examined.

Cockings v. Fraser, B. R. E. 25 G. 3.

Park, 114. || 1 Marsh. on Ins. 219. 3d ed. ||

A cargo of peas was so much damaged, that the produce was three fourths less than the freight; but as it in fact arrived at the port of destination, the underwriter was holden not to be liable.

Mason v. Skurray, Sitt. after Hil. 1780, at Guildhall.

Dyson v. Rowcroft, 5 Bos & Pul. 474.; and see the same principle laid down in the cases of *Glennie v. the London Assurance Company*, 2 Maul. & S. 371. *Hedberg v. Pearson*, 7 Taunt. 154. S. C. 2 Marsh. Rep. 432.

Burnett v. Kensington, 7 Term Rep. 210. S. C. Esp. Rep. 416.

Day v. Milford, 15 East, 559.

Park, 117.;
||see also
Marshall on Insurance, 3d ed. p. 627.||

Hog v. Goulding, Sitt. after Tr. 1745, at Guildh.

cor. *Lee C. J. Beawe's Lex Mercat.* 510.

Rodgers v. Maylor, Sitt. after Tr. 1790.
1 Park, 194.;
||see also
Shepherd v. Chewter, 1 Camp. 274.
Christian v. Coombe, 2 Esp. 489.
Reyner v. Hall, 4 Taunt. 725.||

De Garron v. Galbraiths, Sitt. after Tr. 1795.
1 Park, Ins. 194. 7th ed.

||But where a ship with a cargo of *fruit* was forced by stress of weather to put into a port out of the course of her voyage, and it was there found that the fruit was spoiled by the sea-water and rotten, and the government prohibiting the landing it was necessarily thrown overboard, it was held to be a *total loss*.

And it is now settled that if the ship be stranded, the insurer is liable for any partial loss in any of the articles, though it did not arise from the stranding, but from some other cause; for the not stranding destroys the exception, and lets in the general words of the policy.

And though formerly considered a doubtful question, it is now decided that the memorandum does not exempt the insurer from the *total loss* of an *entire* individual thing. As where goods in separate packages are warranted "free of particular average," the insured shall recover for so many of the packages as are *wholly lost*; but not for those which remain in specie, however greatly damaged.||

When the quantity of damage sustained in the course of the voyage is known, and the amount which each underwriter upon the policy is liable to pay is settled, it is usual for the underwriter to indorse on the policy, "*adjusted this loss, at so much per cent.*" or some words to the same effect. This is called an adjustment.

It has been determined, that after an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances respecting it.

However, this rule has of late been somewhat relaxed. An action was brought on a policy of assurance on ship and goods from *London to Shelburne*, in *Nova Scotia*. The policy had been adjusted by the defendant at 50 per cent., and it was contended, that he was now bound by that adjustment. On the other hand, it was argued, that the adjustment was not binding; and that if it were it ought to have been declared upon specially. Lord *Kenyon* said, that he did not think it necessary to declare on the adjustment specially, that it was *primâ facie* evidence against the defendant; but if there had been any misconception of the law or fact, upon which it had been made, the underwriter was not absolutely concluded by it.—This turned out to be the case, and there was a verdict for the defendant.

Again, the plaintiff produced no other evidence at the trial but the adjustment; and the witness who proved it swore, that doubts, soon after they had signed it, arose in the minds of the underwriters, and they refused to pay; upon which Lord *Kenyon* said, that under those circumstances the plaintiff must go into other evidence, which not being prepared to do he was nonsuited. In the following term a motion was made to set aside the nonsuit, upon the ground that an adjustment was *primâ facie* evidence

evidence of the whole case, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's subscription to the policy.—Lord *Kenyon*: I admit the adjustment to be evidence in the case to a certain extent; but I thought at the trial, and still think, that when the same witness, who proved the signature of the defendant to the adjustment, said, that doubts, soon after the adjustment took place, arose in the minds of the underwriters as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence: and that to shut the door against enquiry after an adjustment, would be to put a stop to candour and fair dealing amongst the underwriters. The rule was refused.

An action was brought upon an insurance upon goods on board a *foreign ship*, “the policy to be deemed sufficient proof of interest “in case of loss.” The defendant suffered judgment to go against him by default; and on a motion to set aside the writ of inquiry, the Court of King’s Bench said, that although such a policy would be void in this country, by virtue of the statute of the 19th G. 2. c. 37., yet the statute did not extend to policies on foreign ships: and in this case the underwriter, having suffered judgment to go by default, has confessed the plaintiff’s title to recover; and the amount of that loss was fixed, by his own stipulation in the policy, which he cannot now controvert.

Thellusson v. Fletcher, Dougl. 501.

If an insurer pay money for a total loss, and in fact it be so at the time of adjustment; if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. But substantial justice is done, by putting him in the place of the insured, and giving him all the advantages that may arise from the salvage.

|| See *Houstan v. Thornton*, Holt, 242.||

A box of bullion was wholly lost, the loss adjusted and paid, and an agreement was entered into at the time of adjustment, that the insured would refund to the insurer whatever he should recover, in such proportion as the sum insured bore to the whole interest. The bullion was afterwards fished up, and the insured paid into court the insurer’s proportion, after deducting salvage. The court held this to be right.

Da Costa v. Firth, 4 Burr. 1966.

|| Where goods insured on a valued policy were seized, confiscated, and sold, by order of an enemy’s government, but the necessary documents not having arrived here, the underwriters agreed to pay 50*l.* per cent. on account, but no abandonment was made, and the foreign consignees of the goods afterwards, by remonstrances, obtained the restoration of half the proceeds of the sale of the goods, which half amounted to more than the whole sum they were valued at in the policy; it was held, that the underwriters, nevertheless, were not entitled to recover back the 50*l.* per cent. paid on account, the assured having sustained a loss of half his goods, for which he was no more than indemnified by the 50*l.* per cent. received, and the superior value of the other half arising from the benefit of the market, in which the underwriters had no concern.

Tunno v. Edwards, 12 East, 488.

But after payment of a total loss on a policy on freight, freight

Barclay v.

H h 3

subse-

Stirling,
5 Maul. & S. 6.

subsequently paid to the insured, which had been earned by the ship, may be recovered by the insurer from the insured, as money had and received to his use.

Bilbie v. Lum-
ley, 2 East,
469. Brisbane
v. Dacres,
5 Taunt. 143.

Where the insurer pays the loss with full knowledge of the facts, or with full means of knowing them, the money cannot be recovered back.

Forrester v.
Pigou,
3 Camp. 380.

And a subsequent promise by the insured, to repay money to an insurer, which the latter paid unconditionally, cannot be enforced, for it is without consideration.

Dehahn v.
Hartley,
1 Term Rep.
343.

But if the money is paid under a mistake of the real facts, as where an underwriter paid a loss on a policy containing a warranty, and he afterwards discovered that the warranty had not been complied with, the money may be recovered back.

Reyner v.
Hall, 4 Taunt.
725.; and see
May v.
Christie,
1 Holt, 67.

And so a settlement made by the insured, in ignorance of facts, does not bind him; as where a ship was warranted free of capture in port, and the insured, having received a letter stating the loss to have occurred in port, settled with the underwriter on that footing, but it afterwards turned out the capture was not in port; it was held, the insured was not precluded by the adjustment from recovery on the policy for such loss, though the underwriter's name had been struck off the policy.||

Beawes' Lex
Mer. 146.
||For the bet-
ter adjust-
ment and
payment of
salvage under

SALVAGE. — Salvage is an allowance made for saving a ship, or goods, or both, from the dangers of the seas, fire, pirates, or enemies: and it is also sometimes used to signify the thing itself which is saved; but it is in the former sense only in which it is here used.

12 Ann. st. 2. c. 18., see 1 & 2. Geo. 4. c. 76. § 19.||

Park, 140.

Underwriters, by their policy, expressly undertake to bear all expenses of salvage.

The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c.

In order to entitle the insured to recover expenses of salvage, it is not necessary to state them in the declaration, as a special breach of the policy.

Carey v.
King, Ca.
temp.
Hardw. 304.

Thus, in a declaration on a policy on goods it was stated, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expenses of salvage.

Thelluson v.
Sheddon,
2 New Rep.
229.

||Salvage payable under a decree of the Court of Admiralty must be proved by regular evidence of the judgment of that court.||

Randal v.
Cockran,
1 Ves. 98.

But if the insurer pay to the insured such expenses, and from particular circumstances the loss be repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss.

TOTAL

TOTAL LOSS AND ABANDONMENT. — Before a person insured can demand from the underwriter a recompense for a total loss, he must abandon to him whatever claims he may have to the property insured. Park, 145.

¶ But in order to render an abandonment necessary, the thing insured, or a part of it, must “exist in specie” in the hands, or at least for the benefit, of the insured; and it must exist in such a state of integrity as to be fit for some useful or available purpose. 13 East, 304. 15 East, 15. 5 Barn. & A. 597. 2 Barn. & C. 691.

Where a ship was so much injured by perils of the sea that the expense of getting her off the place where she then lay (if it could be accomplished), and of repairing her, would have exceeded her value when repaired, the loss was held total, without any abandonment; and *Abbott C. J.* said, “If the subject-matter of insurance remained a ship, it was not a total loss; but if it were reduced to a mere congeries of planks, the vessel was a mere wreck. The name which you may think fit to apply to it cannot alter the nature of the thing.” Cambridge v. Anderton, 2 Barn. & C. 691. 1 Ry. & Moo. 60.; and see Read v. Bonham, 3 Brod. & B. 147. Allen v. Sugrue, 8 Barn. & C. 561.

In the case of damage to goods by perils of the sea, if the goods be so far injured by the perils of the sea as to have a tendency to putrefaction, and are obliged to be thrown overboard, this seems to be in itself a total loss, without any abandonment. Dyson v. Rowcroft, 3 Bos. & Pul. 474. Cologan v. London Assurance Company, 5 Maul. & S. 447.

But where a ship damaged by sea perils was obliged to put into port, and on survey was reported unfit to proceed without thorough and expensive repair, on notice of which the underwriters declined to interfere; and the owner then, without notice of abandonment, had the ship sold for the benefit of all concerned; and the proceeds of the sale, after deducting expenses and salvage, left a balance against the assured; it was held, that the assured could not treat this as a total loss, not having abandoned, for the ship remained in the character of a ship when sold. Martin v. Crockatt, 14 East, 467.; and see Bell v. Nixon, Holt, Ca. 425.

It seems that in case of an insurance on freight abandonment is unnecessary.¶ Idle v. Royal Exchange Assurance Company, 1 Term Rep. 608.

pany, 8 Taunt. 755. Mount v. Harrison, 4 Bing. 388.; *sed vide* Parmeter v. Todhunter, 1 Camp. 541.

As soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not: and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never afterwards recover for a total loss. (a) Mitchell v. Edie, 1 Term Rep. 608. ¶ Hunt v. Royal Exchange Assurance Company, 1 Term Rep. 608.

5 Maul. & S. 47. Aldridge v. Bell, 1 Stark, 498. Anderson v. Royal Exchange Assurance Company, 37 East, 8. S. C. 3 Smith, 48. Martin v. Crockatt, 14 East, 465. (a) But the insured is entitled to a reasonable time for examining into the state of a damaged cargo before he makes his election on the question of abandonment. Gernon v. Royal Exchange Assurance Company, 6 Taunt. 383. S. C. 2 Marsh, 88.¶

But if the insured, hearing that his ship is much disabled, and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order Da Costa v. Newnham, 2 Term Rep. 407.

the repairs to be made; they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. For the reason why the notice of abandonment is deemed necessary, is to prevent surprise or fraud upon the underwriter: but in the case put, they have by their own act superseded the necessity of notice.

Park, 144.

When an abandonment is made, it must be total, and not partial.

2 Burr. 697.

||Anderson v.

Wallis, 2 Maul.

& S. 240. Brotherston v. Barber, 5 Maul. & S. 418. Bainbridge v. Neilson, 10 East, 529.

Falkner v. Ritchie, 2 Maul. & S. 290.||

The insured may in all cases choose not to abandon; but he cannot at his pleasure abandon, and thereby turn a partial into a total loss.

||(a) Wilson v.

Royal Ex-

change As-

surance Com-

pany, 2 Camp.

625. Barker

v. Blakes,

9 East, 283.

(b) If the underwriter intends to resist the abandonment he is bound to do so

within a reasonable time. Hudson v. Harrison, 3 Brod. & B. 97. S. C. 6 Moore, 288.||

The insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half the value; if the voyage be absolutely lost or not worth pursuing (a); if further expense be necessary; or if the insurer will not engage at all events to bear that expense, though it should exceed the value, or fail of success. (b)

1 Term Rep.

191.

But he cannot abandon, unless at some period or other of the voyage there has been a total loss; and if neither the thing insured, nor the voyage is lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon.

Pringle v.

Hartley,

5 Atk. 195.

A ship was taken by a *Spanish* privateer, retaken by an *English* privateer, and carried into *Boston* in *New England*, where, as no person appeared to give security for the salvage, she was sold; the recaptors had their moiety, and the overplus remaining in the hands of the officers of the Court of Admiralty, the owners were entitled to abandon and to recover for a total loss.

Goss v.

Withers,

2 Burr. 685.

||M'Iver v.

Henderson,

4 Maul. & S.

576. Cologan

v. London As-

surance Comp.

5 Maul. & S.

447 ||

A ship was taken by the *French*, remained with them eight days, and was then retaken: the master, mates, and sailors, except a landman and an apprentice, had been taken out and carried to *France*. Before the capture, the ship had been separated from her convoy, and was so far disabled by storm, as to be incapable of proceeding in her voyage without going into port to refit. Part of the cargo was thrown overboard in the storm, and the rest spoiled while the ship lay at *Milford Haven*. In actions upon two policies, one on the ship, and the other on the cargo, it was held that this was a total loss, so as to entitle the owner to abandon.

Mills v.

Fletcher,

Dougl. 219.

A ship, bound from *Mountserrat* to *London*, was captured, and the captain, crew, rigging, and part of the cargo, which was sugar, were taken away. She was retaken and carried into *New York*, where the captain also arrived. Upon taking possession, he found that part of the cargo that was left had been washed overboard; that fifty-seven hogsheads of what remained were damaged; and that the ship was in such a state that she could not be repaired, without unloading her entirely. The

owners

owners had no storehouses at *New York*; nor were any sailors to be had. The salvage came to forty hogsheads of sugar; and if the ship had been repaired, it would have exceeded the freight by 100*l*. There was an embargo laid on all ships till *December*, and this ship was to have arrived in *London* in *July* preceding. The captain, upon the advice of his friends, sold the cargo, and was paid for it; he agreed also to sell the ship, but the person who contracted for her ran away, upon which the captain left her in a creek, and came to *England*. The owners of the ship had a right to abandon to the insurers on the ship and freight.

|| But where the ship was wrecked, but the goods were brought on shore though in a very damaged state, so that they became unprofitable to the assured, it was held that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by a notice of abandonment.

Underwriters on freight are not liable for the loss of freight of a portion of the cargo damaged by sea-water, and which the master in his discretion leaves behind at a port instead of waiting till they can be dried so as to be safely reshipped; although the master's proceedings be such as a prudent man uninsured would have adopted.||

The right to abandon must depend upon the nature of the case at the time of the action brought, or at the time of the offer to abandon: and, therefore, if at the time advice is received of the loss it appears that the peril is over and the thing in safety, the insured has no right to abandon. Thus, in a case where there was a capture and recapture, and it was stated that at the time of the offer to abandon the ship was safe in port, and had sustained no damage, the court held, that the insured had no right to abandon.

395. *Brotherston v. Barber*, 5 Maul. & S. 418. *Parsons v. Scott*,

But if the underwriter pay for a total loss, and it afterwards turn out to be but partial, the insured shall not be obliged to refund; but the insurer shall stand in his place for the benefit of salvage.

|| And if in consequence of capture an abandonment has taken place, and the ship be afterwards recaptured and earn freight, the underwriters on the ship, under the abandonment of the ship to them, are entitled to such freight.||

& B. 579. 5 Maul. & S. 79.

A ship was insured from *Wyburg* to *Lynn*, at which place she arrived: the jury found that the ship was not worth repairing; but the damage sustained in the voyage insured did not exceed 48*l*. per cent. By the court,—The jury have precluded us from saying this is a total loss; and where neither the thing insured nor the voyage is lost, the insured cannot abandon.

An insurance was made on ship, cargo, and freight, at and from

Thompson v. Royal Exchange Assurance Company, 16 East, 214.

Mordy v. Jones, 4 Barn. & C. 594.

Hamilton v. Mendes, 2 Burr. 1198.
1 Bl. Rep. 276.
S. C. || *Bainbridge v. Neilson*, 10 East, 529.
Patterson v. Ritchie, 4 Maul. & S. 2 Taunt. 565.||

Da Costa v. Firth, 4 Burr. 1966.

Davidson v. Case, 5 Moore, 116.
S. C. 8 Price, 542. 2 Brod.

Cazalet v. St. Barbe, 1 Term Rep. 187.

Manning v.

Newnham,
Tr. 22 G. 5.
Park, 260.
7th ed.
|| Marshall on
Ins. 595.
5d ed.
2 Camp. 625.
note a ||

from *Tortola* to *London*, warranted free of particular average. On the first of *August* the whole fleet got under weigh, but not being able to get clear of the islands, they anchored that night, and the next day got clear of them. About ten o'clock of the 2d of *August*, several squalls of wind arose, which occasioned the ship to strain, and make water so fast, that the crew were obliged to work both pumps: on the 3d, the captain made a signal of distress, and returned to *Tortola*. A survey was held, by which the ship was declared unable to proceed to sea with her cargo; and that she could not be repaired in any of the *English West India* islands. Many of the sugars in the bilge and lower tier were washed out, and several of the casks broke and in bad order. This was holden to be a total loss, the voyage being entirely defeated.

Hunt v. Royal
Exchange
Assurance,
5 Maul. & S.
47.

|| But the loss of voyage for the season by perils of the sea is not a ground of abandonment upon a policy on goods, with a clause of warranty free from average, &c., when the cargo is in safety, and not of such a perishable nature as to make the loss of voyage a loss of the commodity, although the ship be rendered incapable of proceeding on the voyage.

Wilson v.
Royal
Exchange
Assurance,
2 Camp. 622.;

And if another vessel can be procured to forward the cargo to its destination, there is no loss of the voyage so as to render the underwriters liable for a total loss.

and see *Anderson v. Royal Exchange Assurance*, 7 East, 58.

Anderson v.
Wallis,
2 Maul. & S.
240.; and see
Everth v.
Smith, *id.* 278.

And the retardation of the voyage by necessary repairs occasioned by sea perils, so that the goods lose their market for that season, does not amount to a total loss, entitling the insured to abandon.

Falkner v. Ritchie, *id.* 290.; *sed vide* 2 Dow. & Ry. 474. 5 Brod. & B. 108.

Thorneley v.
Hobson,
2 Barn. & A.
515.

Where the ship's crew deserted in tempestuous weather to save their lives, and another crew took possession and conducted the ship safely into port, the desertion was held not a total loss; and the ship having been sold by the Admiralty Court to pay the salvage, and the assured not having taken means to prevent the sale, they were held not entitled to abandon.||

FRAUD AND MISREPRESENTATION. — Policies are annulled by the least shadow of fraud or undue concealment of facts; and both parties are equally bound to disclose circumstances within their knowledge: for if the insurer, at the time he underwrote, knew that the ship was safe arrived, the contract will be void.

Skin. 327.

A policy was held to be void, where goods were insured as the property of an ally, when in fact they were the goods of an enemy.

Roberts v.
Fournereau,
Sittings at
Guildhall,
after Tr. 1742.

A ship was known to have sailed from *Jamaica* on the 24th of *November*, and the agent told the insurer she sailed the latter end of *December*; the policy was declared void.

|| Park, 285. 7th ed. *Webster v. Foster*, 1 Esp. 407.||

Woolmer v

In an insurance upon goods, the insured warranted the ship
and

and goods to be neutral; it was expressly found by the jury, that they were not neutral. The court, therefore, though the loss happened by storms, and not by capture, declared that the insured could not recover.

7 Term Rep. 705. Baring v. Christie, 5 East, 598. Campbell v. Innes, 4 Barn.

Goods were insured on board a ship, warranted *Portuguese*. The goods were lost by a different peril, but in fact the ship was not *Portuguese*. The policy was adjudged void *ab initio*.

One having an account that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard. The policy was decreed in equity to be delivered up.

v. Hamilton, 5 Taunt. 37. Lynch v. Dunsford, 15 East, 494. Gladstone v. & S. 54. Redman v. Loudon, 5 Camp. 503.||

The agent for the plaintiff, two days before he effected the policy, received a letter from *Cowes*, in which were these words: "On the 12th of this month I was in company with the *Davy* (the ship in question), at twelve at night lost sight of her all at once; the captain spoke to me the day before that she was "leaky, and the next day we had a hard gale." The ship, however, rode out the gale, and was captured by the *Spaniards*. The policy was held to be void, because the letter was not communicated to the insurer.

1 New Rep. 14. Bridges v. Hunter, 1 Maul. & S. 15.||

A ship was insured "at and from Genoa." The ship loaded at *Leghorn*, and was originally bound for *Dublin*; but losing her convoy, she put into *Genoa* in *August*, and lay there till the *January* following. All these facts were known to the insured, but not communicated to the insurer. The policy was held to be void.

Paxton, 1 Taunt. 463. Sawtell v. Loudon, 5 Taunt. 359.||

A ship being bound from the coast of *Africa* to the *British West Indies*, sailed from *St. Thomas's* on the coast of *Africa* on the 2d of *October*, a circumstance with which the plaintiff was acquainted by a letter received in *February*. The policy was not made till the 21st of *March*. The letter was not shewn, nor was any thing said of her sailing from *St. Thomas's*, but in the instructions "the ship was said to have been on the coast the 2d of *October*." The policy was held to be void.

The broker's instructions stated *the ship ready to sail on the 24th of December*; the broker represented to the underwriter that the ship was in port, when in fact she had sailed the 23d of *December*. The policy was void.

1782. ||Park, Ins. 292. 7th ed.||

But there are many matters as to which the insured may be innocently silent: 1st, As to what the insurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what lessens the risk. (a) An underwriter is bound to know

Muilman, 3 Burr. 1419. 1 Bl. Rep. 427. S. C. ||Rich v. Parker, & A. 423.||

Fernandes v. Da Costa, Sittings after Hil. 4 G. 5.

Da Costa v. Scandret, 2 P. Wms. 170.; ||and see Lynch King, 1 Maul.

Seaman v. Fonnereau, 2 Stra. 1183. ||See Kirby v. Smith, 1 Barn. & A. 672. Reid v. Harvey, 4 Dow. 97. Willes v. Glover,

Maul. & S. 15.|| Hodgson v. Richardson, 1 Bl. Rep. 463.; ||and see Robertson v. French, 4 East, 150. Grant v.

Ratcliffe v. Shoobred, Sittings at Guildhall, after Tr. 1780. ||Marshall on Ins. 466. 5d ed. M'Andrews, v. Bell, 1 Esp. Rep. 375.||

Fillis v. Brutton, Sittings at Guildhall, after Hil.

Carter v. Boehm, 3 Burr. 1905. 1 Bl. Rep. 595. S. C.

||Weir v. Aberdein, 2 Barn. & A. 520. Friere v. Woodhouse, Holt, 572.
(a) The time of a ship's sailing is not in general a

circumstance necessary to be communicated to the underwriters, except in the case of a missing ship. *Foley v. Moline*, 5 Taunt. 430. S. C. 1 Marsh. 117. *Fort v. Lec*, 3 Taunt. 581.; nor need any ingredient of sea-worthiness be disclosed, unless information on that subject has been particularly called for. *Hayward v. Rogers*, 4 East, 590. *Beckwith v. Sidebotham*, 1 Camp. 116.; or the insured of goods make any representation of their state. *Boyd v. Dubois*, 5 Camp. 155.||

Stewart v. Bell, 5 Barn. & A. 258.; and see *Kingston v. Knibbs*, 1 Camp. 508. note. *Boyd v. Dubois*, 5 Camp. 155.

Planche v. Fletcher, Dougl. 238.

know particular perils, as to the state of war or peace. If a privateer is insured, the underwriter needs not be told her destination.—An insurance was made on *Fort Marlborough* in the *East Indies* for twelve months against the attacks of an *European* enemy, for the benefit of the governor. The defence set up was an undue concealment of circumstances, particularly the weakness of the fort, and the probability of its being attacked by the *French*. The court held that the policy was good.

||Where the insurance was from *London* to *Jamaica* generally, and the goods were destined to a particular place in the island, and the usual course was to proceed to the adjoining port and there tranship the cargo into shallops, the underwriters were held liable for a loss on board the shallops, though no notice was given them of this practice, for they were bound to take notice of the usual course of the voyage insured.||

A ship was insured “from *London* to *Nantz*, with liberty to “call at *Ostend*.” The ship’s clearances and papers were all made out for *Ostend*; but she was never intended to go thither. After the policy was made, war was declared against *France*. Two defences were set up: 1st, That there was a fraud in clearing out the ship for *Ostend*, when she never was designed for that place; 2d, That as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice. The court held that neither of the objections were valid; for as to the first it was the common usage; and of the second the insurer was bound to take notice.

An underwriter refused to pay a loss by capture, the ship being *Portuguese* and condemned for having an *English* supercargo on board, because the insured had not disclosed that circumstance. The court held, that the condemnation was unjust, and was not such a circumstance as the insured was bound to disclose.

Mayne v. Walter, B. R. East. 22 Geo. 5. Park, 506. 7th ed.; || and see *Clapham v. Cologan*, 3 Camp. 382. *Dawson v. Atty*, 7 East, 567. *Littledale v. Dixon*, 1 N. R. 151.||

Park, 196.

||*(b)* In *Marsden v. Reid*, 3 East, 572., the court intimated an opinion that if a material fact be represented to the first underwriter, to induce him to subscribe the policy, it shall be taken to have been made to all the rest.||

A representation is a state of the case, not forming a part of the written instrument or policy; and it is sufficient if it be substantially performed. If there be a misrepresentation, it will avoid the policy, as a fraud, but not as a part of the agreement. Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is necessary that they make a part of the written instrument. But if a representation be false in any material point, it will avoid the policy; because the underwriter has computed the risk upon circumstances which did not exist. *(b)*

||Thus,

|| Thus, where a *London* merchant insuring at *Leith* represented (contrary to the fact) that he had done some insurances at *Lloyd's* upon the same voyage, at the same premium given to the *Leith* underwriters, who (not being well acquainted with the nature of the risk themselves) subscribed the policy from their confidence in the skill and judgment of the *London* underwriters; it was held by the House of Lords (reversing the judgment of the Court of Session), that this was a fraud which vitiated the policy, though the misrepresentation was not such as affected the nature of the risk.||

Sibbald v.
Hill, 2 Dow.
265.

The following instructions were shewn to the first underwriter, but not inserted in the policy: "Three thousand five hundred pounds upon the ship *Julius Caesar*, for *Halifax*, to touch at *Plymouth*, and any port in *America*: she mounts twelve guns, and twenty men." These instructions were not shewn to the present defendant, but she was represented generally as a ship of force. At the time of her capture, she had on board 6 four-pounders, 4 three-pounders, 3 one-pounders, 6 swivels, and 27 men and boys in all, of which 16 only were men. The witness said, he considered her as being stronger with this force than if she had 12 carriage-guns and 20 men; and that there were neither men nor guns on board at the time of the insurance. The court held, that these instructions were only a representation; and that they had been substantially performed.

Pawson, v.
Watson,
Cowp. 785.

A ship was insured at and from *Port l'Orient* to the *Isles of France* and *Bourbon*, and to all or any ports or places, where and whatsoever, in the *East Indies*, *China*, *Persia*, or elsewhere, beyond the *Cape of Good Hope*, from place to place, and during the ship's stay and trade, backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in *France*. A slip of paper, at the time the policy was underwritten, was *wafared* to it, and shewn to the underwriters, on which was written the following representation: — "The ship has had a complete repair, and is now a fine and good vessel, three decks. Intends to sail in *September* or *October* next. Is to go to *Madeira*, the *Isle of France*, *Pondicherry*, *China*, the *Isles of France*, and *l'Orient*." The ship, in fact, did not sail till the 6th of *December*, and did not reach *Pondicherry* till the month of *July* following. She continued there till *August*, when, instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter and undergone considerable repairs, she returned to *Pondicherry*, and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *l'Orient*, but was taken by the *Mentor* privateer. The usual time, in which the direct voyage is performed between *Pondicherry* and *Bengal*, is six or seven days; but this ship was six weeks in going to, and two months in returning from *Bengal*, and lay off *Madras*, *Masulipatam*, *Visigapatam*, and *Yanon*, and took in goods at all those places. Lord *Mansfield* told the jury, that if no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual

Bize v.
Fletcher,
Doug. 271.
|| Park, 513.
7th ed.||

voyage

voyage as performed did not tend to increase the risk, *this slip of paper being only a representation*, the plaintiff was entitled to their verdict.

If the misrepresentation be in a *material* point, it will avoid the policy, even though it happen by mistake.

Macdowell
v. Fraser,
Doug. 247.
||Thompson
v. Buchanan,
4 Bro. P. C.
482.||

Thus, in a policy on a ship from *New York* to *Philadelphia*, the broker represented to the insurer that the *ship was seen safe in the Delaware on the 11th of December* by a ship which arrived at *New York*; whereas in fact the ship was lost on the 9th of *December*. The policy was held to be void, although there was no suspicion of fraud.

Shirley v.
Wilkinson,
Doug. 295.

The same rule holds if the broker conceal any thing *material*, though the only ground for not mentioning it should be that the fact concealed appeared immaterial to him.

Barber v.
Fletcher,
Doug. 292.
||Bowden v.
Vaughan,
10 East, 405.
Hubbard v.
Glover, 3 Camp. 313.||

But the thing concealed must be some *fact*, not a *mere speculation* or *expectation* of the insured. Thus, where a broker insuring several vessels, speaking of them all, said, "which vessels are *expected* to leave the coast of *Africa* in *November* " or *December*," the policy was held good, although in fact the ship in question had sailed in the month of *May* preceding.

Bell v. Bell,
2 Camp, 475.
Marshall on
Insurance,
473. 3d ed.

||The insured is, however, only bound to communicate *facts*, and not the impression produced by them on the public mind; for men argue differently from political appearances: but the means of information and of judging upon those subjects are open alike to the insurer and insured.||

Park, 208.
||Gladstone
v. King,
1 Maul. & S.
35.||

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent*; for in either case the contract is founded in deception, and the policy is consequently void.

This rule prevails, even though the act cannot be at all traced to the owner of the property insured.

Stewart v.
Dunlop,
Cas. of
House of
Lords, Apr. 8.
1785.
||See Wake
v. Atty,
4 Taunt. 493.||

A man having arrived at *Greenock*, knowing of the loss of the ship insured, and meeting an intimate friend and acquaintance of the insured, and a partner with him in some other transactions, communicated the intelligence of the loss of the ship to him, *who desired it might be concealed*. The same day the person receiving the account held a conversation with the plaintiff's clerk, who, notwithstanding that, swore, that he had no information from him respecting the ship, nor did he get *any hint* from him, further than the said person asking the deponent, if he knew whether there was any insurance made upon her, and if there was any account of her. The same day the plaintiff desired this clerk to write to get an insurance effected, which he did, without telling his master of this conversation. The Court of Session in *Scotland* held the policy to be void; and the House of Lords confirmed the decree.

Fitzherbert v.
Mather,
1 Term Rep.
12. ||Glad-

The plaintiff's agent shipped goods for the plaintiff, and wrote to the plaintiff's agent in town to get an insurance done. The letter was dated the 16th of *September*, and it contained this sentence:

tence: "I this day shipped on board the *Joseph*, which sailed immediately, a cargo of oats, &c." This letter was not, however, sent till one o'clock on the 17th. The case states, that about six o'clock in the evening of the 16th, *Thomas* (the agent) heard a report that the ship was on shore; and at six o'clock in the morning of the 17th *he knew* the ship was lost. The policy was held void on account of the fraud in *Thomas*.

The courts of justice in this country have not yet adopted any general rule with respect to the return of premium in cases of fraud. In two or three instances in the court of Chancery, where the underwriters have been relieved from the payment of the sums insured, on account of fraud, the decree has directed the premium to be returned.

Thus, in a case in the year 1690, the defendant and others had come to the insurance office, and bought a policy for insuring the life of one *Horwell* (upon whose life they had no concern or interest depending) for a year; and the policy ran whether interested or not interested, at a premium of 5*l.* per cent. They took this way of drawing in subscribers: they agreed with one *Marwood* a known merchant upon the Exchange, and a leading man in such cases, to subscribe first; but in case *Horwell* died within the year, *Marwood* was to lose nothing, but on the contrary was to share what should be gained from the other subscribers. Upon the credit of *Marwood's* subscribing, several others (who had inquired of *Marwood* about *Horwell*, who was his neighbour) subscribed likewise. *Horwell* lived about four months, and then died; and this bill was brought to be relieved against the policy: and this matter being all confessed by the answer, the court decreed the policy to be delivered up, and the premium to be repaid.

So also, in the case of *Da Costa v. Scandrett*, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the insured.

It is true, that during the argument in the case next to be quoted, the counsel cited a case of *Rucker v. Hollingbury*, in which the Master of the Rolls had been of a different opinion from that delivered in the two preceding cases. But Lord *Mansfield* said, that there must be some mistake in reciting the case before the Master of the Rolls; for the practice of the Court of Chancery was certainly agreeable to the two former cases.

The case in which this observation was made was an action on a policy of insurance on a ship, with a count of a general *indebitatus assumpsit* for money had and received to the plaintiff's use; and damages were laid at 98*l.* The trial was had, under a decree of the Court of Chancery, where the now defendant, the insurer, being there complainant, had offered to pay back the premium, which was 10*l.* No money was, in the present case, paid into court; though the usual course in these cases is for the defendant, the insurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium,

stone v. King,
1 Maul. & S.
38. Wake v.
Atty,
4 Taunt. 495. ||

|| See Marshall
on Insurance,
648. 5d edit. ||

Wittingham
v. Thorn-
borough,
Pr. Ch. 20.
2 Vern. 206.
S. C.

Da Costa v.
Scandrett,
2 P. Wms.
170.

Wilson v.
Duckett,
5 Burr. 1361.

on the count for money had and received to his use; although they were of opinion against the policy, upon the foot of fraud; and found against it, as being fraudulent. In fact, the first underwriter was only a decoy-duck, to induce other persons to underwrite the policy: and it had been previously agreed between the insured and him, that he should not be bound by signing the policy; which this court considered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord *Mansfield* (before whom this cause was tried), and of the counsel on both sides, it was agreed to bring this question before the court, Whether, upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff (the insured,) or retained by the defendant (the insurer)? The cases above mentioned were quoted by the counsel for the plaintiff; but they being all in Chancery, Lord *Mansfield* said, he wanted to know whether there was any common law determination to the same effect. As it did not appear that there was, his lordship said, it was plain what must be done in this case; for he looked upon *the offer made* by the complainant's bill in equity to be the same thing as if the money had *actually been brought into court* in the present case.

But although the common law has been so silent upon the subject, as not to lay down any general rule; and although, in all the cases stated, the premium was restored; yet, if the fraud is notorious, palpable, and gross in its nature, the court may order, and has ordered, the underwriter to retain the premium.

Thus, where an action was brought by the insured to recover 150*l.*, being the amount of the defendant's subscription; the ground of refusal was, that the insurance was fraudulent; and that the plaintiff knew of the loss of the ship, at the time of effecting the policy. The counsel for the plaintiff were under the necessity of admitting that their client had made some fraudulent insurances upon this very ship, subsequent to the one now in dispute; but contended, that news of the loss of the ship had not arrived till after this particular one was effected. The evidence, however, was so strong as easily to convince the jury, that the plaintiff had received information of the loss before the order for making the insurance was given to the broker; and they found a verdict for the defendant.

Lord *Mansfield* said, the fraud was so gross that the premium should not be recovered from the underwriter.

It is proper, however, to observe, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. Thus it was said by Lord *Mansfield*, in the case of *Carter v. Boehm*: "The policy would be void against the underwriter, if he concealed any thing; as, if he insured a ship on her voyage, which he privately knew to be arrived; and *an action would lie to recover the premium.*"

|| Since the last-cited cases were decided, the important question, with respect to the return of premium in cases of fraud by the insured

Tyler v.
Horne,
Sittings at
Guildhall,
after Hil.
T. 1785.

|| 1 Park, Ins.
329. 7th ed.
3 Marsh. Ins.
661. ||

insured, has been set at rest by a decision of the Court of King's Bench. In the case alluded to (a) the fraud had been committed, not by the insured himself, but by his agent; yet the whole court were of opinion, that in all cases of *actual fraud* on the part of the insured, committed either by himself or his agent, the underwriter shall not be compelled to repay the premium.

Vandyck v. Hewitt, 1 East, 96., decided on the illegality of the insurance, and 5 Bos. & Pul. 55. Lubbock v. Potts, 7 East, 449. S. P.

If, however, a policy be avoided by misrepresentation without fraud, the assured is entitled to a return of the premium. || Feise v. Parkinson, 4 Taunt. 640.

Oom v. Bruce, 12 East, 225. Hentig v. Staniforth, 5 Maul. & S. 122.

||DESTROYING SHIP TO DEFRAUD OWNERS OR INSURERS.|| — By statute 1 Ann. st. 2. c. 9. § 4. it is enacted, That if any captain, master, mariner, or other officer, belonging to any ship, shall willingly cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon, (or, by a subsequent statute, to the prejudice of any person or persons that shall underwrite any policy or policies of insurance thereon,) he shall suffer death as a felon. 4 Geo. 1. c. 12. § 5.

||The 1 Ann. stat. 3. c. 9. is repealed, with the exception of § 3. (which relates only to the admission of witnesses for prisoners on trial), by the 7 & 8 Geo. 4. c. 27.; but its provisions are embodied in and extended by the 7 & 8 Geo. 4. c. 30. § 9. (the malicious trespass act), which enacts, " That if any person shall " unlawfully and maliciously set fire to, or in anywise destroy " any ship or vessel, whether the same be complete or in an unfinished state; or shall unlawfully and maliciously set fire " to, cast away, or in anywise destroy any ship or vessel, " with intent thereby to prejudice any owner, or part-owner, of " such ship or vessel, or of any goods on board the same, or " any person that hath underwritten or shall underwrite any " policy of insurance upon such ship or vessel, or on the freight " thereof, or upon any goods on board the same, every such " offender shall be guilty of felony, and being convicted thereof, " shall suffer death as a felon." || 7 & 8 Geo. 4. c. 30. § 9.

||SEAWORTHINESS OF SHIP.|| — Every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. This arises from a tacit and implied warranty, that the ship shall be in a condition to perform the voyage. Mills v. Rockbuck, in the Exch. Park, Ins. 355. 7th ed. ||Marshall on Ins. 154. 3d ed.||

But, though the insured ought to know whether she was seaworthy or not at the time she set out upon her voyage; yet, if it can be shewn that the decay to which the loss is attributable did not commence till a period subsequent to the insurance, the underwriter will be liable, if she should be lost a few days after her departure.

It was said by Lord Mansfield, that " by an implied warranty " every ship insured must be tight, staunch, and strong; but, it is " sufficient Vol. V. I i Eden v. Parkinson, Dougl.

708. *Watson v. Clarke*, 1 Dow. 344. || “ sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable.”

Munro v. Vandam, 1 Park. Ins. 333. || *Parker v. Potts*, 5 Dow. 25. *Watson v. Clark*, 1 Dow. 344. || However, if a ship sail upon a voyage, and in a day or two become leaky and founder, or be obliged to return to port, without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not seaworthy when she sailed; and the jury, upon the plaintiff's own case, may draw such a conclusion.

344. *Douglas v. Scougall*, 4 Dow. 269.

Shoolbred v. Nutt, *Sittings at Guildhall*, after Hil. 1782. || *Park*, 346. 7th ed.; and see 4 *East*, 598. || As it is a condition or implied warranty in every policy of insurance that the ship is seaworthy, there need be no representation of that, for if she sail without being so, the policy is void. And any insufficiency in her former voyage will not vacate the policy.

Park, 252. || See *Potts v. Ball*, 8 Term Rep. 548. ||

Johnson v. Sutton, Dougl. 254. || *S. P. Vanharthals v. Halhed*, 1 *East*, 487. n. ||

|| **ILLEGAL VOYAGES AND VOID POLICIES.** || — Whenever an insurance is made on a voyage expressly prohibited by the common law, statute, or maritime law of this country, the policy is void.

The goods on board a ship were insured “ at and from *London* to *New York*, warranted to depart with convoy from the channel for the voyage.” She had provisions on board, which she had a licence to carry to *New York*, under a proviso in the prohibitory act of 16 G. 3. c. 5.; but *one half of the cargo, including the goods which were the subject of this insurance, was not licensed*. The commander-in-chief had issued a proclamation to allow the entry of unlicensed goods; but he had no authority under the act of parliament to issue such proclamation, or to permit the exportation of unlicensed goods. The statute prohibits all intercourse with *New York*, and confiscates all ships trading to that place, unless they have a licence. The court held the policy was void: it is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot substantiate a contract in direct contradiction to law.

Delmada v. Motteux, *B. R. Mich.* 25 Geo. 5. *Park*, 357. 7th edit. || *Marsh. on Ins.* 75.; and see *Gibson v. Service*, 5 Taunt. 455. *S. C.* 1 *Marsh. Rep.* 119. ||

Parkin v. Dick, 11 *East*, 502. *S. C.* 2 *Camp.* 221. || And if a general insurance be effected on goods, part of which is of a nature to make the voyage illegal, the policy is entirely vitiated.

But it is otherwise, if no other part of the cargo, except that illegally exported, could have been seized and forfeited: and, therefore, where 300 barrels of gunpowder were exported, half of which only were licensed, the insurance as to the 150 which were licensed was held valid. ||

Keir v. Andrade, 6 Taunt. 498. 2 *Marsh. Rep.* 196.; and see *Pieschell v. Allnutt*, 4 Taunt. 792.

Brandon v. Nesbitt, 6 Term Rep. 25. *Bristow v. Towers*, *Id.* 35.; || and see *Brandon v. Curling*, 4 *East*, 410. *Oom v. Bruce*, 12 *East*, 225. (a) But the king's licence, or since the 48 Geo. 5.

c. 126. the licence of the secretary of state, will legalize the insurance, though it will not entitle the alien to sue in his own name. *Kensington v. Inglis*, 8 East, 275. *Rawlinson v. Jansen*, 12 East, 223. *Robinson v. Morris*, 5 Taunt. 730.; and licences to trade with an enemy are construed liberally. *Groning v. Crockett*, 3 Camp. 85. *Schroeder v. Vaux*, 15 East, 52. *Effurth v. Smith*, 5 Taunt. 529. *Flindt v. Scott*, 5 Taunt. 674.; and see *Marsh.* on *Ins.* 86, 87. ||

|| Lord *Alvanley* has, however, declared it to be his opinion, that an insurance of foreign property is good against all losses but that arising from capture by *British* forces. (a) On this excepted head the Court of Common Pleas has decided, that no action can be maintained for a loss by *British* capture, though the policy was effected before the war, and the action brought after it. (b) But though *foreign* property cannot be insured against *British* hostile capture, yet it seems that *British* property may be legally insured against *British* capture, seizure, and detention. (c)

suprà. *Kellner v. Le Mesurier*, 4 East, 396. *Gamba v. Le Mesurier*, 4 East, 407. (c) *Lubbock v. Potts*, 7 East, 449.

The goods of a neutral, consigned for him to a friendly port, may be insured, though he be resident in an enemy's country. (d) And a neutral, residing in an enemy's country, and carrying on trade therein in partnership with an alien enemy, may insure his own interest in the joint property. (e) ||

Edie, 6 Term Rep. 413.; and see *Marshall*

An insurance upon a smuggling voyage, prohibited by the revenue laws of this country, would be void. *Aliter*, if merely against the revenue laws of a foreign state; for no country pays attention to the revenue laws of another.

London Sittings, Hil. Vac. 1780. *Park*, 360. 7th ed.; || and see *Marshall* on *Ins.* 52. ||

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void. And this rule prevails, whether the insurer did or did not know that the subject of the insurance was a prohibited commodity.

Bell, 3 Bos. & Pul. 604. *Camden v. Anderson*, 6 Term Rep. 723. 1 Bos. & Pul. 272.; and see *Marshall* on *Ins.* 57. ||

By statute 4 & 5 W. & M. c. 15. § 14, 15, 16. a penalty of 500*l.* is inflicted on the insurer, who shall by way of insurance procure the importation of prohibited goods; and a like penalty on the insured.

By 8 & 9 W. 3. c. 36. § 1. the importation of any foreign alammodes or lustrings, by way of insurance or otherwise, without paying the duties, is expressly prohibited.

By 28 G. 3. c. 38. § 45. persons making insurances on wool, &c. are liable for the first offence to a fine of 50*l.* and six months solitary imprisonment. The same penalty is imposed on the insured, and the insurance is void.

|| But a legal cargo may be insured, though purchased with the proceeds of an illegal one; and though the ship had, by her previous illegal commerce, been subjected to seizure and confiscation. ||

(a) *La Furtado v. Rodgers*, 3 Bos. & Pul. 191.; but see the judgment of Lord *Ellenborough* in *Brandon v. Curling*, 4 East, 410. (b) *Furtado v. Rodgers*,

(d) *Bromley v. Heseltine*, 1 Camp. 75.; and see *Barker v. Blakes*, 9 East, 285. (e) *Rotch v.* on *Ins.* 40. 82.

Planchè v. Fletcher, Dougl. 238. *Lever v. Fletcher*,

on *Ins.* 52. || *Park*, 244. || *Lubbock v. Potts*, 7 East, 449. *Chalmers v.*

on *Ins.* 272.; and

Bird v. Appleton, 8 Term Rep. 562.; and see *Marshall* on *Ins.* 68. 3d edit.

In a policy, “valued free from average,” and “interest or no interest,” it is manifest, that the performance of the voyage or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance.

Assievido v.
Cambridge,
10 Mod. 77.
|| See Marshall
on Ins. 122.||

It was declared from the Bench, in the reign of Queen Anne, that such insurances were *formerly* bad; for it is said in that case, that in former times, if one had no interest, though the policy ran, *interest or no interest*, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or uninterested in the subject-matter, should profit by them.

Depaiba v.
Ludlow,
Comyn's Rep.
360.

The idea thus started is very much confirmed by what fell from the court, in the case of *Depaiba v. Ludlow*: for the court there observed, that the insurances upon interest or no interest were introduced *since* the revolution.

But though this mode of insuring thus gained a footing in *England*, yet when introduced, the courts of justice looked upon these contracts with a jealous eye; and by their determinations shewed the strong prejudices which they entertained against them. The courts of equity, in particular, manifested that their inclination would lead them as much as possible to suppress such a species of contract: nay, that they still considered them as void.

Goddart v.
Garrett,
2 Vern. 269.
|| 1 Eq. Ca. Ab.
571. See
2 New R. 296.||

The defendant had lent money on a bottomry bond, but had no interest in the ship or cargo; the money lent was 300*l.*, and he insured 450*l.* on the ship: the plaintiff's bill was to have the policy delivered up; because the defendant was not concerned in point of interest, as to the ship or cargo. *Per Curiam*, — Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, though it be expressed in the policy, *interested or not interested*. The reason the law goes upon is, that insurances were made for the benefit of trade, and not that persons unconcerned therein, and who were not interested in the ship, should profit thereby; and *where one would have the benefit of the insurance, he must renounce all interest in the ship*. And the reason why the law allows that a man, having some interest in the ship or cargo, may insure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship. *Per Cur.* — Decree the policy to be delivered up to be cancelled.

Le Pypre v.
Farr, 2 Vern.
716.

So, on a policy of insurance on goods, by agreement valued at 600*l.*, the insured not to be obliged to prove any interest, the Lord Chancellor ordered the defendant to discover what goods he put on board; for although the defendant offered to renounce all interest to the insurers, yet it must be referred to the master to examine the value of the goods saved, and to deduct it out of the value or sum of 600*l.*, at which the goods were valued by the agreement.

Goss v.
Withers,
2 Burr. 865.;
|| and see

The difference between policies upon interest, and such as are not, was, that in policies upon interest the insured recovered for the loss actually sustained, whether it were total or partial; but

but upon a wager policy he could never recover but for a total loss.

Cousins v.
Nantes,
3 Taunt. 513.¶

It is enacted by stat. 19 Geo. 2. c. 37. that insurances made on ships or goods, *interest or no interest*, or, *without further proof of interest than the policy*, or *by way of gaming or wagering*, or *without benefit of salvage to the insurer*, shall be void. By § 2. there is an exception for insurances on private ships of war, fitted out solely to cruise against his majesty's enemies; and also by § 3. on any merchandizes or effects, from any ports or places in *Europe or America*, belonging to the crowns of *Spain or Portugal*.

This statute hath been frequently holden not to extend to insurances of foreign property, and on foreign ships.

Thellusson v.
Fletcher,
Doug. 515.

It hath been also frequently holden upon this act, that a valued policy is not a wager policy, for the insured must prove some interest, although he need not prove the value of this interest. If, indeed, it could be made appear, that a valued policy were used merely as a cover to a wager, in order to evade the statute, it would be void.

Lewis v.
Rucker,
2 Burr. 1167.
Grant v. Park-
inson, Mich.
22 G. 3. B. R.
Marsh. Ins.

95. 3d edit. Da Costa v. Firth, 4 Burr. 1966.

Upon a joint capture by the army and navy, the officers and crew of the ships have, before condemnation, an insurable interest by virtue of the prize act, which usually passes at the commencement of a war.

Le Cras v.
Hughes, B. R.
East. 22 G. 5.
Park, 269.
[S. C. Marsh.
105. 3d edit.]

¶ And since the passing of the stat. 45 Geo. 3. c. 72., which directs that property taken in conjunct expeditions of the army and navy shall be divided among the joint-captors, it has been held that the captors had an insurable interest in such prizes before condemnation, subject to the apportionment of the crown.¶

Stirling v.
Vaughan,
2 Camp. 225.
S. P. 11 East,
619.

All insurances, made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, and are void. Thus, where the defendant, in consideration of 20*l.* paid by the plaintiff, undertook that the ship should save her passage to *China* that season, or that he would pay 1000*l.* within one month after her arrival in the river *Thames*; the contract was holden to be void, although the plaintiff had some goods on board.

Kent v. Bird,
Cowp. 583.

Wherever the court can see upon the face of the policy that it is merely a contract for gaming, where indemnity is not the object in view, they are bound to declare such policy void. As, where by the policy it appeared, that the plaintiffs had lent 26,000*l.* on bond to a captain of an *East Indiaman*, to which amount the ship and cargo were insured, and that in case of loss no other proof of interest was to be required than the exhibition of the bond; the court held, that the contract was void.

Lowrey v.
Bourdieu,
Doug. 451.

As to re-assurances; it is declared by stat. 19 G. 2. c. 37. § 4. that it shall not be lawful to make re-assurance, unless the insurer be insolvent, become a bankrupt, or die; in any of which cases, such insurer, his executors, administrators, or assigns, may make

re-assurance to the amount before by him insured, expressing in the policy that it is a re-assurance.

André v.
Fletcher,
2 Term Rep.
161.

A re-assurance was made by the defendant on a *French* vessel, first insured by a *French* underwriter at *Marseilles*, who was living, and, at the time of subscribing the second policy, was solvent. The court were unanimously of opinion that this re-assurance was void; and that every re-assurance in this country, either by *British* subjects or foreigners, on *British* or foreign ships, is void by the statute, unless *the first assurer be insolvent, become a bankrupt, or die.*

Newby v.
Reed, Sittings
in London,
East. Vacat.
1763, 1 Bl.
Rep. 416.

In the year 1763, it was ruled by Lord *Mansfield* Chief Justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions, yet upon the first action he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the other insurers.

Rogers v.
Davis, Sittings
in Mich. Vac.
17 G. 3. before
Lord *Mansfield*. ||Park,
425. 7th edit. ||

Thus, also, it was determined in a subsequent case at *Guildhall*. It was an action on a policy of insurance on a ship from *Newfoundland* to *Dominica*, and from thence to the port of discharge to the *West Indies*. It was a valued policy on the ship and freight; and on the goods as interest should appear. The ship sailed from *Saint John's* the 17th of *December*, 1775; and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.*, and paid into court 124*l.* This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward Islands*, with an exception of *American* captures: but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was entitled to receive the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage now insured was different from that insured at *Liverpool*. There was, however, a verdict for the plaintiff for his full demand, *with liberty for the defendant to bring an action against the Liverpool underwriters, if he thought fit.*

Davis v.
Gildart, Sittings
in East. Vac. 17 G. 5.
at *Guildhall*.
||Park, 424.
7th edit. ||

Accordingly, in the *Easter* term following, an action was brought for money had and received to the use of the plaintiff, who was the defendant in the last cause, in order to recover a contribution for the loss which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the subject of the former action) 2200*l.* were insured: that on the two *Liverpool* policies 1700*l.* were insured: that the merchant was interested to the amount of 500*l.* on the ship; 300*l.* on the freight; and 1400*l.* on the cargo. That the plaintiff had paid 200*l.* loss, and 47*l.* for the costs. The question was, Whether the defendant was liable to contribute any thing, and what? The whole interest was 2200*l.*, and the whole insurance was 3900*l.* It was insisted by the counsel for the defendant, that the insurance in *London* was an illegal re-assurance;

ance; and therefore the plaintiff might have made a good defence in an action brought against him: and if so, he could not now recover over against the defendant.

Lord *Mansfield*. — The question seems to be, whether the insured has not two securities for the loss that has happened? If so, can there be a doubt that he may bring his action against either? It is like the case of two securities; where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance is void as a *re-assurance*? But a re-assurance is a contract made by the insurer to secure himself; and *this is only a double insurance*. — There was another ground taken in the cause, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

Although a man, by making a double insurance, shall not be allowed to recover a double satisfaction for the same loss, yet various persons may insure various interests on the same thing, and each to the whole value (as the master for wages, the owner for freight, one person for goods, another for bottomry); and such a contract does not fall within the idea of a double insurance.

¶ If a policy be effected on behalf of a person having a certain interest, the proceeds of the insurance cannot be claimed by another person not privy to the insurance, though he has a distinct interest in the subject-matter insured. Thus, where *A.* sold goods to *B.*, to be shipped at *B.*'s risk to *Lisbon*, to be paid for by bills drawn upon *R.* and *Co.*, and *C.* went as supercargo and trustee for *A.* and *B.*, and was to retain possession of the goods until the amount of bills drawn upon *R.* and *Co.* was remitted, and then the bills of lading were to be delivered up to *B.*: *B.* directed *R.* and *Co.* to effect an insurance, which was done at *B.*'s expense, and not in pursuance of any agreement with *A.*; and the ship, with the goods on board, was captured, and the underwriters paid a total loss to *R.* and *Co.*, who gave *B.* credit for the money, part of which they paid over to him, and part to *B.* after his bankruptcy. *R.* and *Co.* paid part of the bills drawn upon them, and rejected others. In an action brought by *A.* against *R.* and *Co.* for money had and received to his use, it was held, that they were not bound to apply the money paid on the policy to the discharge of the bills drawn by *B.* for the goods.

Where it is stated, in a case reserved for the court's opinion, that the interest in the insurance is in *A.*, the court is precluded from taking any notice of a count in the declaration avowing the interest to be in *B.* Where the defendant had taken bills of lading from a bankrupt after his bankruptcy as security for a debt due from the bankrupt, and the defendant effected for his own account an insurance on the cargoes, and a loss happening he recovered from the underwriters on a count alleging the interest in the assignees of the bankrupt; it was held, that defendant did not become a trustee for the assignees of the sum recovered,

Godin v. Lond. Assur. Company,
1 Burr. 489.
1 Bl. Rep. 103. S. C.
|| *Lucena v. Craufurd*,
2 N. R. 292. ||

Neale v. Reid, 1 Barn. & C. 657.;
and see *Sideways v. Todd*,
2 Stark. Ca. 400.

Routh v. Thompson,
11 East, 428.

Grant v. Hill, 4 Taunt. 380.; but it would rather seem that the underwriters might in such case recover back the

money paid to the defendant. and that they could not recover the sum as money had and received to their use.

Hagedorn v.
Oliverson,
2 Maul. & S.
485.

But an insurance effected for the benefit of a third person, although without his authority, may be adopted by such third person; and in such case the interest may be alleged to be in him. ||

|| OF DEVIATION. ||— A deviation is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular or usual course of the specific voyage insured. Whenever this happens the voyage is determined; and the insurers are discharged from any responsibility.

The reason of this is, because the ship goes upon a different voyage from that against which the insurer undertook to indemnify.

Nor is it material whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference whether the insured was or was not consenting to the deviation.

Fox v. Black,
Exeter Ass.
1767, coram
Yates J.
2 Park, Ins.
488.

A ship was insured from *Dartmouth* to *Liverpool*; she put into *Loo*, a place she must of necessity pass by; and although no accident befel her in going into or coming out of *Loo* (for she was lost after she got out to sea), it was held to be a deviation.

Townson v.
Guyon, before
Lord Mans-
field, *ibid*.

A ship being insured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* pass; and it was held to be a deviation.

Raine v. Bell,
9 East, 195.
Cormack v.
Gladstone,
11 East, 347.

|| But a ship may *trade* where she has liberty to *touch*, without express permission; provided this occasion no delay or additional risk. ||

Laroche v. Oswin, 12 East, 131.

Park, Ins. 488.

If the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation.

|| Williams v.

Shee, 3 Camp. 469. *Redman v. Loudon*, 3 Camp. 503. 5 Taunt. 462. ||

Elliot v.
Wilson,
7 Br. P. C
459.

The insured ordered their broker to insure on a particular vessel from *Carron* to *Hull*, with liberty to call as usual. These instructions were entered in the broker's books; and the insurer subscribed a policy on the goods, "at and from the loading thereof, on board the said ship at *Carron* wharf, and to continue and endure until the said ship (*being allowed a liberty to call at Leith*) shall arrive at *Hull*." It being usual for these vessels to call at *Borrowstoness*, *Leith*, and *Morison's Haven*, this vessel stopped at the latter; and received no damage in going into or coming out of it. The courts in *Scotland* held it was no deviation; but their judgment was reversed in the House of Lords.

Beatson v.
Howard,
6 Term Rep.
531.

If several places are named in the policy, the ship must go to those places in the order in which they are named, unless some usage, or some special facts be proved, to vary the general rule.

|| And

¶ And leave to call at all or any of the *West India Islands* must be confined to places in their geographical order in the course of the voyage (a), and will not justify going to any of them for purposes unconnected with the voyage. (b)¶
 4 Barn. & A. 72.; and see *Rucker v. Allnutt*, 15 East, 278. *Langhorne v. Allnutt*, 4 Taunt. 519. *Solly v. Whitmore*, 5 Barn. & A. 46. *Bottomley v. Bovill*, 5 Barn. & C. 211.

(a) *Gairdner v. Senhouse*, 3 Taunt. 16.
 (b) *Hammond v. Reid*,

If the deviation be but for a single night, or for an hour, it is fatal.
Guildhall, Hil. 1741. ¶ cited by *Lawrence J.* 6 Term Rep. 433.¶

Clason v. Simmond,
 Sittings at

A ship was bound from *Cork* to *Jamaica*, under convoy. Being of force, she, with two other vessels, took advantage of the night, and cruised in hopes of meeting with a prize; it was held a deviation.

Cock v. Townson,
 C. B. before
 Lord *Camden*.

But, if a merchant ship carry letters of marque, she may chase an enemy, though she may not cruise, without being deemed guilty of a deviation.

Jolly v. Walker,
 Sittings at *Guildhall* after *East*.

1781. ¶ *Parr v. Anderson*, 6 East, 202.¶

¶ Liberty, however, to a letter of marque to chase, capture, and man prizes, will not enable her to convoy a prize taken by her into port (c); nor will the further liberty to see into port any prize justify her waiting in port to get a prize repaired. (d)¶
 Ward, 1 Camp. 265.; and see *Hibbert v. Halliday*, 2 Taunt. 428.

(c) *Lawrence v. Sydebotham*, 6 East, 45.

(d) *Jarratt v.*

If the insured, without the knowledge of the underwriters, take out a letter of marque, (but without a certificate, which by the prize act of the 33 Geo. 3. c. 66. § 15. is absolutely necessary to its validity,) for the purpose of inducing the seamen to enter, and without any intention of cruising, this does not so essentially vary the risk, as to avoid the policy.

Moss v. Byrom, 6 Term Rep. 379.
 ¶ And see
Toulmin v. Inglis, 1 Camp. 421.¶

In an action on a policy of insurance on freight of the ship *Bethiah* at and from *Bordeaux* to *Virginia*, warranted *American* ship and property; the declaration alleged, that the ship was an *American* ship, and the property of *American* subjects. The plaintiff proved the ship to be *American*, and it was to have been contended, that the warranty extended to the goods on board as well as to the ship; but upon the evidence it appeared, that the goods, whether *American* or not, were to be carried in the ship from *Bordeaux* to *Saint Domingo*, and that she was only to call at *Norfolk* in *Virginia* for orders; so that it was unnecessary to decide or discuss the question upon the construction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect, that the goods upon which the freight was payable were consigned to *Virginia*; and that if the freight was payable for the carriage of them from *Bordeaux* to *Saint Domingo*, the underwriters were not liable for the loss, though the ship was to call at *Norfolk* for orders, the freight payable being in such case different from the freight insured. The plaintiff was accordingly nonsuited, and no application was made to set the nonsuit aside.

Murdock v. Potts,
 Sittings at *Guildhall*,
 after Tr. 1795.

Wherever the deviation is occasioned by absolute necessity,—
 as, *Elton v.*

Brogden, as, where the crew forced the captain to deviate,—the underwriter
 2 Str. 1264. continues liable.
 ||Driscoll v. Pul. 313. Scott v. Thompson, 1 New Rep. 181.||

Warwick v. || If part of the crew who are necessary to the navigation of
 Scott, the ship be arrested by a press-gang, and the captain go ashore
 4 Camp. 62. to procure their release, a delay so occasioned arises *ex justâ causâ*, and the underwriters will not be discharged by it; *aliter*, if they are unnecessary.

O'Reilly v. But the deviation must be from strict necessity, or the under-
 Gonne, writers will be discharged. Thus, where the master of a mer-
 4 Camp. 249.; chant vessel, while taking in his loading at a port, was ordered by
 and see Wolf a king's ship to go out to sea, to examine a strange sail in the
 v. Clagett, offing, and the master without compulsion, or making any remon-
 3 Esp. Ca. 277. strance, obeyed, this was held an inexcusable deviation.||
 Phelps v. Auldjo, 2 Camp. 350.; and see Forshaw v. Chabert, 3 Brod. & B. 158. O'Reilly v. Royal Ex-
 change Assurance, 4 Camp. 246.

Motteux v. If a ship is decayed, and goes to the nearest port to refit, it is
 London no deviation.
 Assurance
 Company, 1 Atk. 545.

Harrington v. Wherever a ship, in order to escape a storm, goes out of the
 Halkeld, direct course; or when, in the due course of the voyage, she is
 Sittings at driven out of it by stress of weather; this is no deviation.
 Guildhall,
 after Mich. 1788.

Delaney v. If a storm drive a ship out of the course of her voyage, and
 Stoddart, she do the best she can to get to her port of destination, she is
 1 Term not obliged to return to the point from which she was driven.
 Rep. 22. Smith v. McNeil, 2 Dow. R. 538.||

||(a) Or to A deviation may also be justified, if done to avoid an enemy,
 succour a or to seek for convoy (a); because it is, in truth, no deviation to
 ship in dis- go out of the course of a voyage in order to avoid danger, or to
 tress. *Per* obtain a protection against it.
Lawrence J.
 in *Lawrence v. Sidebotham*, 6 East, 54.||

Bond v. In an action upon a policy, which was to insure the *William*
 Gonsales, *Galley* in a voyage from *Bremen* to the port of *London*, war-
 2 Saik. 448. ranted to depart with convoy, the case was this: the *Galley* set
 sail from *Bremen*, under convoy of a *Dutch* man-of-war to the
Elbe, where they were joined by two other *Dutch* men-of-war,
 and several *Dutch* and *English* merchant ships, whence they sailed
 to the *Texel*, where they found a squadron of *English* men-of-
 war and an admiral. After a stay of nine weeks, they set out
 from the *Texel*, and the *Galley* was separated in a storm, and
 taken by a *French* privateer, taken again by a *Dutch* privateer,
 and paid 80*l.* salvage. It was ruled by Lord Chief Justice *Holt*,
 that the voyage ought to be according to usage, and that their
 going to the *Elbe*, though in fact out of the way, was no devia-
 tion; for till after the year 1703, there was no convoy for ships
 directly from *Bremen* to *London*. And the plaintiff had a ver-
 dict.

On an insurance from *London* to *Gibraltar*, warranted to depart with convoy, it appeared, there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way thither. The insurers insisted, that this being the time of a *French* war, the ship should not have ventured through the channel, but have waited in the *Downs* for an occasional convoy: and many merchants and office-keepers were examined to that purpose. But Lord Chief Justice *Lee* held, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the *Downs*. The juries were composed of merchants; and in both cases they found for the plaintiffs upon the strength of this direction.

Gordon v. Morley, Campbell v. Bourdieu, 2 Stra. 1265.

In the case of *Bond* against *Nutt*, the point of deviation for the purpose of procuring convoy also came under the consideration of the court. Upon that occasion, Lord *Mansfield* and the whole court held, that if a ship go to the usual place of rendezvous, for the sake of joining convoy there ready, though such place be out of the direct course of the voyage, it is no deviation.

Cowp. R. 601.

And in a more modern case, the only question was, whether there was a deviation or not? Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bonâ fide* acted according to the best of his judgment: that he had no other view or motive but to come the safest way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

Enderby and another v. Fletcher, Sittings in London, Trin. Vac. 1780. ||Park, 463. 7th edit.||

In our law books it is sometimes said, that a deviation may be justified by the usage and custom of the trade. But that is not quite correct; for if by the usage of any particular trade it is customary to stop at certain places, lying out of the direct course from *A.* to *B.*, it is not a deviation to stop there, because it is a part of the voyage. There is no deception upon the insurer, because he is bound to take notice of the usages of trade; they are notorious to all the world; and when the usage has declared it lawful in a specific voyage to go to any place, though out of the immediate track, it is as much a part of the contract of insurance between the parties as if it had been particularly mentioned. But in order to justify the captain of a ship in quitting the straight and direct line from the port of loading to that of delivery, there must be a precise, clear, and established usage upon the subject, not depending merely upon one or two loose and vague instances.

Where a ship was insured from *Liverpool* to *Jamaica*, and had put into the *Isle of Man*; it appeared that there were some instances of the *Liverpool* ships putting in there, but it was not the settled, common, established, and direct usage of the voyage and trade: it was therefore held a deviation, and the underwriters

Salisbury v. Townson, Park, 309.

were.

were discharged from any loss that happened subsequent to the deviation.

Cowp. 601.

Wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the intention and spirit of the policy, and, consequently, as much protected by it, as if expressed in terms. And therefore in all cases, in order to determine whether a diversion from the direct course of the voyage is such a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and consequences of the act, as the true criterion of judgment.

Lavabre v.
Walter,
Dougl. 271.

If any of the circumstances above stated do really and *bonâ fide* occur, so as to render a deviation absolutely necessary, the ship must pursue such *voyage of necessity* in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged. Because a voyage superadded by necessity ought to be subject to the same qualifications, and entitled only to the same sort of latitude, as the original voyage, it having become, by operation of law, a part, as it were, of that original voyage.

Foster v.
Wilmer,
2 Stra. 1249.
||Heselton v.
Allnutt,
1 Maul. & S.
45. ||
Ld. Ch. Just.
Lee.

But though an actual deviation from the voyage insured is thus fatal to the contract of insurance, yet a deviation merely intended, but never carried into effect, is considered as no deviation, and the insurer continues liable. This has been frequently so decided. Thus, in the case of an insurance from *Carolina* to *Lisbon*, and at and from thence to *Bristol*; it appeared, that the captain had taken in salt, which he was to deliver at *Falmouth*, before he went to *Bristol*; but the ship was taken in the direct road to both, and before she came to the point where she would have turned off to *Falmouth*. It was held, that the insurer was liable; for it is but an *intention to deviate*, and that was held not sufficient to discharge the underwriter.

2 Stra. 1249.

In the case of *Carter v. the Royal Exchange Assurance Company*, where the insurance was from *Honduras* to *London*, and a consignment to *Amsterdam*; a loss happened before she came to the dividing point between the two voyages, for which the insurers were held liable to pay.

Dougl. 346.

The doctrine laid down in these cases has since been frequently recognized in subsequent decisions, and particularly by Lord Mansfield in the case of *Thellusson v. Fergusson*. The insurance was from *Guadaloupe* to *Havre*; and one of the grounds of defence was, that the ship never sailed from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Brest*. Lord Mansfield, in answer, said, "the voyage to *Brest* was, at most, but an *"intended deviation, not carried into effect."*

If, however, it can be made appear by evidence, that it never was intended, nor came within the contemplation of the parties, to sail upon the voyage insured; if all the ship's papers and documents be made out for a different place from that described in the policy, the insurer is discharged from all degree of responsibility, even though the loss should happen before the dividing point of the two voyages. This distinction was very properly taken by the Court of King's Bench, in a very modern case: and

by

by that distinction they admitted the general doctrine, with respect to the intention to deviate, in its fullest extent.

Wooldridge
v. Boydell,
Dougl. 16.

The ship *Molly*, being insured "at and from *Maryland* to *Cadiz*," was taken in *Chesapeake Bay*, in the way to *Europe*. Upon this the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Mansfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the case appeared to be as follows:—The ship was cleared from *Maryland* to *Falmouth*, and a bond given that all the enumerated goods should be landed in *Britain*, and all the other goods in the *British* dominions. An affidavit of the owner stated that the vessel was bound for *Falmouth*. The bills of lading were, "To *Falmouth* and a market:" and there was no evidence whatever that she was destined for *Cadiz*. The place where she was taken was in the course from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for *Falmouth* nor *Cadiz*, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact. At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they must find for the plaintiff. If, on the contrary, they should think there was no design of going to *Cadiz*, they must find for the defendant. It also appeared in evidence, that the premium to insure a voyage from *Maryland* to *Falmouth*, and from thence to *Cadiz*, would have greatly exceeded what was paid in this case. Upon the motion for a new trial being argued, the counsel for the plaintiff cited the two cases above stated from *Strange's Reports*.

Lord *Mansfield*,—The policy on the face of it is from *Maryland* to *Cadiz*, and therefore purports to be a direct voyage to *Cadiz*. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus à quo*, and *ad quem*, were certain and the same. Here, was the voyage ever intended for *Cadiz*? There is not sufficient evidence of the design to go to *Boston* for the court to go upon. But some of the papers say to *Falmouth* and a market: some to *Falmouth* only. None mention *Cadiz*, nor was there any person in the ship who ever heard of any intention to go to that port. A market is not synonymous to *Cadiz*; that expression might have meant *Naples*, *Leghorn*, or *England*. No man upon the in-

structions

structions would have thought of getting the policy filled up to *Cadiz*. In short, that was never the voyage intended, and, consequently, is not what the underwriters meant to insure.

Way v.
Modigliani,
2 Term
Rep. 50.

In a later case the same doctrine was holden; viz. that if a ship be insured from a day certain from *A.* to *B.*, and, before the day, sail on a different voyage from that insured, the assured cannot recover; even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached.

Kewley v.
Ryan,
2 H. Bl. Rep.
545.

An insurance was at and from *Grenada* to *Liverpool*; the ship sailed from *Grenada* bound for *Liverpool*, but with a design formed before the commencement of the voyage, as appeared by the clearances, and was admitted on all sides, to touch at *Corke*, in her way to *Liverpool*, but was totally lost before she arrived at the dividing point. The court of C. P. held, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge v. Boydell* it appeared, there was no intention in the ship to go to *Cadiz*, which was mentioned as her port of delivery, at all; and in *Way v. Modigliani* there was an actual deviation, by the ship going to fish on the banks of *Newfoundland*: these cases therefore were wholly different from the present, for here the ship was really bound to *Liverpool*, though there were also clearances for *Corke*.

From the proposition just established, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate consequence, that whatever damage is sustained before actual deviation will fall upon the underwriters.

Green v.
Young,
2 Ld. Raym.
840. 2 Salk.
444. S. C.
||Heselson v.
Allnutt,
1 Maul. & S.
46.||

Thus it was held by Lord Chief Justice *Holt*, who said, that if a policy of insurance be made to begin from the departure of the ship from *England* until, &c., and after the departure a damage happen, &c., and then the ship deviate; though the policy is discharged from the time of the deviation, yet, for the damages sustained before the deviation, the insurers shall make satisfaction to the insured.

Hare v.
Travis,
7 Barn. & C.
14.

||So, where the policy was on pearl-ashes from *Liverpool* to *London*, and the captain took on board goods for *Southampton*, intending to go there, and he accordingly delivered the goods, and then proceeded to *London*; the *termini* of the voyage being the same as those described in the policy, it was held to be the same voyage till the vessel reached the dividing point, and that the policy attached, although putting into *Southampton* was a deviation: and the cargo having received sea-damage in the course of the voyage, it was a question for the jury on the evidence, whether the damage accrued before the deviation or subsequently, since the underwriters were liable for damage sustained previous to the deviation.

Clason v.
Simmonds,
6 Term Rep.
555.

Where the policy is general to all or any ports, &c. in a certain district, without enumerating them, they must be visited in the natural and usual course of the voyage, not in an oblique or inverse order.

But

But if the policy be from *London* to the ship's discharging port or ports in the *Baltic*, with liberty to touch at any port or ports for orders, or any other purpose, the ship, in touching for orders before she has selected her port of discharge, is not confined to take the ports in the successive order in which they lie, but may return to a port she has quitted for orders as to her port of discharge; though, after she has once selected her port of discharge, she must touch at the ports only in their successive order.

Andrews v. Mellish,
5 Taunt. 496.;
and see
16 East, 515.

On a policy from *London* to *New South Wales*, and from thence to all ports and places in the *East Indies* or *South America*, with liberty in that voyage to touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the channel, *Cork* in *Ireland*, *Madeira*, *Cape of Good Hope*, *St. Helena*, and wheresoever the ship might proceed to, as well on this as on the other side of the *Capes of Good Hope* and *Horn*, and for all purposes whatsoever, particularly to trade and sail backwards and forwards, and forwards and backwards: it was held, that after the arrival at *New South Wales*, the ship was only protected by the policy so long as she was sailing on a voyage either to *South America* or the *East Indies*, or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage either to *South America* or the *East Indies*.||

Bottomley v. Bovill,
5 Barn. & C.
210.; and see
Armist v. Innes, 4 B.
Moo. 150.
Langhorn v. Allnutt,
4 Taunt. 518.

Subject to the rules already advanced, deviation or not is a question of fact, to be decided according to the circumstances of the case.

Dougl. 758.

In cases of deviation, the premium is not to be returned; because the risk being commenced, the underwriter is entitled to retain it.

||OF WARRANTIES.|| — A warranty, in a policy of insurance, is a condition or a contingency that a certain thing shall be done or happen; and unless that is performed, there is no valid contract. It is immaterial for what end the warranty is inserted in the contract; but being inserted, it becomes a binding condition upon the insured, and he must shew a *literal* compliance with it.

De Hahn v. Hartley,
1 Term Rep.
345.

Neither is it any matter whether the loss happen in consequence of the breach of warranty or not; for the very meaning of inserting a warranty is to preclude all enquiry about its materiality.

Ibid.

It is also immaterial to what cause the non-compliance is to be attributed; for although it might be owing to wise and prudential reasons, the policy is avoided.

Cowp. 607.

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and representation.

Id. 708.

In order to make *written* instructions binding as a warranty, they must appear on the face of, and make a part of, the policy.

Cowp. 708.

Even though a written paper be *wrapped up in a policy*, and shewn

Bize v.

Fletcher,
Dougl. 12.
notes.

shewn to the underwriters at the time of subscribing; or even *though it be wafered to the policy*, it is not a warranty but a representation.

Thus, when evidence was offered to prove that a paper enclosed was always deemed a part of the policy, Lord *Mansfield* refused to hear it.

Bean v.
Stupart,
Dougl. 10.
Kenyon v.
Berthon,
Dougl. 12.

A warranty written *in the margin* of the policy is considered to be equally binding, and liable to the same strict construction, as if written in the body of the policy.

Words written transversely on the policy were held to be a warranty.

De Hahn v.
Hartley,
1 Term Rep.
545.

Where it was said *in the margin* that the ship sailed from *Liverpool* with *fifty hands and upwards*, the court held this was a warranty; and as she in fact sailed from *Liverpool* with only forty-six, though she had upwards of fifty hands from *Beaumaris*, which is within six hours sail from *Liverpool*, the underwriters were discharged.

Hore v.
Whitmore,
Cowp. 784.

If a man warrant to sail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer answerable: and this rule holds, though the ship be delayed for the best and wisest reasons, or even though she be detained by force. Thus, where a ship was insured at and from *Jamaica*, warranted to sail on or before the 26th of *July*; and it appeared that the ship was ready, and would have sailed on the 25th, *if she had not been restrained by the order and command of Sir Basil Keith, governor of Jamaica, and detained beyond the day*; the insurer was discharged.

Veizan v.
Grant,
coram Buller J.
after East. 1779.

If the warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case.

||Park, 485. 7th ed.||
||Ridsdale v.
Newnham,
3 Maul. & S.
456. 4 Camp.
111. S. C.||

Upon a warranty to sail on or before a particular day, if the ship sailed before the day from her port of loading, *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo, beyond the day. But if her cargo was not complete, it would not be a commencement of the voyage.

Bond v. Nutt,
Cowp. 601.
||Wright v.
Shiffner,
11 East, 515.
S. C. 2 Camp.
247.; and see
Lang v.
Anderdon,
3 Barn. & C.
495.||

A ship being insured at and from *Jamaica* to *London*, warranted to sail on or before the 1st of *August*, was *completely laden* for her voyage to *England* at *St. Ann's* in *Jamaica*, and sailed from thence on the 26th of *July*, for *Bluefields*, in order to join the convoy there; but was detained by an embargo till the 6th of *August*. The court held that the sailing from *St. Ann's* was the commencement of the voyage. For when a ship leaves her port of loading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port.

Moir v. Royal
Exchange

||But if the warranty be to *depart* on or before a certain day, the ship must be actually out of her port of departure on the day, and

and it is not enough that she have broken ground so as to satisfy a warranty to *sail* on that day.||

461. 1 Marsh. 70.

The same doctrine was advanced, even though it was a condition inserted in one of the ship's clearances, that *she should pass by the place* (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government.

Thus also, where an embargo was actually published before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and knowingly sent his ship into the embargo; yet, as he swore that he believed the embargo would be immediately taken off, the underwriter was held liable.

|| WARRANTY TO SAIL WITH CONVOY. — The sailing with convoy is imposed on the insured either by the terms of an act of parliament, or by an express warranty to that effect in the policy.

By the 38 Geo. 3. c. 76., continued by 43 Geo. 3. c. 57., no ship or vessel belonging to his majesty's subjects, except as thereafter mentioned, shall sail from any port or place whatsoever, unless under the convoy (a) or protection of such ship or ships as may be appointed for that purpose. And by § 2. the master or commander of every such ship, &c. is required to use his utmost endeavours to continue with such convoy, and shall not wilfully separate therefrom without leave from the officer commanding the same.

convoy from a port, see *Ridsdale v. Sheddon*, 4 Camp. 109.

By § 3. penalties are imposed on the master or commander sailing without convoy, or wilfully separating therefrom during the voyage.

By § 4., in case of a sailing without or a wilful desertion of convoy, every insurance on ship, goods, or freight, &c. (which shall be the property of the master so sailing without convoy, &c. or of any person interested in such vessel or cargo, who shall have directed or been in any way privy to or instrumental (b) in causing such ship, &c. to sail without convoy, &c.) shall be null and void, and nothing shall be recovered by the insured for loss or damage, or for the premium paid for such insurance.

the insured, unless it is shewn that the agent had authority from the insured for that purpose. *Carstairs v. Alluett*, 5 Camp. 497.; and see *Wake v. Atty*, 4 Taunt. 493. And as the law requires the ship to sail with convoy, the presumption is that she did so till the contrary is proved. *Thornton v. Lance*, 4 Camp. 231. Every person who ships goods in a vessel sailing without convoy, does so at his peril of her having a licence for that purpose for the voyage. *Wainhouse v. Cowie*, 4 Taunt. 178. *Ingham v. Agnew*, 15 East, 517. *Darby v. Newton*, 2 Marsh. 252.

By § 5., (c) officers of customs shall not permit vessels to clear outwards till they have given bond (d) not to sail without or wilfully desert convoy.

(d) This bond has been received as evidence that the ship sailed on the voyage insured. *Cohen v. Hinckley*, 2 Camp. 50.

By § 6. the act is not to extend to any vessels not required to be registered (e), nor to ships having licence from the Admiralty

Assurance,
4 Camp. 84.
5 Maul. & S.
6 Taunt. 241.

Thellusson v. Ferguson,
Dougl. 346.

Earle v. Harris, at
Guildhall,
Hil. Vac.
1780.

(a) It must be a convoy for the voyage on which the ship is sailing.
Cohen v. Hinckley,
1 Taunt. 249.
What shall be considered a sailing with

(b) To vacate the insurance it is not enough to shew that the ship sailed without convoy by the instrumentality of an agent of

(c) See
Hinckley v. Walton,
3 Taunt. 131.

(e) See *Long v. Duff*, 2 Bos. & Pul. 209.

(a) Where no convoys are appointed at the port from which the ship commences her voyage, she is not bound to call for convoy at a port in course of the voyage. *Park v. Hamond*, 4 Camp. 544.

If the insured warrant that the vessel shall depart with convoy, and it do not, the policy is defeated, and the underwriter is not responsible.

A convoy means a naval force, under the command of that person whom government may happen to appoint.

Hibbert v. Pigou,
B. R. East.
 23 Geo. 5.
 2 Park, 499.
Qu. Whether sailing orders from the commander-in-chief to the particular ships are necessary to constitute a convoy? ||*See Webb v. Thompson*, 1 Bos. & Pul. 5.]]

But a convoy appointed by the admiral, commanding in chief upon a station abroad, is a convoy appointed by government.

Lethulier's case, 2 Salk.
 443. *Gordon v. Morley*,
 2 Stra. 1265. S. P.

A sailing with convoy from the usual place of rendezvous, as *Spithead* for the port of *London*, is a departure with convoy, within the meaning of such a warranty.

2 Salk. 445.
Jeffreys v. Legendra,
 5 Lev. 520.
Lilly v. Ewer, Dougl. 71.

Although the words used generally are "to depart with convoy," or "to sail with convoy," yet they extend to sail with convoy throughout the voyage.

But an unforeseen separation from convoy is an accident to which the underwriter is liable.

Victoria v. Cleeve,
 2 Stra. 1250.
 ||*Verdon v. Wilmot, Park*,
Ins. 500.
 (7th ed.) *Laing v. Glover*,
 5 Taunt. 49.

It hath been so determined where a ship was separated from her convoy by storm, and by storm prevented from rejoining it, and was lost. And even where the ship has by tempestuous weather been prevented from joining the convoy, at least, so as to receive the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy.

Taylor v. Woodmess,
Sittings at Guildhall,
Hil. Vac.
 4 Geo. 3.
Park, 510. 7th ed. ||*Anderson v. Pitcher*, 2 Bos. & Pul. 164. *Waltham v. Thompson*, Marsh. *Ins.* 381.]]

But it is otherwise, if the not joining be owing to the negligence and delay of the captain. As, where repeated signals for sailing had been made the night before, and continued next day from seven till eleven; notwithstanding which the ship insured did not sail till two hours after.

But

But if the course upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or, if government appoint a convoy to escort the trade of a place to a given latitude, and no farther; and there be no convoy on that station; a vessel taking advantage of such a convoy has complied with the warranty to sail with convoy for the voyage.

De Gray v. Claggett, Lond. Sittings, after Mich. 1795.
D'Eguino v. Bewicke, 2 H. Bl. 551.
[Audley v. Duff, 2 Bos. & Pul. 111. Warwick v. Scott, 4 Camp. 62.]

||WARRANTY OF NEUTRALITY.|| — If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*.

In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury that they were not neutral. The court therefore, though the loss happened by storms, and not by capture, declared that the contract was void.

||A warranty of neutrality is not satisfied by the owner being a native of the neutral country, if he reside and carry on trade in the dominions of a belligerent power; for in such case he must be considered as adhering to the enemy, and his property is liable to confiscation in a court of prize—and this notwithstanding he may have the *animus revertendi* to his native country, and though his ship may be built there, and equipped as a neutral ought to be.

And a warranty that a ship is of a particular country means that she is entitled to all the privileges of the flag of that country, in order to which she must be properly documented; and if she is not, the insurers are discharged, though no inconvenience in fact be sustained for want of the proper documents.||

Claggett, 3 Bos. & Pul. 201. Baring v. Christie, 5 East, 398. Steel v. Lacy, 3 Taunt. 285.

If the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutrality. The insurer takes upon himself the risk of war and peace; for if the property be neutral at the time of sailing, and a war break out the next day, the insurer is liable.

||The law of nations gives to every belligerent cruiser the right of searching merchant ships; therefore, a resistance to such search amounts to a forfeiture of neutrality. And this breach of neutrality is conclusively proved by the sentence of a Court of Admiralty, condemning her upon that ground.||

The sentence of a foreign Court of Admiralty is not conclusive to shew that a ship was not neutral, unless it appear that the condemnation went on that ground. (a)

v. Ogle, 1 Camp. 418. Pollard v. Bell, 8 Term R. 434. Price v. Bell, 1 East, 663. (a) And the court here may receive evidence to prove the truth of the warranty. Calvert v. Bovill, 7 Term R. 523.||

But if it appear evident that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence

See Marshall on Ins. 389. 3d ed.||
Woolmer v. Muilman, 4 Burr. 1419. 1 Bl. Rep. 427. [Garrells v. Kensington, 8 Term R. 230.]
Tabbs v. Bendelack, 4 Esp. 108. 3 Bos. & Pul. 207.
Rich v. Parker, 7 Term R. 705. 1 Dow. R. 331. Baring v. 3 Taunt. 285.
Eden v. Parkinson, Dougl. 705. Tyson v. Gurney, 5 Term R. 477.
Marshall on Ins. 437. 3d ed. Garrells v. Kensington, 8 Term R. 230.
Bernardi v. Motteux, Dougl. 574. [Fisher
Barzillay v. Lewis,

B. R. Tr. dence against the insured, that he has not complied with his
22 Geo. 3. warranty, and the underwriter is discharged.
Park, 359.

||Geyer v. Aguilar, 7 Term Rep. 681. Baring v. Claggett, 5 Bos. & Pul. 201. Bolton v. Gladstone, 5 East, 155. S. C. in error, 2 Taunt. 85.||

Salucci v. And even where no special ground of condemnation is stated,
Woodmess, but the ship is condemned as good and lawful prize, the court
B. R. Hil. here must consider it as conclusive evidence that the property
24 Geo. 3. was not neutral.
||Marsh. Ins.

405. Kindersley v. Chase, A. D. 1801. Marsh, Ins. 425.||

Mayne v. But if the ground of decision appear to be a foreign ordinance,
Walter, manifestly unjust, and contrary to the law of nations, and the
B. R. insured has only infringed such a partial law, that shall not be
East. deemed a breach of his warranty, so as to discharge the in-
22 Geo. 3. surer. (a)
Park, 531.

7th ed. ||(a) And in order to be conclusive, a foreign sentence must be that of a court constituted according to the law of nations, exercising its functions within the belligerent country. Havelock v. Rockwood, 8 Term R. 268. Case of Flad, Oyer, 1 Rob. A. R. 135. 8 Term R. 270. note (a). Donaldson v. Thompson, 1 Camp. 429. Oddy v. Bovill, 2 East, 473.; and see as to the effect of sentences of Courts of Admiralty, on the question of property, Park, chap. 18. (7th ed.)||

Salucci v. If the ship be condemned as prize, and the grounds of the
Johnson, sentence appear manifestly to contradict such a conclusion, the
B. R. Hil. court here will not discharge the insurers, by declaring that the
23 Geo. 3. insured has forfeited his neutrality.
Park, 556.
(7th ed.)

Simond v. ||RETURN OF PREMIUM.|| — A clause was inserted that 8l. per
Boydell, cent. of the premium should be returned, if the ship sailed from
Dougl. 255. any of the *West India* islands with convoy for the voyage, and
arrives. The court held, that the arrival of the ship, whether
with or without convoy, entitled the party to a return of the
premium stipulated.

Aguilar v. ||And where the insurer on freight agreed to return part of the
Rodgers, premium "if the ship sailed with convoy and arrived," it was
7 Term R. 421. held that the assured were entitled to that return, the ship having
See also sailed with convoy and arrived; though she had been captured
Dalgleish v. and recaptured, and the assured had been obliged to pay for the
Brooke, salvage.||
15 East, 295.

Cowp. 668. If the risk is not run, whether the cause of its not being run
3 Burr. 1237. is attributable to the *fault, will, or pleasure* of the insured, the
premium is to be returned.

Lowry v. When a policy is void as a wager policy, and the ship has
Bourdieu, arrived safe, the court will not allow the insured to recover back
Dougl. 251. the premium; though it might, perhaps, be otherwise where the
Andr   v. ship has not arrived.
Fletcher,
3 Term R. 266.; ||or has sustained loss. Routh v. Thompson, 11 East, 428.||

(b) Lubbock v. ||So, the insured on an illegal trading is not entitled to a return
Potts, of premium (b), even though he be a foreigner; for he shall not
7 East, 449. be presumed ignorant of the law. (c)
(c) Morck v.
Abel, 5 Bos. & Pul. 35.

But if an alien's agent insure here, not knowing that hostilities have commenced, the premium shall be returned. (a) ||
 12 East, 225. *Hentig v. Staniforth*, 5 Maul. & S. 122.

Where the risk has *once* commenced, there shall be no apportionment or return of premium afterwards.

But if there are two distinct points of time, or, in effect, two voyages, either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy. ||*Rothwell v. Cooke*, 1 Bos. & Pul. 172. ||

Thus, in an insurance "at and from *London to Halifax*, warranted to depart with convoy from *Portsmouth*," when the ship arrived at *Portsmouth*, the convoy was gone; the premium for the voyage from *Portsmouth to Halifax* was returned. ||*Stevenson v. Snow*, 3 Burr. 1237. 1 Bl Rep. 318. S. C. ||*Audley v. Duff*, 2 Bos. & Pul. 111. ||

A ship was insured for twelve months, at 9*l.* per cent., warranted free from *American* captures. The ship was taken within two months by the *Americans*. There shall be no return of premium, because the contract was entire; the premium was a gross sum stipulated and paid for twelve months. ||*Tyrie v. Fletcher*, Cowp. 666. ||

So also, it was held, where a ship, insured for twelve months, was lost at the end of two; though the whole premium of 18*l.* was acknowledged to be received *at the rate of 15*s.* per month*; for that is only a mode of computing the gross sum. ||*Loraine v. Thomlinson*, Dougl. 564. ||

|| In case of a policy on *profits* generally there is no objection to a clause providing for return of the whole premium for short interest. And short interest here means a short profit on the cargo to the extent of the whole sum insured. ||
 ||*Eyre v. Glover*, 16 East, 218. 3 Camp. 276. ||

Where the premium is entire in a policy on the voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the risk is to end, nor any usage established upon such voyage; though there be several distinct ports at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable. It was so held in a case where a ship was insured "at and from *Honfleur* to the coast of *Angola*, during her stay and trade there, at and from thence to her port or ports of discharge in *St. Domingo*, and at and from *St. Domingo* back to *Honfleur*;" and the policy was at an end by her deviation before she arrived at *St. Domingo*; and, consequently, for the latter part of the voyage insured the insurer ran no risk. ||*Bernon v. Woodbridge*, Dougl. 751. ||
	Kellner v. Le Mesurier, 4 East, 596.	
	Anner v. Woodman, 5 Taunt. 299.	
	Tait v. Levi, 14 East, 481.	
	Moses v. Pratt, 4 Camp. 297.	

It was also held, where a ship was insured "at and from *Ja-maica*, warranted to sail on or before the first of *August*, to return eight per cent. if she sailed with convoy;" and she did not sail till *September*; that there should be no return upon the warranty of the time of sailing; for the court cannot make a distinction between the risk *at* and the risk *from*: though it will be otherwise if the jury find an express usage upon the subject of return of premium. Indeed, it seems that there never has been
 ||*Long v. Allen*, B. R. East. 25 Geo. 3. 2 Park, Ins. 580. ||
 ||*Park*, 391. ||

an apportionment unless there be something like an usage found to direct the judgment of the court.

¶ A policy on goods "at and from *Gottenburgh to Riga*, beginning the adventure on the goods from the loading thereof " of aboard the ship at *Gottenburgh*," will not cover goods previously loaded at *London* which arrived in the ship at *Gottenburgh*; and as the risk never attached, the assured were held entitled to a return of premium.

And where the captors of a ship insured her, but it turned out they had no interest, the interest being in the crown, and the underwriters defended an action on the policy on this ground; it was held the insured were entitled to a return of premium, since there was no risk, and there was nothing illegal in the insurance.

Horney v.
Lushington,
15 East, 46.
Spitta v.
Woodman,
2 Taunt. 416.

Routh v.
Thompson,
11 East, 428.
Secus if the
captors had
an interest.

8 Term R. 154.; or if the vessel had arrived in safety, though the insured had no title to her. *Macculloch v. Royal Exch. Ass.*, 5 Camp. 406.; and see 2 Maul. & S. 491.

(a) Oom v.
Bruce,
12 East, 225.
4 Maul.
& S. 20.

(b) Hentig v.
Staniforth,
5 Maul. & S.
122. 4 Camp.
270.

(c) Siffken v.
Allnutt,
1 Maul.
& S. 39.

(d) *Ibid. sed*
vide 2 Camp.
626.

(e) Feise v.
Parkinson,
4 Taunt. 640.

Kill v.

Hollister,
1 Wils. 129.
¶ Thompson
v. Charnock,
8 Term R.
139.¶

Gardiner v.
Croasdale,
2 Burr. 904.
1 Bl. R. 198.

So also, if a policy is made to a foreign port, but war having previously broken out, unknown to the parties, the voyage cannot be performed (a); or if the licence for the voyage is invalid by reason of its having been granted after the voyage commenced (b); or if, by reason of the voyage being protracted to an unusual period, it is not covered by the licence (c); or if the insurance be on money advanced to the captain at a foreign port, such insurance being void but not illegal (d); or in case of non-compliance with a warranty, without fraud, as where the broker by mere mistake represented that the ship had a *French* licence, when she had not one (e); or if the ship be unseaworthy, without fault of the insured (g), a return of premium may be claimed; and the counsel in an action on a policy need not claim a return of premium in opening the cause (h), but it must be claimed in the course of the trial. (i)¶

(g) *Pearson v. Lee*, 2 Bos. & Pul. 530. (h) *Ibid.* (i) 1 East, 97.

¶ PROCEEDINGS, EVIDENCE, &c.¶—In an action upon a policy of insurance it appeared, that a clause was inserted, that in case of any loss or dispute about the policy it should be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reserved for the consideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

If the plaintiff in his declaration allege, that a total loss has happened, and lay the damages as for a total loss, it shall be no bar to his recovery, though he can only prove a partial loss; for in an action for damages merely, a man may always recover less, but never more than the sum he has laid in his declaration. A contrary doctrine was once attempted to be maintained; but was unanimously over-ruled.

An action was brought on a policy of insurance, in which the declaration stated, that the plaintiff was possessed of one third of the ship on which the insurance was made. It was proved that the plaintiff had purchased the whole ship at one period; and as there was no evidence to shew that he had since parted with any share of it, the counsel for the defendant insisted, that the plaintiff had not proved his declaration, which alleged him to have but one third. Lord Mansfield over-ruled the objection, saying, that this was *prima facie* sufficient evidence; for *omne majus continet in se minus*.

Page v. Rogers, Sittings at Guildhall, Hil. Vac. 1785. ||Park, 604. 7th ed.||

By 19 G. 2. c. 37. § 6. it is declared, "That in all actions or suits brought or commenced by the assured, upon any policy of assurance, the plaintiff in such action or suit, or his attorney or agent, shall, within fifteen days after he or they should be required so to do in writing by the defendant, or his attorney or agent, declare what sum or sums he had assured or caused to be assured in the whole, and what sums he had borrowed at *respondentia* or bottomry for the voyage in question in such suit or action."

||See Marshall on Ins. 702, 703. 5d ed.||

And by § 7. it is enacted, "That it shall and may be lawful for any person or persons, body or bodies corporate, sued in any action or actions of debt, covenant, or any other action or actions, on any policy or policies of insurance, to bring into court any sum or sums of money (a); and that if any such plaintiff or plaintiffs refuse to accept such sum or sums of money so brought into court as aforesaid, with costs to be taxed, in full discharge of such action or actions, and afterwards proceed to trial in such action or actions, and the jury do not assess damages to such plaintiff or plaintiffs exceeding the sum or sums of money so brought into court, such plaintiff or plaintiffs, in every such case and cases, shall pay to such defendant or defendants, in every such action or actions, costs to be taxed; any law, custom, or usage to the contrary notwithstanding."

|| (a) As to the effect of paying money into court, see 9 East, 325. 2 Term R. 275. 3 Bos. & Pul. 557. 1 Barn. & C. 3. 2 Maul. & S. 106. 1 Taunt. 419. 1 Camp. 557. 7 Taunt. 450. 2 Bing. 377. 3 Barn. & C. 10. ||

A man having purchased goods beyond sea, in order to prove his property in the cargo, in an action upon a policy of insurance, produced a *bill of parcels* of one Gardiner at Petersburg, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence against the insurers; but the Chief Justice allowed it.

Russell v. Boheme, 2 Strange, 1127.

||As to the evidence in actions on policy, see

Phillipps, vol. ii. ch. 2. Roscoe, p. 148. *et seq.* ||

||Upon a policy on a ship, the possession of the insured as owner is *prima facie* evidence of property.||

Robertson v. French, 4 East, 150.;

see also Marsh v. Robinson, 4 Esp. R. 98.

If a merchant abroad, who is interested in goods and the freight of a cargo, mortgage them to his creditor here for the payment of money at a certain day, and by a letter inclosing the bills of lading direct an insurance, he has an insurable interest, although the mortgage was become absolute before the letter directing the insurance was received, and an action lies against the

Smith v. Lascelles, 2 Term R. 187.

agent for not insuring agreeably to the instructions contained in such letter.

Carey v.
King,
Ca. temp.
Hardwicke,
B. R. 304.;
||and see
Puller v.
Glover,
12 East, 124.||

In an action on a policy of insurance, for insuring goods on board the ship *A.*, the plaintiff declares, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. The evidence was, that many of the goods were spoiled, but some were saved; and the question was, Whether the plaintiff might give in evidence the expense of salvage, that not being particularly laid as a breach of the policy in the declaration?

Lord *Hardwicke* C. J.—I think he may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river; it goes on and says, that by reason thereof the goods were spoiled, that is the only special damage laid: yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid. And though it was objected, that such a breach of the policy should be laid, as the insurer may have notice to defend it; it is so in this case, for the plaintiff hath laid the accident, which is sufficient notice, because it must necessarily follow that some damage did happen.

2. Of Insurances upon Lives.

||For some
information
respecting the
various Life
Insurance
Companies,
and other
matters relat-
ing to Life
Insurance,
see Babbage
on Life
Assurance,
London,
1826.||

It is enacted by 14 G. 3. c. 48. § 1., “ That no insurance shall
“ be made by any person or persons, bodies politic or corporate,
“ *on the life or lives* of any person or persons, or on any other
“ event or events whatsoever, wherein the person or persons, for
“ whose use, benefit, or on whose account such policies shall be
“ made, *shall have no interest, or by way of gaming or wagering* ;
“ and every insurance made contrary to the true intent and
“ meaning thereof shall be null and void, to all intents and
“ purposes.” And in order more effectually to guard against any
imposition or fraud, and to be the better able to ascertain what
the interest of the person entitled to the benefit of the insurance
really was, it was further enacted by the same statute, “ that it
“ shall not be lawful to make any policy or policies on the life or
“ lives of any person or persons, or other event or events, with-
“ out inserting in such policy or policies the person’s name in-
“ terested therein, or for whose use, benefit, or on whose account
“ such policy was so made or underwritten. And that in all
“ cases where the insured has an interest in such life or lives,
“ event or events, no greater sum shall be recovered or received
“ from the insurer or insurers than the amount or value of the
“ interest of the insured in such life or lives, or other event or
“ events.”

§ 3.

Dwyer v.
Edie, London,
Sittings after
Hil. 1788.
||2 Park, Ins.
639.||

It has been holden, that a person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note. An action was brought on a policy on the life of *James Russell* from the 1st of *June*, 1784, to the 1st of *June*, 1785. *Russell* was warranted in good health, and by a memorandum at the foot of the policy it was declared, that it was intended

intended to cover the sum of 5000*l.* due from *Russell* to the plaintiff, for which he had given his note payable in one year from the 14th of *May* 1784. Two objections were made on the part of the defendant: 1st, That part of the consideration for the note was money won at play; 2d, That *Russell*, at the time he gave the note, was an infant. — *Buller J.* nonsuited the plaintiff upon the ground of part of the consideration being for a gaming transaction, and that therefore there was a want of interest in the plaintiff. But as to the other objection on account of infancy, he said, the interest must be contingent, for *Russell* might or might not avoid his note; and he doubted much whether till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the objection.

In an action on a policy of insurance on the life of Lord *Newhaven*, from 1st *December* 1792 to 1st *December* 1793, the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take the case out of the above statute. It appeared in evidence, that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell* in a large sum of money, part of which debt had been assigned by them to another person: the remainder, being more than the sum insured, was, upon a settlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only. — Lord *Kenyon* was of opinion, that this debt was a sufficient interest: that a creditor had certainly an interest in the life of his debtor; the means by which he is to be satisfied may materially depend upon it; and at all events the death must in every case lessen the security. Verdict for the plaintiff.

Anderson v. Edie, Sittings at Guildhall, in Tr. 1795. ||*Park*, 640., 7th ed.||

|| But though a creditor may insure the life of his debtor to the extent of his debt, yet such insurance is merely a contract of indemnity; and therefore, if after the death of the debtor his executors pay to the creditor the amount of his debt, the creditor cannot recover upon the policy; and this notwithstanding the debtor died insolvent, and the executors were furnished with the means of payment by a third party. ||

Godsall v. Boldero, 9 East, 72.; and see *Ex parte Andrews*, 1 Madd. 574.

A policy made in order to decide upon the sex of a particular person, was held to fall within the prohibition of the statute. Again, a policy having been made, on the event of there being an open trade between *Great Britain* and the province of *Maryland*, on or before the 6th of *July* 1778, Lord *Mansfield* said, that it was clear the plaintiff could not recover. 1st, Is this an interest within the act? It was made to prevent gambling policies. Every man in the kingdom has an interest in the events of war and peace; but I doubt whether that be an interest within the act. But, 2dly, The policy is void, by not having the name inserted according to the second section of the statute.

Roebuck v. Hammerton, Cowp. 757. *Mollison v. Staples*, Sittings at Guildhall, Mich. Vac. 1788.

In a life insurance, the insurer undertakes to answer for all those accidents to which the life of man is exposed, except suicide, or the hands of justice.

|| But where the insurance is made by a person on the life of another,

Marshall on

Ins. 780.
3d ed.

another, death "*by suicide, duelling, or the hand of justice,*" is not excepted.||

The death must happen within the time limited in the policy; otherwise the insurers are discharged. And therefore, if a man receive a mortal wound during the existence of the policy, but does not in fact die till after, the insurers are not liable.

Patterson v.
Black,
Sittings at
Guildhall,
after Hil.

But if a man, whose life is insured, goes to sea, and the ship in which he sailed is never heard of afterwards, the question, whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances.

1780. ||2 Park, Ins. 644.||

Sir Robert
Howard's
case, 2 Salk.
625. 1 L.J.
Raym. 480.
S. C.

A policy was made for one year from the day of the date thereof: the policy was dated 3d *September* 1697. The person died on the 3d *September* 1698, about one o'clock in the morning; and the insurer was held liable.

Where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health; for it never can mean, that he is free from the seeds of disorder.

Willis v.
Poole, Sittings
at Guildhall,
after East.
1780. ||Ross

If the person whose life was insured laboured under a particular infirmity, if it be proved by medical men, that in their judgment it did not at all contribute to his death, the warranty of health has been fully complied with, and the insurer is liable.

v. Bradshaw, 1
6 East, 188.

Bl. R. 312. Watson v. Mainwaring, 4 Taunt. 765. Aveson v. Lord Kinnaird, Morrison v. Muspratt, 4 Bing. 60.||

Lindenau v.
Desborough,
8 Barn. & C.
586. Huguenin
v. Rayley,
6 Taunt. 186.

||It is the duty of a party effecting an insurance on life or property to communicate to the insurer all material facts within his knowledge touching the subject-matter of insurance; and it is a question for a jury whether any particular fact was or was not material.||

Morrison v. Muspratt, 4 Bing. 60. Everett v. Desborough, 5 Bing. 503.

Cowp. 669.
Doug. 758.

If the person whose life was insured should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium.

Higgins v.
Sargent,
2 Barn. & C.
348.

||On a policy on the life of *A.*, payable six months after due proof of his death, the insured are not entitled to interest on the sum insured from the expiration of the six months.

Want v.
Blunt, 12 East,
185; and see
Doe v.
Shewin,
5 Camp. 154.

A policy is void at the time of the insured's death, and no payment by any person after his decease can revive it. Thus, where by the rules of a life insurance society the insured might (if the quarterly premium was left unpaid for fifteen days) within six months, on certain terms, revive his policy, and the insured died five days after a quarterly payment became due; it was held, that his executor could not by paying the arrear revive the policy.||

3. Of Insurance against Fire.

Drinkwater
v. London
Assurance,
2 Wils. 363.

The *London Assurance Company* insert a clause in their proposals, by which they declare, that they do not hold themselves responsible for any damage by fire, occasioned by an invasion, foreign enemy, or any military or usurped power whatsoever.

Under

Under this proviso it was holden, that they were not exempted from loss by fire, occasioned by a mob at *Norwich*, which arose on account of the high price of provisions.

But the Sun Fire Office, in addition to these words, insert, "*civil commotions*;" which words, it was determined, protected them from any responsibility for the losses occasioned by the rioters who rose in *London* in 1780, to compel the repeal of a statute which had passed in favour of the *Roman Catholics*.

Langdale v. Mason, Sitings at Guildhall after Mich. 1780. *coram Mansfield C. J.*

In a policy of assurance against loss by fire from half a year to half a year, the assured agreed to pay the premium half-yearly "as long as the assurers should agree to accept the same, *within fifteen days after the expiration of the former half-year*;" and it was also stipulated, that no insurance should take place till the premium was actually paid. A loss happened within fifteen days after the end of one half-year, but before the premium for the next was paid. It was holden, that the insurers were not liable, though the insured tendered the premium before the end of the fifteen days, but after the loss.

Tarleton v. Staniforth, 5 Term R. 695. || 1 Bos. & Pul. 485.; and see 6 East, 571.||

||The concealment of any material fact avoids the policy, though the terms of insurance do not expressly require the communication, and though there be no fraud in the insured; and if the property is not correctly described the insurers are not liable.||

Bufe v. Turner, 6 Taunt. 538. *Dobson v. Sotheby*, 1 Moo. &

Mal. Ca. 90. *Watchorn v. Langford*, 5 Camp. 422. *Newcastle Fire Insur. Comp. v. M'Morran*, 3 Dow. R. 255.

These policies of insurance are not, in their nature, assignable, for they are only contracts to make good the loss which the contracting party himself shall sustain; nor can the interest in them be transferred from one person to another without the consent of the office. (a) There is a case in which, by the proposals, these policies are allowed to be transferred, and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator respectively, to whom the property insured shall belong; provided, before any new payment be made, such heir, executor, or administrator, do procure his or her right to be indorsed (b) on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases there can be no assignment; and the party claiming an indemnity must have an interest in the thing insured at the time of the loss.]

(a) *Secus* of marine insurances. *Delaney v. Stoddart*, 1 Term R. 26. *Lynch v. Dalzell*, 5 Br. P. C. 497. *Saddlers' Company v. Badcock*, 2 Atk. 554. ||(b) See *Doe v. Laming*, 4 Camp. 75. *Doe v. Shewin*, 5 Camp. 134.||

||To set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, &c., with intent thereby to injure or defraud any person, is made a capital offence by 7 & 8 G. 4. c. 30. § 2.

If the insurer defends an action on the policy on the ground that the plaintiff set fire to the house himself, he must prove the crime as fully as if the insured were indicted for it.

Thurtell v. Beaumont, 1 Bing. 339.

An insurance against "all damage which the assured shall suffer by fire on stock and utensils in their regular-built sugar-house," does not extend to damage done to the sugar by the heat

Austin v. Drew, 6 Taunt. 436. 2 Marsh. 130.

heat of the usual fires employed for refining being accumulated by the mismanagement of the insured, who inadvertently kept the top of the chimney closed.

Vernon v. Smith, 5 Barn. & A. 1.

A covenant to insure premises situated within the bills of mortality, mentioned in 14 G. 3. c. 78., is a covenant that runs with the land by reason of the provisions of that act.||

(K) Of Bottomry [and Respondentia].

2 Blackst. Com. 457.

Latch. 252.

2 Blackst. Com. 458.

2 Valin. Com. p. 4.

2 Blackst. Com. 458.

1 Siderfin, 27.

Molloy, lib. 2. c. 11. § 8.

[THE contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment: and it is understood, that if the ship be lost, the lender also loses his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual or legal rate of interest. (a) When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent. But when the loan is not made upon the vessel, but upon the goods and merchandizes laden thereon, which, from their nature, must be sold or exchanged in the course of the voyage, then the borrower only is *personally* bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. In this consists the difference between *bottomry* and *respondentia*: that the one is a loan upon the ship, the other upon the goods. In the former the ship and tackle are liable, as well as the person of the borrower; in the latter, for the most part, recourse must be had to the *person* only of the borrower. Another observation is, that in a loan upon bottomry, the lender runs no risk though the goods should be lost; and upon *respondentia*, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects the contract of bottomry and that of *respondentia* are upon the same footing, the rules and decisions applicable to one are applicable to both; and therefore, in the course of our enquiries, they shall be treated as one and the same thing, it being sufficient to have once marked the distinction between them.

These terms are also applied to another species of contract, which does not exactly fall within the description of either, namely, to a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voyage itself: as, if a man lend 1000*l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition shall be safely performed: which agreement is sometimes called *foenus nauticum* or *usura maritima*. But as this species of bottomry opened a door to gaming and usurious contracts, especially in long voyages, the legislature, at the time it suppressed insurances upon wagering policies, introduced a clause, by which it was enacted, "That all sums of money lent on bottomry or at *respondentia*

“*dentia* upon any ship or ships belonging to his majesty’s subjects bound to or from the East Indies, should be lent only on the ship, or on the merchandize or effects, laden or to be laden on board of such ship, and should be so expressed in the condition of the said bond; and the benefit of salvage should be allowed to the lender, his agents or assigns, who alone should have a right to make assurance on the money so lent; and in case it should appear that the value of his share in the ship, or in the merchandizes or effects laden on board of such ship, did not amount to the full sum or sums he had borrowed as aforesaid, such borrower should be responsible to the lender for so much of the money borrowed as he had not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, in the proportion the money not laid out should bear to the whole money lent, notwithstanding the ship and merchandizes should be totally lost.”

This statute has entirely put an end to that species of contract which was last mentioned; namely, a loan upon the mere voyage itself, as far, at least, as relates to *India* voyages; but as none other are mentioned, and as *expressio unius est exclusio alterius*, these loans may be made in all other cases, as at the common law, except in the following instance, which is another statute prohibition. It is declared, that all contracts made or entered into by any of his majesty’s subjects, or any persons in trust for them, for or upon the loan of any monies by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the *East Indies*, or parts aforesaid, shall be null and void.

7 Geo. 1. c. 21.
§ 2.

This act it should seem does not mean to prevent the king’s subjects from lending money on bottomry on foreign ships trading from their own country to their settlements in the *East Indies*. The purpose of the statute was only to prevent the people of this country from trading to the *British* settlements in *India* under foreign commissions, and to encourage the lawful trade thereto. It lately became a question in the Common Pleas, Whether an *American* ship since the declaration of *American* independency was a foreign ship, within the statute 7 G. 1. c. 21. § 2.? It came before the court on a motion to discharge the defendant out of custody upon entering a common appearance. The defendant was holden to bail upon a *respondentia* bond, which was executed by the defendant, who was an *American*, to secure the payment of a cargo shipped by the plaintiff on board an *American* ship in the *East Indies*, homeward-bound from *Calcutta* to *Rhode Island* in *America*. The ship had sailed from *England*, and landed a cargo of *European* goods in *Bengal*, previously to her taking in the cargo on which the bond was given. The court were much inclined to think that the bond was void, the case being within the mischief intended to be remedied by the act: but as the question was of considerable consequence, they thought it not proper to be discussed on this summary application;

Sumner v. Green,
1 H. Black.
301. || Bush
v. Fearon,
4 East, 319.||

plication; but they ordered the defendant to be discharged, on the ground, that where it appeared from the affidavit to hold to bail that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in prison; more particularly as the plaintiff would by that means have an opportunity of tampering with the defendant in prison, and of escaping from the penalties of the act, and of preventing the case from being brought before the court.]

2 Roll. Rep.
48. 5 Co. 70.
&c. Cro. Jac.
208. 508.
1 Keb. 559.
711.

Where *A.* lends *B.* 100*l.* to freight a ship abroad, and it is agreed that, if the ship comes home safe, *A.* shall have 150*l.*, and that if she do not, that he shall lose the 100*l.*, this is not usury, but good by the custom of merchants, because of the great perils at sea, and both principal and interest run the same hazard of being lost. But if the principal be secured, and the interest only depend on an hazard, if it be more than is lawful, it is usury.

Joy v. Kent,
Hard. Rep.
418.

[Again, in debt upon an obligation, conditioned to pay so much money, if such a ship returned within six months from *Ostend*, in *Flanders*, to *London*, which was more by the third part than the legal interest of money; and if she did not return, then the obligation to be void; the defendant pleaded, that there was a corrupt agreement betwixt himself and the plaintiff, and that at the time of making the obligation it was agreed betwixt them, that he should have no more for interest than the law permits, in case the ship should ever return; and averred that the obligation was entered into by covin, to evade the statute of usury and the penalty thereof. Upon this averment the plaintiff took issue, and the defendant demurred. — Lord Chief Baron *Hale*, — Clearly this bond is not within the statute, for this is the common way of insurance; and if this were void by the statute of usury, trade would be destroyed. It is not like to the case where the condition of the bond is to give so much money if such or such a person be then alive; for there is a certainty of that at the time. But it is uncertain and a casualty, whether such a ship will ever return or not.

The *Augusta*,
1 Dodson,
A. R. 285.

|| It is necessary, indeed, that the money be advanced on the credit of the ship. If it be advanced on the credit of the owner, and such a bond be afterwards given, even before the ship leaves the place of advance, it will be invalid. ||

Lev. 54. Sid.
27.

So, where the condition of a bottomry bond was, that if the obligor, or the ship, or the goods return safe, then to pay more than the legal interest; this was adjudged good by the custom of merchants, though it depends on many contingencies; and though the obligee may be said to run little hazard; and though any of the contingencies become impossible; as, if the obligor die before his return, &c., yet the bond remains payable, contrary to the general rule of law in such cases; for the law supplies those words, *which shall first happen*, and forecloses the election of the obligor, and gives it to the obligee to take his, on which the contingencies shall first happen.

The

The plaintiff entered into a penal bond of bottomry to pay 40*l.* per month for 50*l.*; the ship was to go from *Holland* to the *Spanish* islands, and so to return to *England*; but if she perished, the defendant was to lose his 50*l.* She went accordingly to the *Spanish* islands, took in *Moors* at *Afric*, and upon that occasion went to *Barbadoes*, and then perished at sea: the plaintiff being sued on the bond and penalty, sought relief in equity, pretending that the deviation was of necessity; but his bill was dismissed, saving as to the penalty.

2 Chan. Ca.
150.

J. S. entered into a bottomry-bond, whereby he bound himself, in consideration of 400*l.*, as well to perform the voyage within six months, as at the six months' end to pay the 400*l.* and 40*l.* premium, in case the vessel arrived safe, and was not lost in the voyage: it fell out that *J. S.* never went the voyage, whereby his bond became forfeited; and he preferred a bill to be relieved: and in regard the ship lay all along in the port of *London*, so that the defendant run no hazard of losing his principal, the Lord Keeper decreed, that he should lose the premium of 40*l.*, and be contented with his ordinary interest.

Vern. 263.
Deguiler v.
Depeister.

A part-owner of a ship borrowed money of the plaintiff upon a bottomry-bond, payable on the return of the ship from the voyage; he was then going in the service of the *East India* Company, and the *East India* Company broke up the ship in the *Indies*; the owners brought their action against the Company, and recovered damages, but they did not amount to a full satisfaction; and the obligee brought his bill to have his proportionable satisfaction out of the money recovered; but his bill was dismissed, and he left to recover as well as he could at law, the court declaring that they would never assist a bottomry-bond which carried an unreasonable interest.

Abr. Eq. 572.
Dandy v.
Turner.

¶ When there are several hypothecation bonds, the last in date is preferred, for it was the means of security of the whole.¶

The Rhadamante, Dodson, A. R. 204.

[It seems to have been a doubt, late in the last century, whether a loss by the attacks of pirates was a risk which the lender on bottomry had by his contract undertaken to bear; for it was argued in the King's Bench, in the reign of *James* the Second. But the court were of opinion, that piracy was one of the dangers of the seas; and the defendant had judgment.

Barton v.
Wolliford,
Comb. 56.

The lender is answerable likewise for losses by capture; or, to speak more accurately, if a loss by capture happen, he cannot recover against the borrower: but in bottomry and *respondentia* bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited (if time be mentioned in the condition), the bond is not forfeited, and the obligee may recover.

This doctrine was laid down by the whole court of King's Bench, in a case upon a bond of this nature, the proceedings on which were fully stated, when the unanimous opinion of the court

Joice v.
Williamson,
B. R. Mich.

Term 25 G. 5.
2 Park, 627. 1
7th ed.
||Marshall on
Ins. 3d ed.
760.||

court was delivered by Lord *Mansfield*:—This comes before the court upon a motion on the part of the defendant for a new trial. It was an action of debt upon a bottomry-bond; the condition of which was, that upon the ship's safe arrival at *New York*, a certain sum of money should be paid to the plaintiff; but that in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded three pleas: 1st, *Non est factum*; 2dly, That the ship did not arrive at *New York*, the port of destination; 3dly, That the ship was captured. Upon the two first pleas issue was joined; and to the last, there was a replication of recapture. The facts, which appeared in evidence on the trial, are these: *the ship was taken before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her stores; at which time *she was retaken* by an *English* privateer, and carried into *Halifax*. The Admiralty Court adjudged her to be a good prize to the *English* privateer, and decreed that she should be restored to the original owners, on paying one eighth for salvage: that she proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ship was not sufficient to satisfy the bond. These are the facts. Now it is clear, that, by the law of *England*, *there is neither average nor salvage upon a bottomry-bond*. It was, indeed, contended at the bar, on the part of the defendant, that this case was within the saving of the bond; for it is provided, that in case of loss by *capture*, &c. the bond should be void: and that here there was a capture, and a detention for one month. But, upon consideration, we think that a capture within this condition does not mean a *temporary capture*, but it *must be a total loss*: now here it was not such a capture as to occasion a total loss. The voyage was not lost, for the defendant pursued it and earned his freight. Freight depends upon the safety of the ship; and as the freight was earned, the ship must have arrived safe at the port of destination. In whatever way we determine this case, there must be a hardship: but we are all of opinion that the verdict is right, and that the rule for a new trial must be discharged.

Thomson v.
Royal
Exchange
Assurance,
1 Maul. & S.
29

||An assured on bottomry cannot recover against the underwriter unless there has been an actual total loss of the ship: for if the ship exist in specie on the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an "utter loss" within the meaning of the bottomry bond.||

Walpole v.
Ewer, Sittings
after Tr. 1789.

An action was brought on a policy of insurance, on a *respondentia* bond, on ship and goods at and from *B.* to *C.* The ship was *Danish*, and an average loss was sustained upon the goods to the amount of 6*l.* 15*s.* per cent., and the plaintiff as holder of a *respondentia* bond had been called upon to contribute; and now brought his action against the *English* underwriters for the amount of that contribution. Lord *Kenyon*, — By the law of *England*, a

lender upon *respondentia* is not liable to average losses, but is entitled to receive the whole sum advanced, provided that the ship and cargo arrive at the port of destination. The plaintiff contends that, as by the law of *Denmark* such lenders upon *respondentia* are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The *Danish* consul has proved that he received a judgment of the court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side, but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight than the opinions of advocates however eminent, or even than the extrajudicial opinions of the most able judges. It seems, as if in this case the underwriters were bound by the law of the country to which the contract relates. Verdict for the plaintiff.

This is not the only case in which the insurers have been holden liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of *England* could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved, and upon that the learned Judge much relied. It was an action on a policy of insurance on a cargo of fish from *Newfoundland* to any part of *Spain, Portugal, or Italy*. The ship met with bad weather, and put into *Alicant* and *Leghorn* to repair. The captain, being owner, presented a petition to the commercial court of *Pisa* to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course (which seems a very extraordinary one), adjusted the loss by charging the cargo at its full value, but the ship at one half, and the freight at one third; and they also charged, as a part of the general average, the seamen's wages and provisions whilst in port. The defendant, as underwriter, had paid into court as much as would cover the average according to the memorandum in the policy, and the law and usage of *England*. The question was, Whether, the plaintiff having been compelled to pay beyond that sum according to the calculation of the sentence of the court of *Pisa*, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard? The plaintiff called several brokers, who said, that, in repeated instances, they had adjusted averages under similar sentences of the court of *Pisa*, and the underwriters, though with reluctance, had always paid them. *Buller J.*—On the general law, the plaintiff would fail; but, in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of *English* money. But if you are satisfied it has been the usage upon the evidence given, it ought not to be shaken. The plaintiff had a verdict.

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has

Newman v.
Cazalet, Sitt,
at Guildh.
after Hil,

a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the track of the voyage, the event has not happened upon which the borrower was to be discharged from his obligation. This has been decided in several cases.

Western
v. Wildy,
Skin. 152.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that such a ship was in the service of the *East India Company*, and that it was to obey such orders as they or their factors should give; and that she was designed for a voyage from *London to Bantam*, and from thence to *China or Formosa*. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from *London to Bantam*, and returned from thence directly to *London*, 550*l.*; if from *London to Bantam*, and from thence to *China or Formosa*, and returned to *London* within twenty-four months, 650*l.* If she returned not within twenty-four months, then to pay 5*l.* per month above 650*l.*, till thirty-six months; and if she returned not within thirty-six months, then to pay 710*l.*, unless it could be proved by *Wildy* that the ship returned not, but was lost within thirty-six months. The ship, in fact, went from *London to Bantam*, and from thence to *Surat* and other parts, and so returned to *Bantam*; and in her voyage from *Bantam to London* was lost within thirty-six months: upon which the present action was brought.

The court inclined to be of opinion, that this ship having deviated from the voyage described, in going to *Surat*, the plaintiff was not to bear the loss, and was consequently entitled to recover. They, however, took time to deliberate; and after consideration, gave judgment for the plaintiff.

Williams v.
Steadman,
Holt's Re-
ports, 126.
Skin. 345.
S. C.

In another case of debt upon a bottomry-bond, the defendant pleaded, that the ship went from *London to Barbadoes sine deviation*, and afterwards she returned from *Barbadoes* towards *London*, and in her return was lost *in voyage prædicto*: the plaintiff replied, that the ship in her return went from *Barbadoes to Jamaica*; and that after a stay there, she returned from *Jamaica* towards *London*, and was lost, and so shews a deviation. The defendant rejoined, that she was pressed into the king's service, and so was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this, that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ship went from *London to Barbadoes* without deviation, and that in the return she was lost in the voyage aforesaid; but does not shew *without deviation*. Now the condition is so in express words, and he ought to shew expressly that he has performed the words of the condition.

The same rule of decision has been adopted in the courts of equity.

1 Equity
Cases Abr.
372.

The plaintiff entered into a penal bond to pay 40*s.* per month for 50*l.*, the ship was to go from *Holland to the Spanish islands*,
and

and to return to England; but if she perished, the defendant was to lose his 50*l*. The ship went accordingly to the *Spanish* islands, took in *Moors* at *Africa*, then went to *Barbadoes*, and perished at sea. The plaintiff, being sued at law upon the bond, came into equity, suggesting that *the deviation was through necessity*. But his bill was dismissed, except as to the penalty.

2 Chan.
Cases, 130.

¶ To place obligees in bottomry and *respondentia* bonds and the assured in policies of insurance upon the same footing as other creditors in the event of the obligors or insurers becoming bankrupt, the bankrupt act, 6 G. 4. c. 16. § 53. enacts, “That the obligee in any bottomry or *respondentia* bond, and the assured in any policy of insurance made upon good and valuable consideration, shall be admitted to claim, and after the loss or contingency shall have happened, to prove his debt or demand in respect thereof and receive dividends with the other creditors, as if the loss or contingency had happened before the issuing the commission against such obligor or insurer; and that the person effecting any policy of insurance upon ships or goods with any person as a subscriber or underwriter who shall become bankrupt, shall be entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person or persons so interested is not or are not within the united realm.”

6 Geo. 4. c. 16,
§ 53.

By the statute-book it appears, that the masters and mariners of ships, having taken upon bottomry greater sums of money than the value of their adventure, had been accustomed wilfully to cast away, burn, or otherwise destroy the ships under their charge, to the great loss of the merchants and owners: it was therefore enacted, “That if any captain, master, mariner, or other officer belonging to any ship, should wilfully cast away, burn, or otherwise destroy the ship unto which he belonged, or procure the same to be done, he should suffer death as a felon.” The duration of this act having been limited to three years, it became extinct: but the necessity of such a provision was so great, that a similar law was made a few years afterwards, and is still in force.]

16 Car. 2.
c. 6. § 12.

22 & 23
Car. 2 c. 11,
§ 12.

¶ The 22 & 23 C. 2. c. 11. has been repealed by the 7 & 8 G. 4. c. 27., but by 7 & 8 G. 4. c. 30. § 9. it is enacted, “That if any person shall unlawfully and maliciously set fire to or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state; or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same; every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon.”

[(L) Of Bills of Lading.

A BILL of lading is a memorandum or acknowledgment, signed by the master of a ship, that he has received certain goods, which he undertakes to deliver at the intended place to the person named in the bill of lading. It is, regularly, made treble: one for the merchant who loads the goods; another for the consignee of the goods; and the third for the master of the ship.

The bill of lading is assignable, the undertaking being, generally, to deliver to the order or assigns of the shipper. But whether the first indorsement or assignment passes the right of property, whether the instrument be negotiable or not, is a point upon which our courts have differed.]

See Evans v. Martlett, 1 Ld. Raym. 271. Wright v. Campbell, 4 Burr. 2046. 1 Bl. Rep. 628. S. C. Snee v. Prescott, 1 Atk. 245. Caldwell v. Ball, 1 Term R. 205. Hibern v. Carter, *id.* 745. Lickbarrow v. Mason, 2 Term R. 63. 1 H. Bl. 557. S. C. 5 Term R. 367. S. C. Fearon v. Bowers, 1 H. Bl. 564. note. Salomons v. Nissen, 2 Term R. 674. ||Giles v. Nathan, 5 Taunt. 558. Haille v. Smith, 1 Bos. & Pul. 563 ||

Haille v. Smith, 1 Bos. & Pul. 563. Cuming v. Brown, 9 East, 506. Salomons v. Nissen, 2 Term R. 674. Lickbarrow v. Mason, *suprà*. ||But it appears to be now settled, by the cases in the margin, that if the assignee takes the bill of lading from the consignee for a valuable consideration, and without any knowledge of any such circumstances as would render it not fairly and honestly assignable by the consignee, he acquires a good title against the consignor, and the consignor is thereby deprived of the right of stopping the goods *in transitu*, which he might have exercised against the consignee.

Abbott on Shipping, 389, 390. (5th edit.)

On the other hand, if the assignee assists in contravening the actual terms of the sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith; if, for instance, he knows that the consignee is in insolvent circumstances, that no bill has been accepted for the price, or that being accepted, it is not likely to be paid, he will stand in the same situation as the consignee, and his interposition in such circumstances, being in fraud of this right of the consignor, will not be available to defeat it.

And as a factor cannot pledge the goods of his principal in his possession, so he cannot defeat the rights of the consignor of goods by assigning over the bill of lading by way of pledge.

Newsom v. Thornton, 6 East, 17.; and see Martini v. Coles, 1 Maul. & S. 140. Shipley v. Kymer, 484. Solly v. Rathbone, 2 Maul. & S. 298.

The indorsement of a bill of lading is not properly an actual transfer in itself, but rather evidence, or an act raising a presumption, of a transfer, and consequently the object and legal effect of the indorsement may be ascertained by other circumstances. It seems, accordingly, that where the indorsement is made without valuable consideration to a mere agent, to enable him to receive the goods, such agent cannot sue in his own name for the goods.

The warrants of the *West India Company* are equally negotiable

Swinger v.

Coxe v. Harden, 4 East, 211. Abbott, 392.

tiable as bills of lading; and when indorsed for a *bonâ fide* consideration, are deemed equivalent to delivery of the goods.

Samuda,
7 Taunt. 265.

By a late act of parliament (a) it is provided, that the person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person, or received by such person to his use, *if he has not notice* by the bill of lading or otherwise at or before the advance or receipt, that such person is not the actual and *bonâ fide* owner of the goods; and such person shall be taken for the purposes of the act to have been entrusted with the goods for the purpose of consignment, or of sale, unless the contrary be made to appear. (b) So also, a person entrusted with and in possession of a bill of lading, or of any of the warrants, certificates, or orders mentioned in the act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods, *or the deposit or pledge thereof*, if the buyer, disponent, or pawnee *has not notice* by the document, or otherwise, that such person is not the actual and *bonâ fide* owner of the goods. (c) But if such person deposit or pledge the goods as security for a pre-existing debt or demand, he who so takes the deposit or pledge without notice shall acquire such right, title, or interest, and no further or other than was possessed by the person making the deposit or pledge. (d) ||

(a) 6 G. 4. c. 94.

(b) § 1.

(c) § 2.

(d) § 3.

(M) Of Bills of Exchange.

1. *Of the Nature and different Kinds of Bills of Exchange and Negotiable Notes: And herein, || of Foreign Bills, and of the Consideration for Bills.||*
 1. Of Inland Bills.
 2. Of Promissory and Negotiable Notes.
2. *What shall be said a Bill of Exchange, or Negotiable Note, within the Custom of Merchants.*
3. *Who shall be said liable to the Payment thereof; and therein of suing the Drawer, Indorser, or Acceptor.*
4. *Who shall be said entitled to the Money.*
5. *Of the Indorsement.*
6. *Of the Acceptance: And herein,*
 1. What shall be said a good Acceptance.
 2. Whose Acceptance shall bind.
 3. Whether an Acceptance may be qualified.
 4. Of the Effect of an Acceptance.

7. *Of the Protest: And herein,*

1. Of the Necessity and Validity of the Protest.

2. At what Time to be made, and therein of giving Notice to the Drawer; of the Drawer's Refusal, so as to entitle the Party to Principal, Interest, and Costs.

8. *Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.*1. *Of the Nature and different Kinds of Bills of Exchange and Negotiable Notes: || And herein of Foreign Bills, and of the Consideration for Bills.||*

For the antiquity of exchange, *vide* Molloy, 277. Malyne, 269. —That the true measure of exchange is *par pro pari*, or value for value. Molloy, 274. —Where the

THE custom of merchants, in relation to foreign bills of exchange, seems to have prevailed time out of mind; and was at first introduced for the expedition of trade and its safety, and to prevent the exportation of money out of the realm; and hath therefore been always countenanced and encouraged, as a matter of great ease and advantage to trade, and is now become part of the law of the land; and as bills of exchange are established merely by the custom of merchants, and for their benefit, so their rules and customs are allowed to prescribe their form and several properties, as to their creating engagements on the parties that are concerned in them.

King of Portugal lowered his coin, this not to prejudice the drawer here. —That originally there could be no exchange without the king's licence. Molloy, 274.

Roll. Abr. 6.
Cro. Car. 301.

By this custom, if a merchant abroad draw a bill on a merchant here, or *vice versá*, requesting him to pay a certain sum of money, and the drawer set his name to it; this amounts to a promise to pay, and subjects him, though but a collateral engagement, to an action on the non-payment.

Cro. Car. 301.
||Cro. Jac.
306.||

And if the drawee, or he on whom the bill is drawn, refuse to accept it, or, having accepted it, refuse to pay it, the payee, or he in whose favour it is drawn, may protest it, and shall recover against the drawer, not only the principal sum, but likewise all interests, costs, and damages, by reason of the protest or refusal of acceptance, or payment of the money.

Carth. 3.
Renew v.
Axton,
Show. 341.
Comb. 190.
S. P.

4 Mod. 105.
Holt, 427.

pl. 2. (a) Nor

are bills of exchange, for value received, such matters of account as are intended by the exception in the statute concerning merchants' accounts. Carth. 226. But for this, *vide tit. Limitation of Actions.*

Also,

Also, a bill of exchange is to be considered as a simple contract debt in a course of administration, which an executor or administrator cannot discharge before debts by bond, without being guilty of a *devastavit*.

Vide head of *Executors and Administrators*.

So, if a merchant in *London* draw a bill of exchange on his correspondent in *Newcastle*, in favour of *J. S.*, and the bill is refused, and *J. S.* dies intestate, his administrator, on letters of administration taken out in *Durham*, cannot bring an action, on the custom of merchants, against the drawer, and lay the same in *London*; for that a bill of exchange is not equal to a bond or specialty, which are the deceased's goods, where they happen to be at his death, but is a simple contract, which follows the person of the debtor, and makes *bona notabilia* where the debtor resides; and therefore administration ought to have been taken out in *London*.

Carth. 373.
Yeomans v. Bradshaw,
Comb. 392.
S. C.
||3 *Salk.* 70.
and 164. *S. C.*||

[But bills of exchange and promissory notes, though, according to the general principles of the law, they are to be considered only as evidence of a simple contract, are yet so far regarded as specialties, that, unless the contrary be shewn by the defendant, they are always presumed to have been made on a good consideration; nor is it incumbent on the plaintiff, either to shew a consideration in his declaration, or to prove it at the trial. Foreign bills were always entitled to this privilege; but it was not without a considerable struggle that it was extended to inland bills: and notes are indebted for it to the statute of Queen *Anne*.]

1 *Bl. Rep.*
445. *Peckham v. Wood*,
B. R. East.
18 *Geo.* 3.
Vide 2 *Ld.*
Raym. 758.
1 *Bl. Rep.* 487.

||But though a consideration for a bill or note is in general presumed, yet in some cases it is necessary for the plaintiff to prove, that he or some preceding party took the bill *bonâ fide*, and for value; as in case of a bill or note given originally without consideration, and while the person giving it was under duress (a); or in case of a bill or note obtained by fraud (b); or in case of transfer by delivery of a person not entitled to make it (c), as in the instance of bills and notes which have been stolen or lost. To compel the plaintiff, however, to give such proof, notice must be given him that it is required, before the trial. (d)

(a) *Duncan v. Scott*,
1 *Camp.* 100.
(b) *Rees v. Marquis of Headfort*,
2 *Camp.* 574.
(c) *Miller v. Race*,
Burr. 452.
Grant v. Vaughan,
Burr. 1516.

Solomons v. Bank of England, 15 *East*, 135. n. (d) *Patterson v. Hardacre*, 4 *Taunt.* 114.; and see *Bayley on Bills*, 4th ed. 373.

And so also between *immediate* parties, as drawer and acceptor, and indorsee and the next indorser, or their agents, it is a ground of defence that the bill was given without consideration (e), or that the consideration has partially failed. (g) Thus, in an action against the acceptor, it is a good defence that the acceptance was, either wholly or in part, for the accommodation of the plaintiff (h), or of some person for whom the plaintiff is a trustee. (i)

(e) *Jefferies v. Austen*,
Str. 647.
(g) *Barber v. Backhouse*,
Peake, 61.
(h) *Darnell v. Williams*,
2 *Stark.* 166.
(i) *Jones v.*

Hibbert, 2 *Stark.* 304.; and see *Lewis v. Cosgrave*, 2 *Taunt.* 1

But the partial failure of consideration will constitute no defence, if the *quantum* to be deducted on that account is matter not of definite computation, but of unliquidated damages. Thus, if a bill or note is given for the stipulated price of goods

(*k*) Solomon v. Turner, 1 Stark. 51. previously delivered, it is no ground of partial (*k*) defence, that the price was exorbitant, or that the goods were damaged when they ought to have been sound (*l*), unless the contract was rescinded on that ground (*m*); and notice to the plaintiff of this description of defence is necessary. (*n*)||

Tye v. Gwynne, 2 Camp. 346. Basten v. Butter, 7 East, 479. (*m*) Lewis v. Cosgrave, *ubi suprâ*. (*n*) Patterson v. Hardacre, *ubi suprâ*; and see further, Bayley on Bills, 596.

Carth. 160. The custom of merchants shall not prevail against the privilege of infants, so as to bind them; and accordingly it hath been adjudged, that if an infant draw a bill of exchange, infancy is a good plea (*a*) in bar to an action brought against him.*
Williams v. Harrison, * Or it may be given in evidence on the general issue; ||(*a*) except, perhaps, where it is drawn for necessaries. See Trueman v. Hurst, 1 Term R. 40. Bayley on Bills, 58.||

Molloy, 276. Bills of exchange are usually drawn payable on sight, so many days after sight, or after date, or on single, double, or treble (*b*) usances; and it is frequent to draw two or three for the same sum, and of the same date, for fear of loss or miscarriage, which carry a (*c*) condition with them that only one shall be paid.

Molloy, 277. Show. 317. Holt, 115. pl. 4. 12 Mod. 15.—But yet varies according to the custom of particular countries; and therefore, where the plaintiff declared on a bill of exchange drawn at Amsterdam, payable at London, at two usances, and did not shew what the two usances were, judgment was given for the defendant; for the court could not take notice of foreign usances which varied, being longer in one place than in another. Salk. 131. pl. 18. Buckley v. Campbell.—[Here it may be proper to mention, that usance between London and any part of France is thirty days after date.—Between London and the following places; Hamburg, Amsterdam, Rotterdam, Middleburg, Antwerp, Brabant, Zealand, and Flanders, is one calendar month after the date of the bill.—Between London and Spain and Portugal, two calendar months.—Between London and Genoa, Leghorn, Milan, Venice, and Rome, three calendar months.—The usance of Amsterdam, on Italy, Spain, and Portugal, is two months.—On France, Flanders, Brabant, and on any place in Holland or Zealand, is one month.—On Frankfort, Nuremberg, Vienna, and other places in Germany, on Hamburg and Breslau, fourteen days after sight, two usances twenty-eight days, and half usance seven.—Half usance when the usance is one month shall contain fifteen days, notwithstanding the inequality in the length of the months.]—(*c*) Therefore, if there are three bills for the same sum, and an action is brought on one of them, and the plaintiff declares, that the money in *billa prædicta mentionat*. is not paid; this is sufficient without averring, that it was not paid on the other bills, because the sum is the same in all the bills.

Starke v. Cheesman, Carth. 510. [Where the time, after the expiration of which a bill is made payable, is limited by months, it must be computed by calendar, not lunar months: thus, on a bill dated the first of *January*, and payable at one month after date, the month expires on the first of *February*.]
1 Salk. 128. East v. Effington, 1 Salk. 130. 2 Ld. Raym. 810. Wegersloff v. Keen, 1 Stra. 224.

Bellasis v. Hester, Ld. Raym. 281. Coleman v. Sayer, Stra. 829. [Bayley on Bills, 202.] Where a bill is payable at so many days after sight, or from the date, the day of presentment or of the date is excluded. Thus, where a bill, payable ten days after sight, is presented on the first day of a month, the ten days expire on the eleventh; where it is dated the first, and payable twenty days after date, these expire on the twenty-first. Where there is no date, and the payment is directed to be made so many days *after* date, the date is taken to be the day on which it issued.

A custom has obtained among merchants, that a person to whom a bill is addressed shall be allowed a little time for payment,

ment, beyond the term mentioned in the bill, called days of grace. But the number of these days varies, according to the custom of different places.

Great Britain, Ireland, Bergamo, and Vienna, three days.

Frankfort, out of the time of the fair, four days.

Leipsick, Naumburg, and Augsburg, five days.

Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologne, Breslau, Nuremburg, and Portugal, six days.

Dantzick, Koningsberg, and France, ten days.

Hamburg (a) and Stockholm, twelve days.

Goldsmith v. Shee. Goldsmith v. Bland, Bayley, 199. || (a) But see

Naples eight, *Spain* fourteen, *Rome* fifteen, and *Genoa* thirty days.

Leghorn, Milan, and some other places in *Italy*, no fixed number.

Sundays and holidays are included in the respite days at *London, Naples, Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzick, Koningsberg, and France*; but not at *Venice, Cologne, Breslau, and Nuremburg*. At *Hamburg*, the day on which the bill falls due makes one of the days of grace, but it is not so elsewhere.

In *England*, if the last of the three days happens to be *Sunday*, the bill is to be paid on *Saturday*. (b) ||(b) Or if the last of the three days

happen to be Good Friday, Christmas-day, or a fast-day, on the day next preceding each of those days. See 39 & 40 G. 3. c. 42. and 7 & 8 G. 4. c. 15. ||

But bills payable at sight are to be paid without any days of grace. (c) ||(c) It seems, however, to be the practice

to allow three days of grace on both foreign and inland bills of exchange, whether payable upon sight or at certain days after sight. See Colman v. Sayer, 1 Barnard. B. R. 303. J'Anson v. Thomas, B. R. Tr. 24 G. 3. Bayley on Bills, 197.; and see Chitt. on Bills, 268, 269. But on checks, bills, or notes payable *on demand*, no days of grace are allowed. Bayley on Bills, (4th ed.) 189, 190. Chitt. on Bills, (7th ed.) 269. ||

1. Of Inland Bills.

Inland bills of exchange are those drawn by one merchant residing in one part of the kingdom, on another residing in some city or town within the same kingdom; and these also, being found useful to trade and commerce, have been established on the same foot with foreign bills. But at common law they differed from them in this, that there was no custom of protesting them, so as to subject the drawer to interest and damages in case of non-payment, as there was on foreign bills.

To remedy this inconvenience, by the 9 & 10 W. 3. c. 17., reciting, that great damages and other inconveniences do frequently happen in the course of trade and commerce, by reason of delays of payment and other neglects on inland bills of exchange, it is enacted, "That all and every bill or bills of exchange, drawn in or dated at and from any trading city or town, or any other place in the kingdom of *England*, do- minion of *Wales*, or town of *Berwick upon Tweed*, of the sum

6 Mod. 29. 80. Salk. 151. pl. 17.

in one bill or in part of it & limited to upon an bill in the same part of the bill but bills may in England & Ireland

"of

||As to protesting bills, see *infra*, p. 557. and Bayley, 210. *et seq.*||

“ of 5*l.* or upwards, upon any person or persons of or in *London*,
 “ or any other trading city, town, or any other place (in which
 “ said bill or bills of exchange shall be acknowledged and ex-
 “ pressed the said value to be received), and is and shall be
 “ drawn payable at a certain number of days, weeks, or months
 “ after date thereof; that from and after presentation and ac-
 “ ceptance of the said bill or bills of exchange, (which accept-
 “ ance shall be by the underwriting the same under the party’s
 “ hand so accepting), and after the expiration of three days
 “ after the said bill or bills shall become due, the party to whom
 “ the said bill or bills are made payable, his servant, agent, or
 “ assigns, may and shall cause the said bill or bills to be pro-
 “ tested by a notary public, and in default of such notary public,
 “ by any other substantial person of the city, town, or place,
 “ in the presence of two or more credible witnesses; refusal or
 “ neglect being first made of due payment of the same; which
 “ protest shall be made and written under a fair written copy of
 “ the said bill of exchange, in the words or form following:—
 “ *Know all men, that I A. B., on the — day of —, at the*
 “ *usual place of abode of the said —, have demanded pay-*
 “ *ment of the bill, of which the above is the copy, which the said*
 “ *— did not pay; wherefore I the said — do*
 “ *hereby protest the said bill, dated at — this — day of*
 “ *—.* Which protest, so made as aforesaid, shall within
 “ fourteen days after making thereof, be sent, or otherwise due
 “ notice shall be given thereof to the party from whom the said
 “ bill or bills were received, who is, upon producing such pro-
 “ test, to repay the said bill or bills, together with all interest
 “ and charges from the day such bill or bills were protested,
 “ for which protest shall be paid a sum not exceeding the sum
 “ of sixpence; and in default or neglect of such protest made
 “ and sent, or due notice given within the days before limited,
 “ the person so failing or neglecting thereof is and shall be
 “ liable to all costs, damages, and interest, which do and shall
 “ accrue thereby.

“ Provided nevertheless, that in case any such inland bill or
 “ bills of exchange shall happen to be lost or miscarried within
 “ the time before limited for payment of the same, then the
 “ drawer of the said bill or bills is and shall be obliged to give
 “ another bill or bills of the same tenor with those first given,
 “ the person or persons to whom they are and shall be so de-
 “ livered giving security, if demanded, to the said drawer, to
 “ indemnify him against all persons whatsoever, in case the said
 “ bill or bills of exchange, so alleged to be lost or miscarried,
 “ shall be found again.”

But this statute was deficient, in that it had no effect unless
 the party on whom the bill was drawn accepted it by under-
 writing the same, which few or none cared to do.

To remedy which, by the 3 & 4 Ann. c. 9. it is enacted,
 “ That in case, upon presenting any such bill or bills of ex-
 “ change, the party or parties, on whom the said bills shall be
 “ drawn,

“ drawn, shall refuse to accept the same by underwriting the same as aforesaid, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the said bill or bills to be protested for non-acceptance, as in case of foreign bills of exchange; any thing in the said act or any other law to the contrary notwithstanding, for which protest there shall be paid 2s. and no more.

“ Provided, that no acceptance of any such inland bill of exchange shall be sufficient to charge any person whatsoever, unless the same be underwritten or indorsed in writing thereupon; and if such bill be not accepted by such underwriting or indorsement in writing, no drawer of any such inland bill shall be liable to pay any costs, damages, or interest thereupon, unless such protest be made for non-acceptance thereof, and within fourteen days after such protest, the same be sent, or otherwise notice thereof be given to the party from whom the bill was received, or left in writing at the place of his or her usual abode; and if such bill be accepted, and not paid before the expiration of three days after the said bill shall become due and payable, then no drawer of such bill shall be compellable to pay any costs, damages, or interest thereupon, unless a protest be made and sent, or notice thereof be given in manner and form above mentioned; nevertheless, every drawer of such bill shall be liable to make payment of costs, damages, and interest upon such inland bill, if any one protest be made for non-acceptance or non-payment thereof, or notice thereof be sent, given, or left as aforesaid.

“ Provided, that no such protest shall be necessary, either for non-acceptance or non-payment of any inland bill of exchange, unless the value be acknowledged and expressed on such bill to be received; and unless such bill be drawn for the payment of 20*l.* or upwards, and that the protest hereby required for non-acceptance shall be made by such persons as are appointed by the above statute 9 & 10 W. 3. c. 17.

“ And it is further enacted by the said statute 3 & 4 Ann. c. 9. that if any person doth accept any such bill of exchange, for and in satisfaction of any former debt, or sum of money formerly due to him, the same shall be accounted and esteemed a full and complete payment of such debt; if such person, accepting of any such bill for his debt, doth not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof.

“ Provided, that nothing herein contained shall extend to discharge any remedy that any person may have against the drawer, acceptor, or indorsor of such bill.”

2. Of Promissory and Negotiable Notes.

The increase of trade, and necessity of paper credit, put bankers and others upon an expedient of bringing promissory notes within the custom of merchants, and making them negotiable,

Salk. 24. pl. 8.
129. pl. 12.
2 Ld. Raym.
757. 6 Mod.
29.

able, as inland bills of exchange; but this the judges would not admit of, promissory notes being only considered by the common law as evidences of a debt, and not assignable or negotiable in their own nature.

(a) Made perpetual by the 7 Ann. c. 25. § 3.; and held to extend to promissory notes drawn in Scotland, by Lord *Tenterden* C. J. in *Bentley v. Northhouse*, East. Term, 8 Geo. 4. K. B.; and that it extends to notes made abroad, see *Pollard v. Herries*, 5 Bos. & Pul. 335. *Splitgerber v. Kohn*, 1 Stark. Ca. 125. ||

But it being found necessary to make use of this kind of credit, by the 3 & 4 Ann. c. 9. (a), reciting, that whereas it hath been held, that notes in writing signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over within the custom of merchants to any other person; and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same; therefore to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, it is enacted, " That all notes in writing, that shall be made and signed " by any person or persons, body politic or corporate, or by the " servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, " to sign such promissory notes for him, her, or them, whereby " such person or persons, body politic and corporate, his, her, " or their servant or agent as aforesaid, doth, do, or shall promise to pay to any other person or persons, body politic and " corporate, his, her, or their order, or unto bearer, any sum of " money mentioned in such note, shall be taken and construed " to be, by virtue thereof, due and payable to any such person " or persons, body politic and corporate, to whom the same is " made payable; and also every such note payable to any person or persons, body politic and corporate, his, her, or their " order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be according to the " custom of merchants; and that the person or persons, body " politic and corporate, to whom such sum of money is or shall " be by such note made payable, shall and may maintain an " action for the same in such manner as he, she, or they might " do upon an inland bill of exchange, made or drawn according " to the custom of merchants, against the person or persons, " body politic and corporate, who, or whose servant or agent, as " aforesaid, signed the same; and that any person or persons, " body politic and corporate, to whom such note that is payable " to any person or persons, body politic and corporate, his, her, " or their order, is indorsed or assigned, or the money therein " mentioned ordered to be paid by indorsement thereon, shall " and may maintain his, her, or their action for such sum of " money, either against the person or persons, body politic and " corporate, who, or whose servant or agent as aforesaid, signed " such

“ such note, or against any of the persons that indorsed the
 “ same, in like manner as in case of inland bills of exchange;
 “ and in every such action, the plaintiff or plaintiffs shall recover
 “ his, her, or their damages and costs of suit; and if such plain-
 “ tiff or plaintiffs shall be nonsuited, or a verdict be given
 “ against him, her, or them, the defendant or defendants shall
 “ recover, his, her, or their costs against the plaintiff or plain-
 “ tiffs; and every such plaintiff or plaintiffs, defendant or de-
 “ fendants respectively recovering, may sue out execution for
 “ such damages and costs, by *capias, fieri facias, or elegit.*”

And it is further enacted by the said statute, “ That all and
 “ every such actions shall be commenced, sued, and brought
 “ within such time, as is appointed for commencing or suing
 “ actions upon the case, by the statute 21 Jac. 1. c. 16. § 3. of
 “ *Limitations.*

“ Provided, that no body politic or corporate shall have power,
 “ by virtue of this act, to issue or give out any notes by them-
 “ selves or their servants, other than such as they might have
 “ issued, if this act had never been made.”

It hath been adjudged, that a note written by the plaintiff,
 and subscribed by the defendant, is a note *made and signed* by
 the defendant within this act; for the signing or subscribing
 is the lien, and the writing or making is only the mechanical
 part of it. (a)

name be written in any part of the note, provided it be in his own handwriting.
 Dobbins, 1 Stra. 359. ||

Trin. 6 Ann.
 Ash v. Baron,
 in *B. R.*
 ||(a) And it is
 sufficient if
 the maker's
 See Taylor v.

[A promissory note, in its original form of a promise from one
 man to pay a sum of money to another, bears no resemblance to
 a bill of exchange. When it is indorsed, the resemblance be-
 gins, for then it is an order by the indorser to the maker of the
 note, who, by his promise, is his debtor, to pay the money to
 the indorsee. This is the exact definition of a bill of exchange.

Per Lord
Mansfield
 in *Heylin v.*
Adamson,
Burr. 676.;
 ||and see
Brown v.
Harraden,

4 Term R. 148. *Carlos v. Fancourt*, 5 Term R. 482. *Edie v. East India Company*, *Burr.*
 1224. ||

The indorser of the note corresponds to the drawer of the
 bill; the maker to the drawee or acceptor; and the indorsee to
 the payee, or party to whom the bill is made payable.

When this point of resemblance is once fixed, the law is fully
 settled to be exactly the same in bills of exchange and promissory
 notes: and as some confusion has arisen in the books from an in-
 attention to the real analogy between them, it may be proper to
 observe, that whenever the law is reported to have been settled
 with respect to the acceptor of a bill, it is to be considered as
 applicable to the drawer, or, as he may, with more propriety, be
 called, the maker of a note; when with respect to the drawer of
 a bill, then to the first indorser of the note: the subsequent in-
 dorsers and indorsees bear an exact resemblance to one another.

Till the twenty-third of *George III.* these notes and bills were
 written on a plain piece of paper unstamped: by a statute made
 in that year, certain duties were imposed on every piece of vel-
 lum,

Vide 23 Geo.3.
c. 49.

lum, parchment, or paper on which bills and notes, falling under certain descriptions, should be written, engrossed, or printed.

51 G. 3. c. 25.
48 G. 3. c. 149.
see schedule
part 1.

(a) Reserving interest from the date of a bill or note will not render an increased stamp necessary: the stamp is to be according to the sum due at the time the bill or note is given. *Prussing v. Ing*, 4 Barn. & A. 204.

|| Subsequent statutes have increased or modified these duties, the provisions of which are consolidated in the 55 G. 3. c. 184., which latter statute imposes the following increased duties on bills of exchange and promissory notes.

Inland bill of exchange, draft, or order to the bearer, or to order, either on demand or otherwise, not exceeding two months after date, or sixty days after sight, of any sum of money. (a)

	£	s.	d.
Amounting to 40s. and not exceeding 5 <i>l.</i> 5 <i>s.</i>	-	-	0 1 0
Exceeding 5 <i>l.</i> 5 <i>s.</i> and not exceeding 20 <i>l.</i>	-	-	0 1 6
Exceeding 20 <i>l.</i> and not exceeding 30 <i>l.</i>	-	-	0 2 0
Exceeding 30 <i>l.</i> and not exceeding 50 <i>l.</i>	-	-	0 2 6
Exceeding 50 <i>l.</i> and not exceeding 100 <i>l.</i>	-	-	0 3 6
Exceeding 100 <i>l.</i> and not exceeding 200 <i>l.</i>	-	-	0 4 6
Exceeding 200 <i>l.</i> and not exceeding 300 <i>l.</i>	-	-	0 5 0
Exceeding 300 <i>l.</i> and not exceeding 500 <i>l.</i>	-	-	0 6 0
Exceeding 500 <i>l.</i> and not exceeding 1,000 <i>l.</i>	-	-	0 8 6
Exceeding 1,000 <i>l.</i> and not exceeding 2,000 <i>l.</i>	-	-	0 12 6
Exceeding 2,000 <i>l.</i> and not exceeding 3,000 <i>l.</i>	-	-	0 15 0
Exceeding 3,000 <i>l.</i>	-	-	1 5 0

(b) A note payable two months after sight, if those two months, exclusive of the days of grace, exceed sixty days, requires the same stamp as a bill exceeding sixty days after sight, date and sight not being in this case synonymous.

Inland bills of exchange, draft, or order for the payment to the bearer or to order, at any time exceeding two months after date, or sixty days after sight (b), of any sum of money,

Amounting to 40s. and not exceeding 5 <i>l.</i> 5 <i>s.</i>	-	-	0 1 6
Exceeding 5 <i>l.</i> 5 <i>s.</i> and not exceeding 20 <i>l.</i>	-	-	0 2 0
Exceeding 20 <i>l.</i> and not exceeding 30 <i>l.</i>	-	-	0 2 6
Exceeding 30 <i>l.</i> and not exceeding 50 <i>l.</i>	-	-	0 3 6
Exceeding 50 <i>l.</i> and not exceeding 100 <i>l.</i>	-	-	0 4 6
Exceeding 100 <i>l.</i> and not exceeding 200 <i>l.</i>	-	-	0 5 0
Exceeding 200 <i>l.</i> and not exceeding 300 <i>l.</i>	-	-	0 6 0
Exceeding 300 <i>l.</i> and not exceeding 500 <i>l.</i>	-	-	0 8 6
Exceeding 500 <i>l.</i> and not exceeding 1,000 <i>l.</i>	-	-	0 12 6
Exceeding 1,000 <i>l.</i> and not exceeding 2,000 <i>l.</i>	-	-	0 15 0
Exceeding 2,000 <i>l.</i> and not exceeding 3,000 <i>l.</i>	-	-	1 5 0
Exceeding 3,000 <i>l.</i>	-	-	1 10 0

Sturdy v. Henderson, 4 Barn. & A. 592.

An inland bill, draft, or order for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his or her behalf, has the same duty imposed on it as have bills of exchange for the like sum payable to bearer or order.

So an inland bill, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, has the same duty as a bill

a bill payable to bearer or order on demand for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite, the same duty as on a bill on demand for the sum therein expressed only.

And the following instruments are deemed and taken to be inland bills, drafts, or orders for the payment of money, within the intent and meaning of the schedule annexed to the said act; *videlicet*; All drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons for money received, which shall entitle or be intended to entitle the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

All and bills, drafts, or orders for the payment of any sum of money out of any particular fund (a) which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

(a) See *Emly v. Collins*, 6 *Maul. & S.* 144. *Butts v. Swan*, 2 *Brod. & B.* 78. *Firbank v. Bell*, 1 *Barn. & A.* 36.

A foreign bill of exchange (or bill of exchange drawn in but payable out of *Great Britain*), if drawn singly and not in a set, is subject to the same duty as is imposed on an inland bill of the same amount and tenor.

Foreign bills of exchange drawn in sets according to the custom of merchants, for every bill of each set, where the sum made payable thereby shall not exceed 100*l.* - - - £0 1 6
 Where it shall exceed 100*l.* and not exceed 200*l.* - 0 3 0
 Where it shall exceed 200*l.* and not exceed 500*l.* - 0 4 0
 Where it shall exceed 500*l.* and not exceed 1,000*l.* 0 5 0
 Where it shall exceed 1,000*l.* and not exceed 2,000*l.* 0 7 6
 Where it shall exceed 2,000*l.* and not exceed 3,000*l.* 0 10 0
 Where it shall exceed 3,000*l.* - - - - - 0 15 0

The following are exemptions from the preceding and all other stamp duties.

All bills of exchange, or bank post bills, issued by the Governor and Company of the Bank of *England*.

§ 20.

All bills, orders, remittance bills, and remittance certificates, drawn by commissioned officers, masters, and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of the act passed in the 35th year of Geo. 3. for the more expeditious payment of the wages and pay of certain officers belonging to the navy.

All

All bills drawn pursuant to any former act or acts of parliament by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon and payable by the treasurer of the navy.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory notes.

All bills, for the pay and allowances of his majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed, or hereafter to be prescribed by his majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army dépôt, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorized to perform the duties of the paymastership during a vacancy, or the absence, suspension, or incapacity of any such paymaster as aforesaid; *save and except such bills as shall be drawn in favour of contractors or others who furnish bread or forage to his majesty's troops, and who by their contracts or agreements shall be liable to pay the stamp duties on the bills given in payment for the articles supplied by them.*

The duties on promissory notes are on the following scale:—

(a) A note for 11*l.* payable to A. B. on demand, is a promissory note payable to bearer on demand within the meaning of this clause, and requires a stamp of 2*s.* Keates v. Whieldon, 8 Barn. & C. 7.; but if payable to A. B. *or order* on demand, it falls within the clause next following. Armitage v. Berry, 5 Bing. 501.

Promissory note for the payment to the *bearer on demand* of any sum of money,

	£	s.	d.
Not exceeding one pound and one shilling	-	-	5
Exceeding 1 <i>l.</i> 1 <i>s.</i> and not exceeding 2 <i>l.</i> 2 <i>s.</i>	-	-	10
Exceeding 2 <i>l.</i> 2 <i>s.</i> and not exceeding 5 <i>l.</i> 5 <i>s.</i>	-	-	3
Exceeding 5 <i>l.</i> 5 <i>s.</i> and not exceeding 10 <i>l.</i>	-	-	9
Exceeding 10 <i>l.</i> and not exceeding 20 <i>l.</i> (a)	-	-	2
Exceeding 20 <i>l.</i> and not exceeding 30 <i>l.</i>	-	-	3
Exceeding 30 <i>l.</i> and not exceeding 50 <i>l.</i>	-	-	5
Exceeding 50 <i>l.</i> and not exceeding 100 <i>l.</i>	-	-	8

Which said notes may be re-issued after payment thereof, as often as shall be thought fit.

But if payable to A. B. *or order* on demand, it falls within the clause next following. Armitage v. Berry, 5 Bing. 501.

Promissory note for the payment *in any other manner than to the bearer on demand*, but not exceeding two months after date, or sixty days after sight, of any sum of money,

Amount-

	£	s.	d.
Amounting to 40s. and not exceeding 5 <i>l.</i> 5 <i>s.</i>	-	-	0 1 0
Exceeding 5 <i>l.</i> 5 <i>s.</i> and not exceeding 20 <i>l.</i>	-	-	0 1 6
Exceeding 20 <i>l.</i> and not exceeding 30 <i>l.</i>	-	-	0 2 0
Exceeding 30 <i>l.</i> and not exceeding 50 <i>l.</i>	-	-	0 2 6
Exceeding 50 <i>l.</i> and not exceeding 100 <i>l.</i>	-	-	0 3 6

These notes are not to be re-issued after being once paid.

Promissory note for the payment *either to the bearer on demand, or in any other manner than to the bearer on demand*, but not exceeding two months after date, or sixty days after sight, of any sum of money,

Exceeding 100 <i>l.</i> and not exceeding 200 <i>l.</i>	-	-	-	0 4 6
Exceeding 200 <i>l.</i> and not exceeding 300 <i>l.</i>	-	-	-	0 5 0
Exceeding 300 <i>l.</i> and not exceeding 500 <i>l.</i>	-	-	-	0 6 0
Exceeding 500 <i>l.</i> and not exceeding 1,000 <i>l.</i>	-	-	-	0 8 6
Exceeding 1,000 <i>l.</i> and not exceeding 2,000 <i>l.</i>	-	-	-	0 12 6
Exceeding 2,000 <i>l.</i> and not exceeding 3,000 <i>l.</i>	-	-	-	0 15 0
Exceeding 3,000 <i>l.</i>	-	-	-	1 5 0

These notes are not to be re-issued after being once paid.

Promissory note for the payment to the bearer or otherwise, at any time not exceeding two months after date, or sixty days after sight, of any sum of money,

Amounting to 40s. and not exceeding 5 <i>l.</i> 5 <i>s.</i>	-	-	-	0 1 6
Exceeding 5 <i>l.</i> 5 <i>s.</i> and not exceeding 20 <i>l.</i>	-	-	-	0 2 0
Exceeding 20 <i>l.</i> and not exceeding 30 <i>l.</i>	-	-	-	0 2 6
Exceeding 30 <i>l.</i> and not exceeding 50 <i>l.</i>	-	-	-	0 3 6
Exceeding 50 <i>l.</i> and not exceeding 100 <i>l.</i>	-	-	-	0 4 6
Exceeding 100 <i>l.</i> and not exceeding 200 <i>l.</i>	-	-	-	0 5 0
Exceeding 200 <i>l.</i> and not exceeding 300 <i>l.</i>	-	-	-	0 6 0
Exceeding 300 <i>l.</i> and not exceeding 500 <i>l.</i>	-	-	-	0 8 6
Exceeding 500 <i>l.</i> and not exceeding 1,000 <i>l.</i>	-	-	-	0 12 6
Exceeding 1,000 <i>l.</i> and not exceeding 2,000 <i>l.</i>	-	-	-	0 15 0
Exceeding 2,000 <i>l.</i> and not exceeding 3,000 <i>l.</i>	-	-	-	1 5 0
Exceeding 3,000 <i>l.</i>	-	-	-	1 10 0

These notes are not to be re-issued after being once paid.

Promissory notes for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money to be paid shall be definite and certain, are liable to the same duty as promissory notes payable in less than two months after date, for a sum equal to the whole amount of the money to be paid.

And the following instruments shall be deemed and taken to be promissory notes, within the intent and meaning of this schedule; *viz.*

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to twenty pounds.

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited.

The following are exemptions from the duties on promissory notes :—

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds, or be indefinite.

And all other instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes shall, nevertheless, be liable to the duty which may attach thereon as agreements or otherwise.

§ 20. All promissory notes for the payment of money issued by the Bank of *England* are exempted from the preceding and all other stamp duties, in consideration of the governor and company paying into the hands of the receiver-general of the stamp duties in *Great Britain*, as a composition for the duties which would otherwise have been payable for their promissory notes and bank post bills, the sum of 3,500*l.* for every million, and after that rate for every half a million.

§ 11. And it is enacted, that if any person shall make, sign, or issue, or shall accept or pay any bill of exchange, draft, or order, or promissory note for the payment of money, liable to any of the duties imposed by this act, without the same being duly stamped for denoting the duty hereby charged thereon, he shall for every such bill, draft, order, or note forfeit the sum of 50*l.*

§ 12. A penalty of 100*l.* is also imposed on any person who shall
(a) But a bill of exchange may be post-dated, if the payment is not thereby postponed for more than two months or sixty days from the time it is issued. *Passmore v. North*, 13 East, 517.

§ 15. And a penalty of 100*l.* is imposed upon any person who shall issue an unstamped draft on a banker without specifying the place where it was issued; a penalty of 20*l.* upon the person receiving such draft, and on a banker for paying it a penalty of 100*l.*

§ 18. A penalty of 50*l.* is also imposed on any banker or other person who shall, after the passing of the act, issue notes with printed dates.

§ 19. And a penalty of 50*l.* is imposed on any person re-issuing promissory notes, &c. contrary to law, and for not cancelling them; and upon the person taking them a penalty of 20*l.*

The

The Bank and Royal Bank of *Scotland*, and *British* Linen Company, are empowered by the said act to issue small notes on unstamped paper, in the same manner as they were authorized to do before the passing of the act, accounting for the duties payable in respect of such notes in the manner prescribed by the 48 G. 3. c. 149.

§ 23.

By § 24. of this act re-issuable notes are not to be issued by bankers or others (except the Governor and Company of the Bank of *England*) without a licence for that purpose.

And promissory notes for the payment of money to the bearer on demand, made out of *Great Britain* (unless made and payable only in *Ireland*), are not negotiable unless stamped; and persons circulating such notes are liable to a penalty of 20*l.* for each note circulated.

§ 29.

If upon a bill dated abroad the defence is that it was made in *England*, and has not an *English* stamp, that defence must be made out by distinct evidence, since such conduct to evade the stamp duties would be a very serious offence.

Abraham v. Dubois,
4 Camp. 269.

Provided a bill or note bear a stamp of a proper denomination, it is now no ground of objection that it is of greater value than that required by law; nor is it since 55 G. 3. c. 184. § 10. that it bear a stamp of a different denomination, unless such stamp is specially appropriated to some other instrument, by having its name on the face of it. And where a bill or note is upon a stamp so specially appropriated, it may, perhaps, be stamped under 37 G. 3. c. 136. § 5. on payment of the duty and 40*s.* penalty, before it has become payable, and on payment of the duty and 10*l.* afterwards. But this statute only applies to notes with a stamp of *proper amount*, though of wrong denomination. If the stamp is of improper amount, the note cannot be re-stamped.||

45 G. 3.
c. 127. § 6.:
the objections
taken in
1 East, 55.
2 East, 414.
are thus
removed.

See Bayley,
81. (4th edit.)

Green v.
Davies, 4 Barn.
& C. 235.

2. *What shall be said a Bill of Exchange, or Negotiable Note, within the Custom of Merchants.*

As the custom of merchants hath established these bills and notes, so hath it prescribed their form, and required that the same should be in writing, and drawn by the party, or those having legal authority from him; and such drawing raises a contract to pay the money without any express promise.

Carth. 510.
Salk. 128. pl.
10. Ld. Raym.
538. Starky
v. Cheeseman.

As to the form of the bill, it is said, that the same strictness and nicety are not required in the penning of bills current between merchant and merchant, as in deeds, wills, &c.; on the other hand, it may happen, that a writing may have the form of a bill of exchange, and yet be otherwise.

10 Mod. 287.
See 2 Ld.
Raym. 1597.
Gilb. Cas. 94.

As, if *A.* draw a bill upon *B.* in this form, *Sir, you are to pay S. S. so much of the money belonging to the governors and company of Devonshire miners, &c.*; this is no such bill of exchange as will entitle *S. S.* to an action against the drawer on the custom of merchants; for it is only a direction or appointment to the

Pasch. 10 G. '
Jenny v. Herle,
in *B. R.* ad-
judged. Stra.
591. S. C.
2 Ld. Raym.

1561. S. C.;
 ||and see Hill
 v. Halford,
 2 Bos. & Pul.
 413. Smith
 v. Nightingale,
 2 Stark. 375.||

Pasch. 1 G. 1.
 Josselyn v.
 Lacier, in *B.R.*
 adjudged.
 Fortesc. 281.
 S. C.

Dawkes & Ux.
 v. Delorane,
 5 Wils. 207.
 2 Bl. Rep. 782.
 ||Yates v.
 Groves, 1 Ves.
 jun. 280.
 Carlos v.
 Fancourt,
 5 Term R.
 482.||

Banbury v.
 Lisset, 2 Str.
 1211.

Pierson v.
 Dunlop,
 Dougl. 571.

M'Leod v.
 Snee, 2 Ld.
 Raym. 1481.
 2 Stra. 762.
 Barnard, 12.
 K. B.

cashier to pay the money, and that out of a particular fund, and doth not answer the necessity of trade, not being a negotiable bill, or made indorsible over; and charging the drawer on such a note would be liable to this further inconveniency, that hereby every one who gives his steward an order or authority to pay money might be charged for nonpayment.

So, a bill drawn by *A.* upon *B.*, requiring him to pay *C.* 7*l.* every month out of the annuity, or growing fund of the drawer, is no bill of exchange, nor the drawee liable, though he accept such bill; for it concerns neither trade nor credit, but is to be paid out of the growing subsistence of the drawer; so that if the party die, or the fund be taken away, the payment is to cease and determine.

[The Earl of *Delorane* drew a bill on *Brecknock*, requesting him to pay to Miss *Read* thirty-two pounds and seventeen shillings out of *W. Steward's* money, as soon as he should receive it; which bill *Brecknock* accepted generally.

Upon *Brecknock's* refusing to pay, an action was brought against the drawer as on a bill of exchange, but judgment was given against the plaintiff for this among other reasons, that it was payable out of a particular fund; and it being objected at the bar, that this bill was accepted by *Brecknock* generally, and in an unlimited manner, it was answered by the court, that if the bill had been drawn accordingly in a general and unlimited way, both the bill and the acceptance would have been good, but the acceptance here must mean that *Brecknock* accepts it to pay out of *Steward's* money, not out of the drawer's.

And on the same principle which governed these cases, an order from the owner of a ship to the freighter, to pay money *on account of freight*, has been held to be no bill of exchange.

However, such a bill from the freighters of a ship to the person to whom the freight is due, if good in other respects, would certainly not be bad because it was made payable *on account of freight*, because indisputably there is a *personal* credit given to the drawer, the words *on account of freight* only expressing the consideration for which the bill was given.

And there may be cases where the instrument may appear at first sight to be payable out of a particular fund, and in reality be otherwise, of which description the following case is one: — *A. B.* drew a bill of exchange, dated 25th of *May*, by which he requested *M'Leod* “one month after date to pay to *Snee*, or “order, 9*l.* 10*s.* as his quarterly half-pay, to become due from “the 24th of *June* to the 29th of *September* next by advance.” *M'Leod* accepted it, and on his refusal to pay was sued in the Common Pleas, where judgment being given against him, he brought a writ of error in the King's Bench, and objected to the judgment that this case resembled the former cases, being payable out of a particular fund; but the court held that this bill was drawn on the particular credit of the drawer, not on that of the half-pay, for it was to be paid as soon as the quarter began, and whether

whether that should ever become due or not; and the mention of the quarterly half-pay was only a direction how the drawee was to reimburse himself.

Of the distinction taken between bills and notes in this respect the following is an illustration: — “I promise to pay to *William Burchell* the sum of 101*l.* 12*s.* three months after date, for value received out of the premises in *Rosemary Lane*, late in the possession of *Thomas Rower Sherwin*:” was held a good note under the statute.

Burchell v. Slocock, 2 *Ld. Raym.* 1545.
||*Haussoullier v. Hartsinck*, 7 *Term R.* 733.||

But a bill or note must be absolutely payable at all events, and not depend on any particular circumstance which may or may not happen in the common course of things.

3 *Wils.* 213.
1 *Burr.* 525.

|| Thus, a promise to pay “on the sale, or produce immediately when sold, of the *White Hart Inn*, *St. Alban’s*, and the goods, &c.,” is no promissory note, although it be averred in the declaration that the *White Hart* and goods were sold before the action commenced.

Hill v. Halford, 2 *Bos. & Pul.* 415.

So, an instrument in form of a note, but with a memorandum written upon it, stating that it is taken for securing the payment of all such balances as shall be due from one of the makers to the payee to the extent of the sum mentioned therein, or that if any dispute shall arise respecting the subject which is the consideration of it, it shall be void, is no note. (a)

Hartley v. Wilkinson, 4 *Camp.* 127.
4 *Maul. & S.* 25. ||(a) But if the memorandum

indorsed merely import a *wish* it will not affect the validity of the note. *Stone v. Metcalf*, 4 *Camp.* 217. 1 *Stark.* 55. And no *parol* evidence of an agreement at the time to renew or give indulgence is admissible to defeat an action on a bill or note. *Hoare v. Graham*, 5 *Camp.* 57. *Bowerbank v. Monteiro*, 4 *Taunt.* 846. *Dukes v. Dow*, *Sittings after East. Term* 1817, *coram Gibbs C. J.* *Rawson v. Walker*, 1 *Stark.* 561. *Chit. on Bills*, 47. (7th ed.)||

Stone v. Metcalf, 4 *Camp.* 217. 1 *Stark.* 55. And no *parol* evidence of an agreement at the time to renew or give indulgence is admissible to defeat an action on a bill or note. *Hoare v. Graham*, 5 *Camp.* 57. *Bowerbank v. Monteiro*, 4 *Taunt.* 846. *Dukes v. Dow*, *Sittings after East. Term* 1817, *coram Gibbs C. J.* *Rawson v. Walker*, 1 *Stark.* 561. *Chit. on Bills*, 47. (7th ed.)||

So, an instrument acknowledging the receipt of drafts for payment of money, and promising to pay the money specified in the drafts, is not a promissory note, for the payment of the money depends upon the drafts being honoured.||

Williamson v. Bennett, 2 *Camp.* 417,

Thomas Rogers made a bill of exchange, by which he requested *Roger Lynch* to pay to *Henry Haydock*, or order, the sum of 14*l.* 13*s.* out of a fifth payment, when it should become due: this was held not to be a good bill of exchange, on account of the uncertainty whether any fifth payment might ever become due, as well as on account of its being payable out of a particular fund.

Haydock v. Lynch, 2 *Ld. Raym.* 1563.

So, an order to pay money, “provided the terms mentioned in certain letters written by the drawer were complied with,” is not a good bill, though the acceptance admit a compliance with those terms, for it was no bill until after such compliance, and if it was not a bill when drawn, it could never afterwards become one.

Kingston v. Long, *B. R.* M. 25 *G. 3.* *Bayley on Bills*, 12. (4th ed.)

Its uncertainty in this respect was one reason of the determination in the case of *Dawkes* against *Delorane*, it being an order to pay out of *Steward’s* money when received, which might never happen.

Suprà, 531.

So, a note “to pay a certain sum of money, or to render the

Smith v. Bo

heme, cited
2 Ld. Raym.
1362. 1396.
||Alves v.
Hodgson,
7 Term R. 242.||

"body of *J. S.* to prison by such a day," is not a note on which an action will lie by the statute, after failure of rendering the body to prison, because it was not necessarily and originally for payment of money, but only became so by matter *ex post facto*.

Appleby v.
Biddulph,
cited 8 Mod.
563. 4 Vin.
240. pl. 16.

So, neither is a note "promising to pay money, if another do "not pay it within a limited time;" for this is only an eventual promise.]

4 Mod. 242.
Comb. 227.
S. C. Pearson
v. Garret.
[Beardersley
v. Baldwin,
2 Stra. 1151.
S. P.]

Also it hath been resolved, that if *A.* give a note to *B.* for the payment of a sum of money when he the said *A.* should marry such a one; *B.* cannot bring an action on such note, and declare as on a bill of exchange, setting forth the custom of merchants, &c., for that in truth there is no such custom, being only an agreement founded on a marriage brokerage, and to pay money on a collateral contingency; which contingency cannot be called trading, so as to come within the custom of merchants.

Roberts v.
Peake, 1 Burr.
323.

[So, a note "promising to pay to *A. B.* a sum of money, "value received, on the death of a particular person, *provided* he "leave me a sufficient sum to pay the same, *or if* I shall be "otherwise able to pay it," is not good within the statute, because it is not absolutely payable at all events, but depends on two contingencies, neither of which may ever happen.

In the case of notes, however, it is not necessary that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing, the time must certainly arrive on which their payment is to depend.

Cooke v. Cole-
han, 1 Stra.
1217. ||Hill
v. Halford,
2 Bos. & Pul.
414.||

Thus, a note "to pay to *A.* or order, six weeks after the death "of the defendant's father, for value received," was held to be negotiable within the statute; for there was no contingency by which it might never become payable, but it was only uncertain as to the time, which, it was said, was the case of all bills payable after sight.

Per Lord
Mansfield,
Goss v.
Nelson, 1 Burr.
227.

So, a note "payable to an infant, when he, the infant, should "come of age," and specifying the time when that was to be, "viz. on the 12th June 1750," was held to be negotiable within the statute; for it would have been clearly good, if it had been made payable on the 12th of June 1750, which is a day certain, without mentioning that the plaintiff was then to come of age, and it is not the less certain from the addition of that circumstance.

Andrews v.
Franklin,
1 Stra. 24.
[Qu. If a
private ship?]

Thus, "a promise to pay within two months after such a ship "shall be paid off," will make a good note: for the paying off of the ship is a thing of a public nature, and morally certain.

Evans v. Un-
derwood,
1 Wils. 262,
263.

So, "I promise to pay to *George Pratt*, or order, 8*l.*, on the "receipt of his the said *George Pratt's* wages, due from his "majesty's ship the *Suffolk*, it being in full for his wages, and "prize-money, and short-allowance-money for the said ship," was held a good note on the authority of the last case; and there being

being an averment that the wages were received, the plaintiff recovered.]

But it hath been held, that a note drawn in these words, *I promise to account with J. S., or his order, for 50*l.* value received by me, &c.* is a good negotiable note, within the statute 3 & 4 Ann. c. 9., and that the word *account* shall be construed the same as to *pay*, and not to render an account as factor or bailiff; and the rather, because he is not only accountable to *J. S.*, but likewise to his *order*; which he cannot be as factor or bailiff; and therefore it must be to pay the money to the indorsee, or order of *J. S.*

[Neither will the addition of extraneous circumstances vitiate a note. Thus, "I do acknowledge that Sir *Andrew Chadwick* has delivered me all the bonds and notes for which 400*l.* were paid him on account of Colonel *Syngé*, and that Sir *Andrew* delivered me Major *Graham's* receipt and bill on me for 10*l.*, which 10*l.*, and 15*l.* 5*s.* balance due to Sir *Andrew*, I am still indebted for, and do promise to pay;" is good.

The words "value received" being in general inserted in bills and notes, there seems to have been some doubt, whether they were essential: in one case, where the want of these words was objected, a verdict was given on that account against the instrument, but that case seems to be of very doubtful authority: in a subsequent case the same objection was made, but as the instrument was clearly defective on another ground, the court gave no opinion as to this point.

On several occasions it appears to have been said incidentally by the court, and at the bar, that these words are unnecessary.

1 Show. 5. 497. 2 Ld. Raym. 1481. 1556. Lutw. 889. 1 Mod. Ent. 310.

And the point is now fully settled, that they are not necessary; for as these instruments are always presumed to have been made on a valuable consideration, words which import no more cannot be essential. (a)

Da Costa, 5 Manl. & S. 552. (a) It is advisable, however, in all cases to insert the words *value received*, for unless an inland bill or note for the payment of 20*l.* or upwards contain them, the holder cannot recover interest and damages against the drawer and indorser, in default of acceptance or payment; see 9 & 10 W. 3. c. 17.; 3 & 4 Ann. c. 9. § 4. And if a bill or note contain these words, an action of debt may be sustained by the payee against the maker of each. Bishop v. Young, 2 Bos. & Pul. 78. 81. 1 Chit. on Bills, 67.; and by the drawer against the acceptor, where the bill is payable to the drawer, or his order. Priddy v. Henbrey, 1 Barn. & C. 674. In a note it is decided that the words *value received* import *received from the payee*. Clayton v. Gosling, 5 Barn. & C. 360.]

Whether it be essential to the constitution of a bill of exchange, that it should contain words which render it negotiable, as "to order," or "to bearer," seems not, hitherto, to have received a direct judicial decision. (b) There are two cases in which the want of such words was taken as an exception, but as there were other objections on which the bill was in both cases held to be bad, it was not thought necessary to decide on that point.

Smith v. Kendall, 6 Term R. 123. Rex v. Box, 6 Taunt. 525. Lord Raym. 1545. Bayley, 29. In another case the same exception was taken and over-ruled, but under such circumstances as that the point was not generally determined. The defendant had given the plaintiff a draft on

Pasch. 11 G. 1. Morris v. Lea, Stra. 629. 2 Ld. Raym. 1396.

Chadwick v. Allen, 1 Stra. 706. ||Green v. Davies, 4 Barn. & C. 255.]

Banbury v. Lisset, 2 Stra. 1212. Dawkes v. Delorane, 3 Wils. 207.

Fort. 282. Barnard. K. B. 88. 8 Mod. 267. Mod. Ent. 310.

White v. Ledwick, B. R. H. 25 Geo. 3. Bayley, 34. ||Grant v.

Banbury v. Lisset, 2 Stra. 1212. Dawkes v. Delorane, 2 Wils. 212.

|| (b) It is now settled that these words are not essen-

tial. Chamberlyne v. Delarive, 2 Wils. 353.

one *Heddy*, for the payment of a sum of money for work done by the plaintiff for the defendant: the plaintiff had neglected to demand payment for a considerable time after the draft was due; and in the mean time *Heddy* became insolvent. The plaintiff brought his action for work and labour, and the defendant at the trial proved his having given this draft to the plaintiff in payment. But not being payable to the plaintiff or order, the jury considered it as not being a bill of exchange, and gave a verdict for the plaintiff. On an application for a new trial, the court thought it unnecessary to decide on the general question, whether the words importing negotiability were essential to the constitution of a bill of exchange, because they were of opinion that by accepting the draft, and keeping it so long after it became payable, the plaintiff had given credit to *Heddy*, and discharged the defendant.

*Per Lord
Hardwicke,
Moore v.
Paine,
Ca. temp.
Hardw. 288.*

Yet it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them, within the statute, against the maker. And there are several cases in the books of reports where such words were omitted, and no exception taken on that account. The reason of this indulgence to notes may be, that they have less reference to trade and distant commerce, being properly no more than engagements between party and party; and the statute being remedial, the benefit of it has been extended beyond the literal words.

*Blankenhagen
v. Blundell,
2 Barn. & A.
417. Cruch-
ley v. Clarence,
2 Maul. & S.
90. Cruchley
v. Mann, 5 Taunt. 529.*

|| Where the bill or note is payable otherwise than to bearer, it must contain the name of the payee. Uncertainty as to the person to whom the payment is to be made will prevent an instrument from being a bill or note; as where it is made payable to *A.* or *B.*

*Rex v. Ran-
dall, Bayley,
31. (4th ed.)*

If a bill or note is issued with a blank for the payee's name, any *bonâ fide* holder may insert his own name as payee; but until the blank is filled up it is not a bill or note.||

It must also be observed, that in most of the cases where the several instruments have been denied the privilege of bills and notes, it is not, for that reason, to be concluded that they are of no force: when the fund from which they are to be paid can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract, according to the circumstances of the case, or according to the relation in which the parties stand to one another.

*Maber v.
Massias,
Bl. Rep.
1072.*

William Watts, a merchant, who traded to *Gibraltar*, employed *Moses Massias* as his factor there, who used to consign *Watts's* goods to certain agents in *Barbary* for sale. *Massias* used to keep an account with the agents, and another with *Watts*, but *Watts* had no communication with the agents. On the 21st of *May* 1772, *Watts* drew a bill in the following terms, for the balance of an account that day stated between him and *Maber* and *Kentish*, merchants, with whom he had dealings:—

“ Sir,

" Sir,—Please to pay to Messrs. *Maber and Kentish*, or order,
 " 195*l.* 14*s.* 10*d.* out of the produce of goods you have of mine,
 " now lying at *Gibraltar, Barbary, and Leghorn*, as soon as the
 " same shall come into your hands, after discharging the present
 " acceptances.

" To Mr. *Moses Massias*,
 " No. 63. *Prescot Street*."

" WILLIAM WATTS."

Which bill *Massias* accepted in the following words underwritten,
 " I agree to conform to this order, MOSES MASSIAS."

Before this bill was paid, *Watts* became a bankrupt, and *Massias* refusing payment, an action was brought against him for " money had and received to the use of the plaintiff." On the trial it appeared, that *Massias* had large quantities of goods of *Watts* in his hands in 1773, to the amount of 1657*l.*, and more in 1772; that he had paid large sums for *Watts*, but whether for engagements prior to 1772, or not, did not appear.

The defendant gave evidence of several prior engagements, but these did not cover the whole account; and also that there was, at the time of acceptance, and still remained, a balance due to *Massias* himself of 870*l.* There was a verdict for the plaintiff; and an application being made by the defendant for a new trial, the court observed that the question was, Whether the defendant had in his hands 195*l.* for the use of the plaintiff? He was proved to have had goods to the amount of 1657*l.*, and that his acceptances, in the common and technical sense of the words, as applied to bills of exchange, together with certain other indorsements by which he had engaged himself to pay money for *Watts*, left a balance in his hands more than sufficient to pay the plaintiffs; if the balance of 870*l.* due to *Massias* himself be excluded. For this balance, then unliquidated, it never could have been meant to provide, nor was it meant that the bill or its acceptance should be subject to it, for then there would have been fraud in the drawer, and also in the acceptor; both knew, or must be supposed to have known, at least *Massias* knew, how the balance then stood. If he meant to have reserved his own balance he should have made a special acceptance; but having accepted it generally in the terms of the draft, subject only to prior acceptances, he shall not shelter himself by this concealed balance due to himself in the course of a running account.

It having been found by experience, that trade and commerce suffered materially from the circulation of bills, notes, and drafts for very small sums, which passed as cash, and many of them being made payable under certain terms and restrictions with which the poorer sort of manufacturers, artificers, labourers, and others could not comply, without subjecting themselves to great extortion and abuse, the legislature has thought proper to lay certain restraints on bills or notes under a limited sum.

Vide preamble to statute 15 G. 3. c. 51. ||The 48 Geo. 3. c. 88. repeals this statute, but re-enacts these sections, and makes

further provision for enforcing them; see § 4.||

All notes and bills for the payment of any sum under twenty shillings, 15 Geo. 3. c. 51. § 8.

shillings, which had been issued *before* the 24th of *June* 1775, were made payable on demand.

§ 1. Notes and bills for less than twenty shillings, issued *after* the
 § 2. 24th of *June* 1775, are declared void. And any person publishing or uttering such bills or notes, or in any manner engaged in the negotiation of them, is liable to a penalty of not more than 20*l.* nor less than 5*l.*, to be recovered and applied in the manner pointed out by the act, which was to continue for five years.

§ 13. The good effects of this act being found, further provisions for
 17 G. 5. c. 30. the same purpose were made by another two years after.

All promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of 20*s.*, or for any sum of money above that sum and less than 5*l.*, or on which 20*s.*, or above that sum, and less than 5*l.*, shall remain undischarged, issued after the first of *January* 1778, shall specify the names and places of abode of the persons respectively to whom or to whose order they shall be made payable; shall bear date before or at the time of drawing or issuing them, and not on any subsequent day; shall be made payable within the space of twenty-one days next after the day of the date; and shall not be transferable or negotiable after the time limited for the payment: and every indorsement shall be made before the expiration of that time, and bear date at or before the time of making it, and shall specify the name and place of abode of the person or persons to whom or to whose order the money is to be paid: and the signing of every such note, &c., and also every indorsement, shall be attested by one subscribing witness at the least; and all notes, &c. of the above description not having these requisites shall be utterly void.

§ 2. The same penalties, recoverable in the same way as in the former act, are imposed on every one uttering, publishing, or negotiating such notes, &c. without the requisites prescribed.

§ 3. And all negotiable notes, &c. issued before the 1st of *January*, for any sum between the sum of 20*s.* and 5*l.*, or on which 20*s.* or less than 5*l.* remained undischarged, are made payable on demand.

§ 4. And this act and the former act are continued not only for the residue of the five years of the former, but also for other five years.

27 G. 5. c. 16. And by a subsequent statute, both the former are made perpetual.]

|| By 7 Geo. 4. c. 6. banking companies are prohibited, under a penalty, from signing, issuing, or re-issuing, after *April* 1st, 1829, any promissory notes under 5*l.*, and from signing and issuing any *new* notes under 5*l.*, immediately from the passing of the act.||

Carth. 82. It hath been resolved, that a bill of exchange drawn by a
 Show. 125. gentleman, who is no trader, shall notwithstanding make him responsible within the custom of merchants; for otherwise persons
 Witherley v. of distinction travelling abroad would suffer in their credit; and
 Sarsfield, it might bring a general inconveniency on trade itself, when it
 Comb. 45. ill reported. came

came to be known to foreign merchants, that there were some who, though they took upon themselves to draw bills of exchange, yet were not liable to the payment thereof.

|| By the stat. 6 Ann. c. 22. § 9. and 15 Geo. 2. c. 13. § 5. (a) it is enacted, "that no partnership exceeding six persons shall borrow, owe, or take up any more money on their bills or notes payable on demand, or at any less time than six months, during the continuance of the privilege of exclusive banking granted to the Bank of *England*;" but this provision in favour of the Bank of *England*, except as to sixty-five miles round *London*, has been repealed by the late statute 7 Geo. 4. c. 46. § 1, 2.||

(a) This enactment does not extend to the East India Company, by 53 Geo. 3. c. 52. § 103, 109, 110.

3. *Who shall be said liable to the Payment thereof; and therein of suing the Drawer, Indorsor, or Acceptor.*

It is clear, that (b) every drawer of a bill is liable to the payment thereof, as is every (c) acceptor and indorsor: also, (d) if there are several indorsors of the same bill, the last indorsee may bring his action against the first indorsor, or any of them; for the indorsement is *quasi* a new bill, or at least a warranty, as some books express it, by the indorsor, that the bill shall be paid.

cannot afterwards revoke it. Molloy, 285. (d) Skin. 543. pl. 11. Ld. Raym.

(b) That if several drawers subscribe, all are liable. Molloy, 278. (c) And having once accepted it 181. Stra. 479.

So, if a bill be drawn upon *A.*, and he accept it, and afterwards refuse payment, upon which the bill is protested, the person to whom it is payable may bring several actions against the acceptor and the drawer; for the protest is no discharge of the acceptor.

Molloy, 273.

But though the drawer, acceptor, and indorsor are all liable, yet the party can have but one satisfaction: but, until such satisfaction is actually had, he may sue all, or any of them; and accordingly it was adjudged in the Exchequer Chamber, where the case was, An indorsee sued the drawer, and had judgment against him; and he also brought an action against the indorsor, to which the indorsor pleaded the judgment against the drawer, but the plea was held ill; for that the judgment was no satisfaction, without which the party could not be barred of the remedy which he had against the other.

3 Mod. 86. Lutw. 880. 882. Skin. 255. pl. 3. Co. 4. 52. S. C. Claxton v. Swift.

[Neither is the engagement of an indorsor discharged by an ineffectual execution against the drawer, or any prior or subsequent indorsor.

A bill was drawn by *Sheridan*, and afterwards by one *Boon*, and came into the hands of *Hayling*, who sued *Boon*, and took him in execution, and afterwards let him out on a letter of licence without paying the debt. He then sued *Sheridan*, and held him to bail: *Sheridan* not paying the bill, *Hayling* brought a third action against *Mulhall*, one of the bail, who insisted that the debt was satisfied by the imprisonment of *Boon*. But it was observed by the court, that each indorsor is independent of the rest, and that the bill-holder had a right to sue all the indorsors till the

Hayling v. Mulhall, 2 Bl. Rep. 1255.; [and see *M'Donald v. Bovington*, 4 Term R. 825. Bayley 268, 269. (4th ed.)]

In this case the discharge out of execution by

arrest of the bill is a discharge of a subsequent

indorsor although the bill is not paid

bill was satisfied: the law indeed so highly regards the liberty of the subject, that the taking of his body in execution is, with respect to him, a full satisfaction of the debt. But it only operates as a discharge to the identical person so imprisoned; it does not discharge even his goods after his death, since the statute of *James the First*. The remedy still remains, after the death or discharge, against every other indorsor.]

Molloy,
281. 285.
(a) So, if one
subscribe for
the honour
of him who
subscribes for
the honour
of the drawer.

Carth. 129.

Lut. 196.

||(b) But if he
only accept
suprà protest.
it is a con-
ditional
engagement,

and to render such acceptor absolutely liable, the bill must be duly presented to the drawee for payment, and protested in case of refusal. *Hoare v. Cazenove*, 16 East, 391. And presentment to the drawee for payment must be averred in the declaration, or the judgment may be arrested. *Williams v. Germaine*, 7 Barn. & C. 468.||

10 Mod. 36,
37.

If *A.* draw a bill on *B.*, who has effects of his in his hands, and *B.* accept the bill, which is afterwards protested for non-payment, and the bill be afterwards indorsed to *A.* the drawer, he may maintain an action as indorsor against *B.*; but if there had been no effects of *A.*'s in the hands of *B.*, so that the acceptance was only for the honour of *A.* the drawer, he could have no action; for thereby the money would be recovered only to be repaid again.

Salk. 126.
pl. 6. cont.
Salk. 133.
pl. 10.
(c) The Chief
Justices *Holt*,
Raymond,
and *Eyre*
held, that a
demand on
the drawer
was requisite
to be given in
evidence, the
indorsor's

engagement being only conditional.—But *Parker*, *Pratt*, and *King* held it not to be necessary; said by Lord *Hardwicke*, Mich. 10 Geo. 2. to have been so ruled by them at the sittings; and of the latter opinion he seemed to be himself; and held it clearly not to be necessary to allege it in pleading. [And it is now settled, that to entitle the indorsee to recover against the indorsor of an inland bill of exchange, it is not necessary to demand the money of the first drawer. *Heylin v. Adamson*, 2 Burr. 669.]

engagement being only conditional.—But *Parker*, *Pratt*, and *King* held it not to be necessary; said by Lord *Hardwicke*, Mich. 10 Geo. 2. to have been so ruled by them at the sittings; and of the latter opinion he seemed to be himself; and held it clearly not to be necessary to allege it in pleading. [And it is now settled, that to entitle the indorsee to recover against the indorsor of an inland bill of exchange, it is not necessary to demand the money of the first drawer. *Heylin v. Adamson*, 2 Burr. 669.]

4. *Who shall be said entitled to the Money.*

The money is to be paid to him in whose favour the bill is drawn, or to the indorsee, in case it be indorsed over; of which indorsement it seems the drawer, acceptor, and drawee must take notice at their peril; also, if there are several indorsors and indorsees, the last indorsee is entitled to the money.

If a bill of exchange is made payable to *A.*, who indorses it to *B.*, who indorses it to *C.*, and it is protested for nonpayment; *B.* may bring an action on this bill, notwithstanding his indorsement.

If *A.* draw a bill of exchange, payable to *B.*, for the use of *C.*, and *B.* for valuable consideration indorse it over to *D.*, *D.* may bring an action against *A.* the drawer; and he cannot plead that the money was extended in his hands at the suit of the king for a debt due from *C.*, for *C.* being only *cestui que trust*, had only an equitable interest, and no (a) legal remedy for the money; and *B.* is only responsible in equity to *C.* for the breach of trust.

2 Vent. 309. S. C. adjudged; it appearing that the bill was indorsed before any seizure, or writ of extent issued out, and that an indorsement on such bill was good by the custom of merchants. (a) So, in debt on a single bill made to *A.*, to the use of him and *B.*, the defendant pleads a release made to him by *B.*, and on demurrer it was adjudged for the plaintiff without difficulty; for *B.* is no party to the deed, and therefore can neither sue nor release it; but it is an equitable trust for him, and suable in the chancery, if *A.* will not let him have part of the money; and the book of E. 4. cited, that he might release in such case, was denied to be law. Lev. 255. Offly v. Ward.

Carth. 150.

Show. 165.

Dekers v.

Harriat.

Carth. 5.

Skin. 264.

pl. 2.

Show. 5.

S. C. Evans

v. Cramling-

ton, adjudged,

and affirmed in

the Exche-

quer Chamber,

seizure, or writ

5. *Of the Indorsement; ||and of its Effect in transferring the Property to the Holder.||*

Indorsement is a term known in law, which, by the custom of merchants, transfers the property of the bill or note to the indorsee; and is usually made on the back of the bill, and must be in writing (b): but the law hath not appropriated any set (c) form of words, as necessary to this ceremony; and therefore it hath been held, that if a man write on the back of a bill of exchange, *This is to be paid to J. S.*, or *The content of this bill is to be paid to J. S.*, and set his hand to it, this is a good indorsement.

Geary v. Physic, 5 Barn. & C. 254.; and although an indorsement is usually made on the back of a bill, yet it may be made by writing on the face of it, for the writing on the face of a note is of the same effect as an indorsement, and is always accepted and taken as such by the courts of law. Per Cur. Yarborough v. Bank of England, 16 East, 12. || (c) An indorsement set forth in these words, *indorsavit super billam illam content. bille illius solvend.* is sufficient after verdict, without shewing that it was subscribed. Salk. 150. pl. 14. [A blank indorsement will transfer the property, and is more frequent than an indorsement in full. Its effect is to render the bill or note afterwards transferable by delivery only as if it were payable to bearer, for by only writing his name the indorser shews his intention that the instrument should have a general currency, and be transferred by every possessor. Dougl. 633. 639.]

Molloy, 281.

7 Mod. 86, 87.

|| (b) An indorsement with a pencil is a valid indorsement within the custom of merchants.

So, if *A.* having a bill of exchange, writes his name on the back of it, and sends it to *J. S.* his friend to get it accepted, which is done accordingly; *A.*, notwithstanding his name, may bring an action against the acceptor; although objected, that the property was transferred to *J. S.*, for *J. S.* had it in his power either to act as servant or assignee; and if he had filled up the blank

Salk. 126.

pl. 4. Clerk

v. Pigot.

Molloy, 281.

S. P.; and

said to be an usual practice

blank

among merchants.
[Hence, a man to whom a bill was delivered with

blank space, making the bill payable to him, that would have witnessed his election to have received it as indorsee; but that being omitted, his intention is presumed to act only as servant to *A.*, whose name he would use only in order to write the acquittance over it.

a blank indorsement, and who carried it for acceptance, was admitted, in an action of trover for the bill against the drawee, to prove the delivery of it to the latter. *Lucas v. Haynes*, 1 Salk. 130. 2 Ld. Raym. 871.]

Salk. 130.

pl. 16.

Comb. 401.

Carth. 495.

Fisher v.

Pomfret.

A bill payable to a man's order is payable to himself, and he may bring an action thereon, averring that he made no order, &c.

So, where a bill of exchange was indorsed in this manner, *Pay the contents of this bill unto the order of J. S.*, who brought his action as indorsee, averring he had made no order to any body to receive the money; and on demurrer it was urged, that *J. S.* could not maintain an action, because the indorsement was not to him, but to his order: the court held the action well brought against the indorser; and that among tradesmen this form of indorsement is commonly used, although it is intended to be made payable to the person whose order is mentioned.

Salk. 125.

pl. 2.

5 Lev. 299.

Salk. 133.

Skin. 343.

pl. 11.

Comb. 204.

466.

[(a) It is absurd to indorse

As to the indorsing of bills, a difference has been taken between a bill payable to *J. S.* or bearer, and *J. S.* or order; that the first is not assignable by the contract, so as to enable the indorsee (*a*) to bring an action, if the drawer refuse to pay; because there is no such authority given to the party by the first contract; and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or otherwise; but when the bill is payable to *J. S.* or order, there an express power is given to the party to assign, and the indorsee may maintain an action.

them: they pass merely by transfer. *Vide infra*.

Salk. 125.

pl. 2. 133.

Skin. 343.

pl. 11. 411.

Also, though an assignment of a bill, payable to *J. S.* or bearer, be no good assignment to charge the drawer with an action on the bill, yet it is a good bill between the indorser and indorsee, and the indorser is liable to an action for the money; for the indorsement is in nature of a new bill.

Salk. 125.

pl. 2.

3 Lev. 299.

So, it hath been adjudged, that an indorsee of a bill, payable to *J. S.* or bearer, may maintain an action against the drawer, on alleging a special custom, that such bill should bind him; which custom is so found or confessed by the defendant.

Salk. 128.

Also, in cases of bills purchased at a discount, there is said to be this difference, that if it be a bill payable to *A.* or bearer, it is an absolute purchase; but if to *A.* or order, and it is indorsed blank, and filled up with an assignment, the indorsor must warrant it as much as if there had been no discount.

Salk. 126.

pl. 5.; ||but

see *post*,

contrà.||

A bank bill payable to *A.* or bearer, being given to *A.* and lost, was found by a stranger, who transferred it to *C.* for a valuable consideration; *C.* got a new bill in his own name; and *per Holt C. J.*,—*A.* may have trover against the stranger who found the bill, for he had no title; though payment to him would

would have indemnified the bank; but *A.* cannot maintain trover against *C.*, by reason of the course of trade, which creates a property in the assignee, or bearer.

[A bank-note for 21*l.* 10*s.* payable to one *William Finney*, or bearer, on demand, was sent by *Finney* under cover by the general post to his correspondent in *Oxfordshire*; the mail on the same night was robbed, and this note among others taken and carried away by the robber; it afterwards came into the possession of one *Miller*, an innkeeper, for a full and valuable consideration, in the usual course of his business, without any notice or knowledge of its having been taken out of the mail. *Finney*, hearing of the robbery, applied to the bank to stop the payment of this note, which was ordered, on his entering into security to indemnify the bank: *Miller* afterwards presented the note for payment, and delivered it to *Race*, a clerk of the bank, who refused either to pay it or re-deliver it. *Miller* brought an action of trover against *Race*, for the recovery of the note; and a case stating these circumstances coming before the court, it was held, that the plaintiff was entitled to recover; because there appeared no circumstance of collusion in him; he had taken the note in the usual course of his business, for a valuable consideration, and the currency of these notes and the nature of trade required that the fair holder should be protected even against the true owner, who could only recover them back from the finder, or any other person who had given no value for them.

Vaughan, a merchant in *London*, gave to *Bicknell*, one of his ships' husbands, a draft on his banker, Sir *Charles Asgill*, payable to ship *Fortune*, or bearer: *Bicknell* lost the draft; the person who found it, or at least was in possession, however he might have obtained that possession, went four days after the note was payable to the shop of *Grant*, a tradesman at *Portsmouth*, and having bought some tea, gave him the note in payment, and desired to have the balance. *Grant* stepped out to make enquiry who *Vaughan* might be, and being informed he was a responsible man, and that the note was in his handwriting, gave the change out of the note, retaining the price of the tea. *Vaughan* being apprised that *Bicknell* had lost the note, sent notice to Sir *Charles Asgill* not to pay it. Payment being accordingly refused, *Grant* brought his action against *Vaughan* as the drawer. The cause was tried by a special jury of merchants, who found for the defendant. On an application for a new trial, the court held, that these notes were transferable by mere delivery, and however the true owner may have lost them, the fair possessor for a valuable consideration was entitled to the money, and therefore granted a new trial.

The same principle applies to the case of a bill negotiated with a blank indorsement.

A bill was drawn at *Halifax*, by *Rhodes* and another, on *Smith*, *Payne*, and *Smith*, bankers in *London*, payable to *William Ingham*, or order, thirty-one days after date, for value received. *Ingham* indorsed it in blank; *John Daltry* received it from him, and indorsed

Miller v. Race,
1 Burr. 452.
|| See *Lawson v. Weston*,
4 Esp. Ca. 56.
which is in effect overruled by *Gill v. Cubitt*,
infra.||

Grant v. Vaughan,
3 Burr. 1516.
1 Bl. Rep. 485.

Peacock v. Rhodes et al.
Doug. 613.

dorsed it in the same manner, and delivered it to *Joseph Fisher*; it was stolen from *Fisher*, at *York*, without any indorsement by him: *Peacock*, a mercer at *Scarborough*, afterwards received it from a man unknown, who called himself *William Brown*, and by that name indorsed it to *Peacock*, of whom he bought cloth and other articles in the way of his trade as a mercer, and gave him that bill in payment, receiving the balance in cash and small bills: it appeared, that *Peacock* did not know the drawers, but had, several times before that, received bills drawn by them, which were duly paid. *Peacock* tendered this bill for acceptance and payment to the drawees, who refused; on which he brought an action as the indorsee of *Ingham* against the drawers. A verdict by consent was found for the plaintiff, subject to the opinion of the Court of King's Bench, on a special case stating the preceding facts. The court held, that there was no difference between a bill or note indorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The holder of either cannot with propriety be considered as assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule were applied to bills and notes, it would stop their currency: it would render it necessary for every indorsee to enquire into all the circumstances, and the manner in which the bill came to the indorsor: but the law is now clearly settled, that a holder coming fairly by a bill or note is not be affected with the transaction between the original parties, except in such cases as depend on particular acts of parliament.

Gill v. Cubitt,
3 Barn. & C.
466. Down
v. Halling,
4 Barn. & C.
330. Snow
v. Peacock, 3 Bing, 406.

|| But the authority of these last three cases has been shaken by recent decisions; and it is now held, that a party taking a bill which has been stolen or lost, cannot recover upon it, if he took it under circumstances which ought to have excited the suspicions of a prudent and a careful man.

Lovell v.
Martin,
4 Taunt. 799.

If a bill or note, transferable by delivery, be lost, the loser should give immediate notice to the drawer or persons who are to pay it. And if such persons afterwards pay it to a person who has not taken it *bonâ fide*, or paid value for it, they will be responsible to the loser.||

But a transfer by indorsement, where that is necessary, can only be made by him who has a right to make it, and that is strictly only the payee, or the person to whom he or his indorsees have transferred it, or some one claiming in the right of some of these parties.

Where a bill or note is drawn in favour of two or more in partnership with one another, an indorsement by one will bind both, if the instrument concern their joint trade: so, where it is in favour of them or either of them, an indorsement by one is a sufficient transfer, though they be not in partnership.

Carvick v.
Vickery,

So, where a bill drawn by two is made payable to them or their order, it would seem from principle that either might transfer without

without the other; for when two persons join in the same bill, they hold themselves out to the world as partners, and, for that purpose, are to be treated as such; and when a bill goes out into the world, the persons to whom it is negotiated are to collect the state and relation of the parties from the bill itself. If they appear on the bill as partners, it may be of less public detriment to subject them to the inconvenience of being treated as such, than to permit them to deny that they are so. But there is an universal usage among all the bankers and merchants in *London*, that in such a case, an indorsement by one of the payees only is void.]

A note payable to a feme sole, or order, who afterwards marries, can only be indorsed by the husband.

[If a man become bankrupt, the property of bills and notes of which he is the payee or indorsee vests in his assignees, and the right to transfer is in them. And if in fact he indorse a bill or note after his bankruptcy, and that be discovered before it be paid, the assignees may recover it back from his indorsee in an action of trover; and if the money be received, they may recover the money in an action for so much money paid to their use.

418. *Ramsbottom v. Lewis*, 1 Camp. 279. *Ramsbottom v. Cater*, 1

If he die, it devolves to his personal representatives, his executors, or administrators; and they may indorse it, and their indorsee maintain an action, in the same manner as if the indorsement had been by the testator or intestate. But on their indorsement they are liable personally to the subsequent parties, and not as executors; for they cannot charge the effects of the testator.

They may also be the *indorsees* of a bill or note in their quality of executors or administrators; as, where they receive one from their testator or intestate, and in that character they may bring an action on it against the acceptor or any of the other parties.]

It hath been adjudged, that a bill of exchange, or promissory note, cannot be indorsed over for part, so as to subject the party to several actions; as, if *A.* having a bill of exchange upon *B.* indorses part of it to *J. S.*, *J. S.* cannot bring an action for his part, although he allege a custom among merchants for such kind of indorsements; for the contract being entire, and subjecting him only to one man's action, no custom can make him liable to two or more actions for the same debt.

tiff should have acknowledged satisfaction for the rest.

[A bill or note may be indorsed at any time after it has issued, even after the day of payment. However, the indorsement of a note after it is due throws a degree of suspicion upon it, and in an action against the maker by the indorsee, the former is in such case entitled to go into evidence to shew that the note has been paid as between him and the indorser.

Dougl. 653.
in the notes.

10 Mod. 246.
Stra. 516.
Theo. Evid. 81.
[3 Wils. 5.]

[*M'Neillage v. Holloway*,
1 Barn. & A.
218.]
Beaves, 469,
470.
[*Thomason v. Frere*, 10 East,
Stark. Ca. 228.]

Rav. Inson v. Stone,
5 Wils. 1.
1 Stra. 1260.
2 Earnes, 157.
cited 1 Burr.
1225.
1 Term R.
487.

[1 Hen. Bla. 622.]

King, Ex. v. Thom, 1 Term
R. 487.;
vide also
10 Mod. 515.

Carth. 466.
Hawkins v. Cardy,
Salk. 65. pl. 2.
S. C.

[*Hawkins v. Gardner*,
12 Mod. 213.]
where it is said,
that the plain-

1 Ld. Raym.
575.
3 Term R. 80.

Banks v. Col-
well, at
Launceston
Spring Assizes,
1788. ||cited
5 Term R.
81.||

In an action by an indorsee of a promissory note, payable on demand, against the maker, the defendant was admitted to give evidence, that the note had been indorsed to the plaintiff a year and a half afterwards; and to impeach the consideration, by shewing that it had originally been given for smuggled goods, and that payments had been made upon it at several times. There was no privity brought home to the plaintiff, but Mr. J. Buller was of opinion, that he ought to be nonsuited; for he said, it had been repeatedly ruled at *Guildhall*, that wherever it appears that a bill or note has been indorsed over some time after it is due, which is out of the usual course of trade, that circumstance throws such a suspicion on it, that the indorsee must take it on the credit of the indorsor, and must stand in the situation of the person to whom it was payable; and here, the consideration was illegal. He therefore nonsuited the plaintiff.

Taylor v.
Mather, East.
27 G. 3. B. R.
5 Term R.
85. note.

In an action by an indorsee of a promissory note against the maker, it appeared that the note was indorsed some time after it was due, and there were many circumstances which led the court and jury to conclude that it was fraudulently obtained; whereupon a verdict was found for the defendant. Upon a motion for a new trial, it was refused on the merits, and Buller J. at the same time said, it has never been determined that a bill or note is not negotiable after it becomes due; but if there are any circumstances of fraud, and it comes into the hands of a plaintiff by indorsement after it is due, I have always left it to the jury upon the slightest circumstance to presume, that the indorsee was acquainted with the fraud. The rest of the court concurred in this opinion.

Brown v.
Davies, 5 Term
R. 80.; ||and
see Brown v.
Turner,
7 Term R.
630. Tinson v.
Francis,
1 Camp. 19.
Boehm v.
Sterling,
7 Term R.
427.
Roberts v.
Eden, 1 Bos.
& Pul. 399.
Chalmers v.
Lanion,
1 Camp. 583.||

In an action by an indorsee of a promissory note against the maker, the plaintiff rested his case upon the proof of the maker's and payee's handwriting. The note appeared on the face of it to have been drawn on the 6th of *October* 1788, payable to *Sandal* or order, and to have become due on the 13th of *November*: it had *Sandal's* indorsement upon it, and had been noted for nonpayment. Whereupon the defendant's counsel offered to prove these facts: that *Sandal*, having indorsed it in blank, delivered it to *Taddy*, by whom it had been noted for nonpayment; that on the 6th of *December*, *Sandal*, having been paid by the defendant, the maker of the note, took it up from *Taddy*, and afterwards, without the knowledge or consent of the defendant, negotiated it to the plaintiff. But Lord *Kenyon*, being of opinion that, unless knowledge was brought home to this plaintiff, it would make no difference between these parties, rejected the evidence, and the plaintiff had a verdict. Upon a motion for a new trial, his lordship concurred with the rest of the court in granting it, confining himself, however, to this ground, that the note appeared to be noted for nonpayment at the time the plaintiff received it.

It is no objection to the claim of an indorsee, that the indorsement to him does not contain the words "to order."

More v.
Manning,

Manning had given a promissory note to *Statham* or order; *Statham* assigned it to *Witherhead*, and *Witherhead* to *More*, who,
on

on nonpayment at the time, brought an action against *Manning*: on a demurrer to the declaration exception was taken that the assignment to *Witherhead* was made without saying to him or order, and that therefore he could not assign it over to *More*. But it was held by the whole court, that the indorsement was sufficient; for if the original note be assignable, then, to whomsoever it may be assigned, he has the whole interest in it, and may assign it as he pleases: an assignment to him comprehends his assigns.

In another case the plaintiff had declared on an indorsement made by *William Abercrombie*, by which he appointed the payment to be to *Louisa Acheson*, "or order;" on the bill being produced in evidence, it appeared to be originally made payable to *Abercrombie*, or order, but *Abercrombie's* indorsement was only this:—"Pray pay the contents to *Louisa Acheson*." It was objected, "that the indorsement did not agree with the declaration." The court, however, gave judgment, on the ground of a general proposition in law, that a bill is negotiable without the addition of those words to the indorsement; the legal import of such indorsement being, that the bill was payable to order, and that the plaintiff might on this have indorsed it over to another, who would have been the proper order of the first indorser.

Colonel *Clive* drew a bill, payable to Mr. *Cambell*, or order, on the *East India Company*, who accepted it. Mr. *Cambell* indorsed it to Mr. *Robert Ogilby*, but the words "or order" being originally omitted, were afterwards inserted by another hand before the trial; *Ogilby* indorsed it over to Messrs. *Edie* and *Laird*, or order, and afterwards, before the payment, became insolvent: *Edie* and *Laird* brought an action against the Company as acceptors, who refused payment, on pretence that *Ogilby* had no right to assign to the plaintiffs: the real question was, Who should bear the loss, Mr. *Cambell* or the plaintiffs? for the *East India Company*, if they did not pay to the plaintiffs, must pay to Mr. *Cambell*. The court were clearly of opinion, that the plaintiffs had a right to recover; that the law was settled by the two last cases; that such an indorsement as that to *Ogilby* was good, and gave the indorsee a right of indorsing over.

Yet an indorsement may be restrictive, and then it operates to preclude the person to whom it is made from transferring the instrument to another, so as to give him a right of action, either against the person imposing the restriction, or against any of the preceding parties: it may give a bare authority to the indorsee to receive the money for the indorser; as if to say, "Pray pay the money to such a one for my use," or use such other expressions as necessarily import that he does not mean to transfer his interest in the bill or note, but merely to give a power of receiving the money. In such a case it would be clear that no valuable consideration had been paid; but the intention of restraint must appear on the face of the indorsement.

So, if the payee direct by indorsement, that "the within must be credited to the account of a third person." This is not a transfer

Comyns, 511
in C.B. Hil.
6 G. 1. cited
2 Burr. 1222.

Acheson v.
Fountain,
Mich. 9 G. 1.
B. R.
1 Stra. 457.
cited 2 Burr.
1223.

Edie v.
East India
Company,
2 Burr. 1216.
1 Bl. Rep.
295.

2 Burr. 1227
Doug. 659.;
[and see *Robertson v.*
Kensington,
4 Taunt. 30.
Treuttel v.
Barandon,
8 Taunt. 100.
Potts v. Reed,
6 Esp. Ca. 57.]

Doug. 640.

transfer of the bill to that third person, but only an authority to the drawees to give him credit for so much; the payee does not mean to make himself liable as indorsor, or to enable the other to raise money on the bill.

And, if in such a case the drawee accept the bill, instead of cancelling it, and an indorsement be forged and the bill negotiated, the party who shall advance money on it must sustain the loss; and if afterwards a friend of the drawer, by mistake, pay the bill for his honour, the drawer may recover back the money, in an action for money had and received to his use; for it was the duty of the party advancing the money on the bill to read the special indorsement, and he must suffer for his negligence.

Thus, where a bill was drawn by a house in *Denmark* on a house in *London*, payable to a person residing in *Denmark*, or his order, and the payee made such a special indorsement; the drawees accepted and gave notice to the drawers and to the person in whose favour the indorsement was made, that they had received the bill, and placed it to the account of the latter; the clerk of the acceptors forged an indorsement to himself or order, from the person to whose account the money was to be credited, and discounted it at the bank; the acceptors failed before the day of payment, and a friend of the drawers' went to the bank and paid the bill for their honour; the drawers afterwards recovered back the money from the bank, on the ground that this special indorsement restrained the negotiability of the bill, and that the money was paid by mistake.

Ancher v.
Bank of
England,
Doug. 637.

||(a) Which is
warranted by
the stamp on
the note.
Collis v.
Emmett,
1 H. Bl. 315;
and see
Cruchley v.
Mann,
5 Taunt. 529.

An indorsement may be made on a blank note, before the insertion of any date or sum of money, in which case the indorsor is liable for any sum (a), at any time of payment that may afterwards be inserted; and it is immaterial, whether the person taking the note on the credit of the indorsement knew whether it was made before the drawing of the note or not; for in such a case the indorsement is equivalent to a letter of credit for any indefinite sum.

Cruchley v. Clarence, 2 Maul. & S. 90.||

Russell v.
Langstaffe,
Doug. 514.

One *Galley* having had frequent money transactions with *Russel* a banker, and having overdrawn his cash account, *Russel*, suspecting his credit, refused to advance him any more money, without the addition of the name of some indorsor of whom he should approve: on this *Galley* applied to *Langstaffe*, who indorsed his name on five copperplate checks, made in the form of promissory notes, but in blank, that is, without any sum, date, or time of payment mentioned in the body of the notes. *Galley* afterwards filled up the blanks with different sums and dates, and *Russel* discounted the notes. *Galley* became a bankrupt, and *Russel* demanded payment of *Langstaffe*, and, on his refusal, brought an action, in which the court thought he was entitled to recover, though it appeared that he knew the notes were blank at the time of the indorsement.

Bank of
England v.

It is said, that on a transfer by delivery, the person making it ceases to be a party to the bill or note; that such a transfer is a sale,

sale; and that he who sells it does not become a new security, and is not liable to refund the money if the bill should not be paid. Newman, 1 Ld. Raym. 442. 12 Mod.

241. *Lambert v. Pack*, 1 Salk. 128. 7th resolution. ¶ *Fyde v. Clark*, 1 Esp. 447. *Owenson v. Morse*, 7 Term R. 65, 66. *Emly v. Lye*, 15 East, 7. 12.; and see *Chit. on Bills*, 145, 146. 7th edit.¶

But this can only be true to its full extent when applied to the case of a demand by a subsequent party, when one or more have intervened between him and the party against whom he makes the demand: as between the immediate parties to the transfer, this distinction must be taken, that when the bill or note has been given in payment of a precedent debt, or for a valuable consideration at the time of the transfer, without being discounted; then, though the person who has given the money for the bill or note cannot recover against the person who received it, as indorser, yet he may certainly recover in an action for money had and received for his use, as the transferer must be understood to undertake that the bill shall be duly paid. But if the bill or note be *discounted* for the accommodation of the transferer, then the transfer is a sale, and the doctrine here laid down will apply.] Kyd on Bills of Exchange, 90.

6. Of the Acceptance: And herein,

1. What shall be said a good Acceptance.

It hath been already observed, that an acceptance, by the custom of merchants, as effectually binds the acceptor as if he had been the original drawer; and that having once accepted it, he cannot afterwards revoke it; so that herein only we are to see, what act of his will amount to an acceptance. Cro. Jac. 508. Hard. 487.

And herein it is said, that a very small matter will amount to an acceptance; and that any words will be sufficient for that purpose which shew the party's assent or agreement to pay the bill; as if, upon the tender thereof to him, he subscribes, *accepted*; or, *accepted by me*, A. B.; or, *I accept the bill, and will pay it according to the contents*; these clearly amount to an acceptance. Molloy, 278.

Or if the party underwrites the bill presented such a day, or only the day of the month; this is such an acknowledgment of the bill as amounts to an acceptance. Comb. 401.

¶ Before the statute 1 & 2 G. 4. c. 78. the acceptances, both of inland and foreign bills of exchange, might have been in writing, on the bill itself, or on other paper, or they might have been verbal; but by § 2. of this statute it is enacted, "that from and after the 1st day of August 1821, no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance shall be in writing on such bill; or if there be more than one part of such bill, on one of the said parts." As this statute only relates to inland bills, it is necessary to consider the decisions as to parol acceptances; as they still affect foreign bills.

A promise to accept an existing bill if made upon an executed consideration, or if it influence any person to take or retain the bill, is, where 1 & 2 G. 4. c. 78. § 2. does not apply, a complete acceptance Bayley on Bills, 143. (4th ed.) and cases there cited.

acceptance as to the person to whom the promise is made in the one case, and the person influenced in the other, and as to all the subsequent parties in each.||

Pillans v.
Van Mierop,
5 Burr. 1663.;
||and see
Johnson v.
Collings,
1 East, 105.
Clarke v
Cock,
4 East, 67.
Wynne v.
Raikes,
5 East, 514.
Fairlie v. Her-
ring, 5 Bing.
625.||

White, a merchant in *Ireland*, desired to draw on the plaintiffs, *Pillans* and *Rose*, merchants at *Rotterdam*, for 800*l.* payable to one *Clifford*, and proposed to give them credit on a good house in *London* for their reimbursement, or any other mode of reimbursement: the plaintiffs, in answer, desired a confirmed credit on a house of rank in *London*, as the condition of their accepting the bill: *White* named the house of the defendants as that house of rank: the plaintiffs honoured the draft, and paid the money, and then wrote to the defendants, *Van Mierop* and *Hopkins*, merchants in *London*, desiring to know whether they would accept such bills as the plaintiffs should in about a month's time draw on their house for 800*l.* on the credit of *White*: the defendants agreed to honour the bill; but, before it was drawn, *White* failed, and then the defendants wrote to the plaintiffs, informing them that *White* had stopped payment, and desiring them not to draw, as they could not accept their draft. The plaintiffs, however, drew, holding the defendants not at liberty to retract their engagement. And so held the Court of King's Bench.

Molloy, 280.

If a party says, *Leave your bill with me, and I will accept it; or, Call for it to-morrow, and it shall be accepted*; these words, according to the custom of merchants, as effectually bind as if he had actually signed or subscribed his name according to the usual manner.

Molloy, 279,
280. said to
have been
ruled by *Hale*
C. J.

But if a man says, *Leave your bill with me; I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted*; this does not amount to a complete acceptance; for the mention of his books and accounts shews plainly that he intended only to accept the bill in case he had effects of the drawer's in his hands.

Mich. 12 G. 1.
Wilkinson
v. Lutwich,
1 Stra. 648.
cor. *Raymond*

But where the drawer wrote a letter to the person, in whose favour the bill was drawn, to this purport, *That if he would let him write to Ireland first, he would pay him*; this was held a good acceptance.

C. J. at *Nisi Prius*, 1 Ld. Raym. 444. 1 Stra. 648.

Mich. 6 G. 1.
Car v. Cole-
man, in *B. R.*

So, where a foreign bill was drawn on the defendant, and being returned for want of acceptance, defendant said, that if the bill came back again, he would pay it; this was ruled a good acceptance.

Mich. 8 G. 2.
Lumley v.
Palmer, in
B. R. 2 Stra.
1000. S. C.
[See *acc.*
Julian v.
Shobrooke,
2 Wils. 9.
In *Pillans*
v. *Van Mierop*,

It seems clear, that a parol acceptance is sufficient at common law to charge the acceptor; also it hath been adjudged, since the statute 3 & 4 Ann. c. 9. *suprà*, that an indorsee of an inland bill of exchange may maintain an action against the acceptor, on a parol acceptance (*a*) as to the principal sum, though not as to interest and costs; for the act being made to give a further remedy for interest, damages, and costs against the drawer, cannot be supposed to take any advantage from the payee which he had before; and therefore the true construction of the (*b*) act is, that to charge the drawer with interest and costs, the drawee must refuse to ac-

cept

cept it in writing; nevertheless, if he accepts the bill by parol, he is liable to the principal sum in the bill, as he would have been before the act. *per Lord Mansfield, 3 Burr. 1672. Sproat v.*

Matthews, 1 Term Rep. 182.] [(a) This must be understood of an inland bill of exchange before the stat. 1 & 2 Geo. 4. c. 78.] (b) So, on the statute of 9 & 10 W. 5. c. 17. which gives damages and costs in case of a protest, it hath been held, that that statute did not take away the party's remedy against the drawer, if there was no protest, as to the principal sum, but only as to the damages and costs. 6 Mod. 80, 81. Salk. 151. pl. 17. Brough v. Perkins. || And it is now held, that a protest is not necessary to the recovery of interest. Windle v. Andrews, 2 Barn. & A. 696.||

[A drawee of a bill underwrote it thus: "Mr. Jackson, please to pay this bill, and charge it to Mr. Newton's account." It was contended, that this was not an acceptance, for that the party did not mean to become the principal debtor: it was only a direction to Jackson to pay out of a particular fund. But the court held, that the underwriting being a direction to pay the sum, it was of no importance to what account it was to be placed when paid: that was a transaction between the parties themselves, and this was a sufficient acceptance. *Moor v. Withy, Tr. 10 G. 3. B. R. Bull. N. P. 270.*

A bill was sent to the drawee for acceptance; he kept it for ten days before it became due without any objection; and whilst it continued in his hands, he entered it in his bill-book under a particular number, and wrote the number on the bill, and at the bottom the day when it would become due, and then sent it back, refusing to accept it: it was proved, that it was the common practice of the drawee to enter and mark all bills in the same manner, whether he intended to accept them or not: the court seemed to think that these circumstances alone did not amount to an acceptance. *Powell v. Monnier, 1 Atk. 611.*

If a merchant be desired to accept a bill on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person; the bare act of drawing this bill will not amount to an acceptance of the other, for the party evidently shews he meant only to make himself liable in case the bill drawn by him should be accepted and paid. *Smith v. Nissen, 1 Term Rep. 269. || Anderson v. Heath, 4 Maul. & S. 503. Rees v. Warwick, 2 Barn. & A. 115.||*

An agreement to accept or honour a bill will, in many cases, be equivalent to an acceptance, and whether that agreement be merely verbal or in writing is immaterial: if A., having given or intending to give credit to B., write to C. to know whether he will accept such bills as shall be drawn on him on B.'s account, and C. return for answer that he will accept them; this is equivalent to an acceptance, and a subsequent prohibition to draw on him on B.'s account will be of no avail, if, in fact, previous to that prohibition, the credit has been given. *Beawes, 466.*

The mere answer of a merchant to the drawer that he will "duly honour his bill," is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer. *Beawes, 454. Pierson v. Dunlop, Cowp. 572. 574. 1 Atk. 711. Powell v. Monnier.*

Mason v.
Hunt,
Doug. 286.
299.;
[and see
Johnson v.
Collings,
1 East, 98.
Clarke v.
Cock,
4 East, 57.]

And an agreement to accept may be expressed in such terms as to put a third person in a better condition than the drawer. If one man, to give credit to another, make an absolute promise to accept his bill, the drawer, or any other person, may shew such promise on the exchange, to procure credit, and a third person advancing his money on it, has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor.]

2. Whose Acceptance shall bind.

Molloy,
279. 284.
Salk. 126.
pl. 3. Ld.
Raym. 175.
Pinkney v.
Hall. [Mason v. Rumsey, 1 Camp. 384.]

A bill drawn on two, must regularly have a joint acceptance; but if there are two joint traders, and one accepts a bill drawn on both, for him and partner, this shall bind both, if it concerns the trade; otherwise, if it concerns the acceptor only in a distinct interest and respect.

Molloy, 282.
But for this
*vide tit. Master
and Servant.*

If a book-keeper or servant having authority, or usually transacting business of this nature for his master, accept a bill of exchange, this shall bind his master.

Mich. 7 G. 2.
Thomas v.
Bishop, in
B. R.
2 Stra. 955.
S. C.
2 Kel. 136.
pl. 16. S. C.
2 Barnard.
K. B. 320.
S. C.
[See Lefevre
v. Lloyd,
5 Taunt. 749.
Goupy v.
Harden,
7 Taunt. 159.
2 Marsh. 404.]

A bill of exchange was drawn by *A.*, agent to the *York Buildings Company* in *Scotland*, on *B.* their cashier in *London*, in the words following:—*To Cashier to the Honourable Governor and Assistants of the York Buildings Company, at their house in Winchester Street: Sir, Pray pay to J. S., or his order, 200l., and place it to the account of the Company, for value received, as per advice from your humble servant.* The letter of advice referred to was directed to the Governor and Company, informing them of the draft made upon *B.* in favour of *J. S.*, but it did not appear that this was the usual method of drawing bills on the Company: *B.* accepted the bill generally; and this bill having been indorsed over, and an action thereon brought by the indorsee against *B.*, the question was, Whether this acceptance should charge him in his own right, or not? And it was held, that it should; this being in every respect a good bill of exchange, and only the drawer, payee, and acceptor concerned in it, as far as appears on the face of the bill; for though it may be for the advantage of the Company, yet they are not liable to the payment of it; nor is the person in whose favour it was drawn, or the indorsee, obliged to take notice of such advantage, or of any transactions between them and their cashier, or how they stand liable to each; for were it allowed, that an indorsee must be put to seek a paymaster that bears no visible part in the transaction, this would be such a prejudice to trade, and paper-credit made so blind and hazardous a thing, that no man in his senses would ever be engaged in it: and as to the letter of advice, this was held to be only a private transaction between the drawer and a stranger; which it is not to be imagined the payee or indorsee could be privy to, and therefore cannot be any prejudice to them; nor a circumstance fit for the consideration of a jury, before whom nothing ought to be laid, in cases of this kind,
but

but what all persons concerned in the transaction may be reasonably supposed to know; and those are, all things visible on the bill, but no circumstance extrinsic to it.

3. Whether an Acceptance may be qualified; ||and herein of the Statute 1 & 2 G.4. c.78.||

It is held, that an acceptance may be qualified, as thus: I accept this bill, half to be paid in money, and half in bills; and this is good by the custom of merchants; for he, who may refuse the bill totally, may accept it in part; but he to whom the bill is due may refuse such acceptance (a), and protest it so as to charge the drawer. Also it is said, that after such acceptance and refusal of payment, he hath the same liberty of charging the drawer which he had in case the bill had been accepted absolutely, and payment refused.

Comb. 452.
Petit v.
Benson.
||(a) Per
Bayley J. in
Sebag v.
Abitbol,
4 Maul. & S.
466.; and
per Lord
Ellenborough
5 Taunt. 544.||

in Boehm v. Garcias, 1 Camp. 425. See also Gammon v. Schmoll, 5 Taunt. 544.||

So, the drawee may accept the bill, to pay it at a longer day than that on which it is made payable, and this shall bind him; but herein care must be taken that the drawee, by such acceptance or agreement, be not a sufferer.

Molloy, 283.

A bill was drawn payable the first of *January*; the person on whom the bill was drawn accepts the bill, to be paid the first of *March*; the servant brings back the bill; the master, perceiving this enlarged acceptance, strikes out the first of *March*, and puts in the first of *January*, and then sends the bill to be paid; the acceptor then refuses; whereupon the person to whom the monies were to be paid strikes out the first of *January*, and puts in the first of *March* again. In an action brought on this bill, the question was, Whether these alterations did not destroy the bill? and ruled it did not.

Molloy, 285.
per Pemberton C. J.;
||and see
Paton v. Winter, 1 Taunt.
420.||

If *A.* draw a bill payable such a day, and the drawee accept it some time after, he is liable; and in an action against him the plaintiff may declare, that *secundum tenorem et effectum billæ* he did not pay, &c.; for the effect of the bill is the payment, and not the day of payment.

Carth. 459,
460. Salk.
127. pl. 8.
129. pl. 11.
Ld. Rayn.
364.
Lutw. 253.

Jackson v. Pigot. See Comyns, 75. pl. 49. 12 Mod. 212. 410.

[The acceptance may direct the payment to be made at a place different from that mentioned in the bill; as, at the house of a banker: in which case, if the holder neglect to demand payment within a reasonable time, and the banker afterwards fail, he must stand to the loss.

Bishop v.
Chitty, 2 Stra.
1195.; ||and
see Rowe v.
Young,
2 Brod. &
Bing. 165.||

But if the banker continue solvent, the holder is not bound to prove a demand on the banker in an action against the acceptor.

Smith v.
Delafontaine,
B. R. Trin.

25 G. 3. Bayley, App. No. 5.

||Since the statute 1 & 2 Geo. 4. c. 78. if the drawee determine that the bill shall be payable only at a particular place, he must in his acceptance express that he accepts the bill "payable at a banker's house or other place only, and not otherwise or elsewhere,"

Turner v.
Hayden,
4 Barn. & C.
1.

"elsewhere." If he accept "payable at a banker's," without further words, it is a general acceptance; and an omission to present the bill there, though the banker, after it is due, fail with funds of the acceptor's in his hands, will not discharge the acceptor.

Fayle v. Bird,
6 Barn. & C.
531. Selby
v. Eden,
5 Bing. 611.

And it makes no difference that the bill is made by the drawer payable at a particular place; still, unless the acceptor introduce into the acceptance negative words to the effect mentioned in the statute, it is a general acceptance, and presentment at the particular place is unnecessary.||

Smith v. Abbot,
2 Stra.
1152.; ||and
see Clarke v.
Cock, 4 East,
75.||

An acceptance may also be "to pay when certain goods consigned to the acceptor, and for which the bill is drawn, shall be sold;" for it would affect trade if factors were not allowed to use this caution when bills are drawn on them, before they have an opportunity to dispose of the goods.

Julian v.
Shobrooke,
2 Wils. 9.

So, an acceptance "on account of the ship *Thetis*, when in cash for the said vessel's cargo," is sufficient to bind the acceptor.

Banbury v.
Lissett, 2 Str.
1212.

On the same principle, an acceptance "to pay as remitted from the place where the person on whose account the acceptance is made resides," seems binding after the remittance made.

1 Term R.
182.

But what shall be considered as an absolute or conditional acceptance, is a question of law to be determined by the court, and is not to be left to the jury.

Wilkinson v.
Lutwidge,
1 Str. 648.

A bill was drawn in *New England* for a sum of money advanced there, for the repairs of a ship, of which *Lutwidge* the drawee, residing at *Whitehaven*, was the freighter. *Wilkinson*, the holder of the bill, applied to a merchant in *London*, to send the bill to *Lutwidge* for acceptance; the merchant sent it inclosed to the drawee, who by letter acknowledged the receipt, and wrote thus: "The bill which you sent me I will pay, in case the owners of the *Queen Ann* do not: and they living in *Dublin*, I must first apply to them; I hope to have their answer in a week or ten days: I do not expect they will pay it, but I judge it proper to take their advice before I do, with which I request you will acquaint Mr. *Wilkinson*, and that he may rest satisfied of the payment." In another letter he wrote, "I have not had an opportunity of sending the bill to *Ireland*, but will take the first opportunity, and then will remit to the gentlemen concerned, according to my promise." The bill not being paid, an action was brought against *Lutwidge*, as acceptor, in which he insisted that these letters did not amount to an absolute acceptance, but were only conditional, to pay in case the owners of the *Queen Ann* did not; and that his promise to procure payment from them was in favour of the plaintiff; but Chief Justice *Raymond* thought it was rather in favour of himself; that the letters were a complete acceptance, and amounted to this: that he wished the holder of the bill to give him time to write to *Ireland*, but assured him that at all events the money should be secured, whether the owners of the *Queen Ann* paid it or not.

A bill

A bill was drawn on *Mathews*, payable to one *Lenox*, or order, and by indorsement came into the hands of *Sproat*: *Sproat's* clerk presented the bill for acceptance to *Mathews*, who lived in *London*, and who told him, "that the drawer had consigned a ship and cargo to him and another person in *Bristol*; but as he could not tell whether the ship would arrive at *London* or *Bristol*, he could not accept at that time:" the clerk, by the consent of *Mathews*, left the bill, and afterwards called, in company with his master, to know whether *Mathews* would accept the bill or not, who, on being pressed, declared "the bill was a good one, and would be paid, even if the ship were lost."

The court held that this was only a conditional, not an absolute acceptance. *Mathews* had three events in contemplation; the arrival of the ship at *Bristol*, her arrival in *London*, or her being lost: if the ship arrived in *London*, the cargo being consigned to him, he would have effects to reimburse himself; if she were lost, he had the policy of insurance, by which he could indemnify himself by recovering against the underwriters; but if she arrived in *Bristol*, the cargo was consigned to another, he would have no effects: in either of the former events he meant to accept the bill, in the latter he did not.

If the acceptance be in writing, and the drawee intend that it should be only conditional, he must be careful to express the condition in writing as well as the acceptance; for if the acceptance should, on the face of it, appear to be absolute, he cannot take advantage of any verbal condition annexed to it, if the bill should be negotiated and come to the hands of a person unacquainted with the condition, and even against the person to whom the verbal condition was expressed, the burden of proof will be on the acceptor.

A conditional acceptance, when the conditions on which it depends are performed, becomes absolute.

Nichol was the captain of a ship of which *Pierson* was the owner. The ship was freighted with naval stores by *M^cLintot*, who, being unable to discharge the freight, drew a bill on *Dunlop* and Co. payable fifteen days after sight to the order of *Nichol*, and gave *Nichol* a certificate or navy-bill, assigned to *Dunlop* and Co. as a security till the bill of exchange should be accepted: *Nichol* indorsed the bill, and sent it to *Pierson*, together with a letter from *M^cLintot* to *Dunlop* and Co., in which was inclosed the certificate which *M^cLintot* desired them to tender at the Navy-office, and at the same time he advised them that he had drawn on them as above. On the 2d of *October* 1776, *Pierson* sent this letter, with the certificate inclosed, and also the bill of exchange, to *Dunlop* and Co.; when the bill was demanded again the next day, the defendants delivered it up, saying, "it would not be accepted till the navy-bill was paid;" but they refused to deliver the navy-bill, saying, they would receive the money themselves. It was held, that this was a conditional acceptance, which on the receipt of the money became absolute. *Nichol*, the captain, had a lien on the naval stores for his freight; the certificate was a security

Sproat v. Mathews, 1 Term R. 182. || See *Swan v. Cox*, 1 Marsh. 177. *Clarke v. Cock*, 4 East, 73.||

Vide Dougl. 286. || *Bow-erbank v. Monteiro*, 4 Taunt. 844.; and see *Chit. on Bills*, 180, 181. (7th ed.)||

Pierson v. Dunlop, Cowp. 571. || But a conditional acceptance must be so stated in declaration, with an averment that the condition has been performed. *Langston v. Corney*, 4 Camp. 176.||

curity for that freight ; it was given into his possession as a pledge for the money till the bill should be paid. It was not sent to *Dunlop* and Co. by the post in the usual course, but was inclosed to *Pierson* as his security. He was therefore not bound to part with it till the bill was accepted. *Dunlop* and Co. by detaining it, and saying that the bill would not be accepted till the navy-bill should be paid, undertook, on that event, to accept and pay the bill of exchange.

But if the conditions, on which the agreement to accept a bill is made, be not complied with, that agreement will be discharged.

Mason v.
Hunt,
Doug. 297.

As, if a merchant undertake to accept bills to a certain amount, on condition that a cargo of an equal value be consigned to him, and an order given for insurance ; if the cargo consigned do not equal the value, he is not bound to accept.

Beawes, 456.

When a bill is drawn for the account of a third person, and is accepted according to its tenor for his account, and he fails without making provision for its payment, the acceptor must discharge the bill, and can have no redress against the drawer.

Id. ibid.

But if the drawee do not choose to accept on the account of him for whose account he is advised the bill is drawn, he may accept for the account and honour of the drawer.

Id. ibid.

Or, if a bill, made payable to order, be indorsed by a substantial man before acceptance be demanded, the drawee, if he have any doubt about the drawer, or of him on whose account it is drawn, may accept it for the honour of the indorsor ; but in this case he must first have a formal protest made for non-acceptance, and should send it without delay to the indorsor for whose honour he has accepted it.

Id. 458.
||Smith v.
Nissen,
1 Term R.
269. ||

Such acceptances as these are called acceptances *suprà* protest ; and have this effect with respect to the security of the acceptor, that they give him a right to call on the party for whose honour he accepts ; and in the case of an acceptance for the honour of the indorsor, on him and all the parties before him : whereas a simple acceptance, according to the tenor of the bill, gives him a remedy only against the drawer, or against him on whose account the bill is drawn, as the case may be.

The method of accepting *suprà* protest is this : the acceptor must personally appear with witnesses before a notary (whether the same who protested the bill or not is of no importance), and declare that he accepts such protested bill in honour of the drawer or indorsor, &c., and that he will satisfy the same at the appointed time ; and then he must subscribe the bill thus : “ Accepted *suprà* protest, in honour of *T. B.*,” &c.

Beawes, 457.

But this acceptance *suprà* protest may be so worded, that though it be intended for the honour of the drawer, yet it may equally bind the indorsor, and in such a case it must be sent to the latter.

Id. ibid.

If the person on whom the bill is drawn refuse to accept it, any third person, after protest for non-acceptance, may accept *suprà* protest for the honour of the bill or of the drawer, or of any

any particular indorsor : if he accept for the honour of the bill or of the drawer, he is bound to all the indorsees as well as to the holder ; if in honour of a particular indorsor, then to all subsequent indorsees.

Any one accepting a bill *suprà* protest, though without the orders or knowledge of the person for whose honour he accepted it, has a remedy against that person, who is bound to satisfy him as if he had acted entirely by his directions, for his commission, postage, and other charges. Beawes, 457, 458.

If a bill be protested for non-acceptance, and after it has been accepted *suprà* protest by a third person, the drawee, on receiving fresh advice and orders, determine to accept and pay it, the acceptor *suprà* protest may permit him, though the holder cannot be obliged to free him from his acceptance ; and if the two acceptors agree, the drawee must pay the other his commission, charges, &c. as it was by his acceptance that the bill was prevented from being returned protested. *Id.* 457.

If the acceptor of a bill for the honour of the drawer or indorsor receive his approbation of the acceptance, then he may safely pay the bill without any protest for nonpayment. But if the person for whose honour the bill was accepted, either return no answer to the advice, or express a disapprobation of the acceptance, then the acceptor *suprà* protest must cause a formal protest to be drawn up for nonpayment against him to whom the bill was directed, and on his continuing to refuse payment, must pay it for him. *Id.* 458.

|| An acceptance *suprà* protest is only a conditional engagement ; and to render the acceptor absolutely liable, the bill must be duly presented for payment to the drawee, and protested in case of refusal. Hoare v. Ca-zenove, 16 East, 391. Williams v. Germaine, 7 Barn. & C. 468.

A bill was drawn in *America* on C. and Co. of *Liverpool*, directed to them at *Liverpool*, requesting them to pay 500*l.* to L. and Co. or order, in *London*, and indorsed by L. and Co. to plaintiffs. The bill, on presentment to the drawees at *Liverpool*, was refused acceptance, whereupon the defendants accepted it for honour of L. and Co., the payees, in this form : " Accepted under protest, for honour of L. and Co., and will be paid for their account, if regularly protested, and refused when due." The bill when it became due, was presented at the house of the drawees for payment, and refused ; whereupon it was protested at *Liverpool*, and by the next post it was forwarded to *London*, and two days after it became due it was presented for payment to the defendants, who refused to pay it, on the ground that it should have been presented and protested in *London* on the day when due. At the trial at Guildhall, several merchants of eminence, and also notaries, proved that it was usual to protest such a bill in *London*, where it was made payable, and not at the residence of the drawees : and two notaries for the plaintiff also proved, that such bills were sometimes protested at *Liverpool*, where the drawee resided. — Held by Lord Tenterden C. J., and Mitchell v. Baring, October Sittings, London, 1829, before Lord Tenterden C. J. and special jury.

and afterwards by the Court of K. B. on a motion for a new trial, that it was not necessary to decide whether the protest at *Liverpool* would have been sufficient, if the defendants' acceptance had been general, though they seemed to think it would. But, at all events, the defendant, by stipulating in the acceptance that the bill must be duly "protested and *refused* when due," had rendered it necessary that the bill should be presented on the day when due to the drawees at *Liverpool*; since it could only be *refused* where there was some person to whom to present it, and in *London* there was no such person.||

Beawes, 458.

When a bill is protested for nonpayment, any man may pay it under protest, for the drawer's or indorsor's honour, even he who made or he who suffered the protest; but he must previously declare before a notary for whose honour he discharges it; and of this the notary must give an account to the parties concerned, either jointly with the protest, or in a separate instrument.

Beawes, 459.
||(a) And if the bill has been accepted by the drawee, he may sue such acceptor; *Ex parte* Wackerbath, 3 Ves. 574.; but it is otherwise if the acceptance was for the accommodation of the drawer. *Ex parte* Lambert, 15 Ves. 179. Mertens v. Winnington, 1 Esp. Ca. 112.||

He who discharges a bill protested for nonpayment in honour of the drawer, has his remedy against the latter, but not against the indorsors (a); but he who discharges a bill protested for nonpayment in honour of an indorsor, has his remedy not only against that indorsor, but against all that were before him, including the drawer: but he has no right against subsequent indorsors.

Id. 458.

A man, after having given a simple acceptance to a bill, cannot satisfy it under protest, in honour of an indorsor, because as acceptor, he has already bound himself to that indorsor; but a drawee, not having yet accepted the bill, may discharge it for the honour of the indorsor or drawee, as if he were a third person unconcerned.

Id. *ibid.*

Yet it is said that the possessor of a bill, protested for nonpayment, is not bound to admit of its discharge from a third person under protest, either in honour of the drawee or of any indorsor, unless he declare and prove that the honour of that bill was particularly recommended to him: and if the protested bill be indorsed by the possessor's correspondent, and were remitted by him, then the possessor ought not to admit of any payment in honour of the indorsements, but under the express condition that the payer shall have no redress against the said correspondent.

4. Of the Effect of an Acceptance.

Id. 455.

The effect of the acceptance is to give credit to the bill, and to render the acceptor liable according to the tenor of his acceptance; the very act of accepting implies an acknowledgment that he has effects of the drawer in his hands.

Symonds v. Parminster, 1 Wils. 185.

If, therefore, the drawee accept a bill generally, and by reason of his nonpayment the drawer is obliged to pay it, the latter, as drawer,

drawer, may maintain an action against him, not only for the principal sum, but, in case of a protest, for damages, interest (a), and costs.

to entitle the party suing to interest. *Windle v. Andrews*, 2 Barn. & A. 696.||

If, indeed, the drawee have no effects of the drawer in his hands, and notwithstanding accept the bill, he has his remedy, if he pay it, against the drawer; but with regard to every body besides, the acceptor is considered as the original debtor, and to be entitled to have recourse against him, it is not necessary for the holder to shew notice given to him of nonpayment by any other person.

When a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance.

|| And it has formerly been held (b), that if the drawee of a bill put his name on it as acceptor, he cannot afterwards, even before it has been delivered to the payee, discharge his acceptance by erasing his name; but it is now settled, that if the drawee, having once written his acceptance with intention of accepting the bill, changes his mind, and before it is communicated to the holder, or the bill delivered back to him, obliterates his acceptance, he is not bound as acceptor. (c)||

Birbeck, 15 East, 17. *Bentinck v. Dorrien*, 6 East, 199. (c) *Cox v. Troy*, 5 Barn. & A. 474.

But the acceptor may be discharged by an express declaration of the holder, or by something equivalent to such declaration.

Black held, as indorsee, a bill drawn by one *Dallas*, and accepted by *Peele*. *Black* arrested *Peele*, but finding that no consideration had been given for the acceptance, his attorney took security from *Dallas*, and sent word to *Peele*, "that he had settled with *Dallas*, and he needed not to trouble himself any further." (d) *Dallas* afterwards became bankrupt, and then *Black* demanded payment of *Peele*. The cause was tried first before Lord *Mansfield*, and afterwards by Chief Justice *De Grey*, who both held that the acceptor was discharged.

discharge him. See *Whatley v. Tricker*, 1 Campb. 35. *Parker v. Leigh*, 2 Stark. Ca. 228.||

In another case a book of the plaintiff's was produced in which the bill was entered, and over against it this memorial, "Mr. *Pulteney's* acceptance annulled." The jury, however, gave a verdict for the plaintiff; but the Court of Exchequer granted a new trial, on the ground that this was an implied discharge; and on the second trial before Chief Baron *Skinner*, one *Alexander*, who had indorsed the bill to the plaintiff, was produced as a witness on the part of the defendant, and swore that *Walpole* had positively agreed to consider *Pulteney's* acceptance as at an end; on which the jury found for the defendant. *Walpole* had kept the bill from 1772 to 1775 without calling on *Pulteney*.

But no circumstances of indulgence shewn to the acceptor by the

|| (a) A protest is no longer necessary on an inland bill, Dougl. 249.

|| *Arden v. Watkins*, 5 East, 525. *Darnell v. Williams*, 2 Stark. 166.||

Mar. 17. *Beawes*, 454. || *Robertson v. Kensington*, 4 Taunt. 30.||

(b) *Thornton v. Dick*, 4 Esp. Ca. 270. *Trimmer v. Oddy*, cited *Bentinck v. Dorrien*, 6 East, 200. *Roper v.*

Black v. Peele, cited Dougl. 49. || (d) It must amount to an unconditional renunciation of all claim upon the acceptor, in order to

Walpole v. Pulteney, cited Dougl. 249.

Dingwall v.
Dunster,
Dougl. 247.
||Anderson v.
Cleveland,
13 East, 430.
S. C. 1 Esp.
Ca. 46.||

the holder, nor any attempt by him to recover of the drawer, will amount to an express declaration of discharge.

Dunster accepted a bill merely to lend his credit, and to accommodate *Wheate*, the drawer. *Fitzgerald*, the payee, indorsed it to *Dingwall*, and delivered it to him in payment for jewels. After it became due, the plaintiff, understanding that the acceptor never had any consideration for it, and that *Wheate* was the real debtor, wrote to one *Ready*, *Wheate*'s attorney, on the 6th of *February*, and on the 4th of *November* 1775, pressing him for payment. *Dunster*, on the 13th of *February* 1775, wrote a letter to *Dingwall*, thanking him in strong terms for not proceeding against him, but mentioning in the same letter, that he had been informed by a person who had been sent from him to *Dingwall* on the business, that *Wheate* had taken up the bill, and given another to *Dingwall*'s satisfaction. It did not appear that *Dingwall* took any notice of that letter. But he for some time received interest on the bill from *Wheate*, and also the principal due by another bill, made at the same time, and drawn and accepted by the same parties, and under like circumstances. The plaintiff suffered several years to elapse without calling on *Dunster*, or treating him as his debtor. The question was, Whether the plaintiff, by his conduct, had discharged the acceptor? and the court unanimously held, that he had done nothing from which it could be concluded he meant to abandon his claim against him. He had done right in applying to *Wheate* for payment, as he was apprised that he was in fact the debtor, and *Dunster* was so far sensible of his kindness, as to thank him for his indulgence in a letter; had the suggestion in that letter been true, relative to the plaintiff's having delivered up the bill to *Wheate*, that might have made a material difference: but the plaintiff having returned no answer to the letter, and the fact not having been attempted to be proved at the trial, it was probable the assertion was not warranted. This case had no resemblance to the two preceding cases which had been cited in argument.

Neither will any length of time short of the statute of limitations, nor the receipt of part of the money from the drawer or indorsor, nor a promise by indorsement on the bill by the drawer to pay the residue, discharge the holder's remedy against the acceptor.

Ellis v.
Galindo,
Dougl. 250.
in the notes.

A bill was drawn by one brother and accepted by another. When it became due, the payee received of the drawer 3*l.* 15*s.* 4*d.*, and at the same time the following indorsement was made on the bill: "Received on account of this bill 3*l.* 15*s.* 4*d.*:" "Balance remaining due, 26*l.* 4*s.* 8*d.*, I promise to pay Mr. *Thomas Ellis* within three months from the date of this." Signed by *James Galindo*, who was the drawer. The balance was never paid, and at the distance of three years an action was brought against the acceptor; the cause was tried before Lord *Mansfield*, who thought the acceptor was discharged, and nonsuited the plaintiff. The ground of his Lordship's opinion probably was, that the indorsement was as a new bill accepted by the plaintiff in payment of the

the old; and on an application for a new trial, his Lordship said, he did not think that this case at all interfered with the determination in *Dingwall* and *Dunster*. The plaintiff's counsel contended that the indorsement was made to prevent an imputation of neglect, because delay in coming against an acceptor may discharge a drawer or indorser. The court all seemed to think that this was a question of intention, and ought therefore to have been left to the jury, but they refused a new trial on account of the smallness of the sum.

¶ And in the case of accommodation acceptances it has been decided, that the holder's giving time to or taking a *cognovit* from the drawer, though he have notice that the bill was accepted for the accommodation of such drawer, will not discharge the acceptor.¶

Fentum v. Pocock,
5 Taunt. 192.
S. C. 1 Marsh.
14. *Mallet v. Thompson*,
5 Esp. Ca. 178. *Harrison v. Cooke*, 5 Camp. 362.

But, when the holder of a bill receives part of the money from the drawer, he cannot recover more than the residue from the acceptor; and where the drawer pays the whole, the acceptor is completely discharged.

Bacon v. Searles,
1 H. Bl. 88.

By the law of *Leghorn*, if a bill had been accepted and the drawer had failed, and the acceptor had not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance became void. This happening to be the case of one *Burrowes*, he instituted a suit at *Leghorn*, to discharge himself of his acceptance, which was accordingly vacated by a sentence in the court there. He afterwards returned to *England*, and was sued here on his acceptance; on which he filed a bill in Chancery for an injunction and relief. Lord Chancellor *King* was clearly of opinion, that this cause was to be determined according to the laws of the place where the bill was negotiated; and the acceptance having been vacated by a competent jurisdiction, that sentence was conclusive, and bound the court here.

Burrowes v. Jemino,
2 Stra. 733.

If the drawee offer a conditional acceptance, and the holder, instead of acquiescing, do something which shews that he does not admit such acceptance, the drawee is not bound, even if the event afterwards happen on which the acceptance was to depend.

A bill payable to one *Lenox*, or order, forty days after sight, was drawn on the defendant; *Lenox* indorsed it to the plaintiff: *Allen*, the plaintiff's clerk, presented the bill to the defendant, who lived in *London*, for acceptance: the defendant told him that the drawer had consigned a ship and cargo to him and another person at *Bristol*, but as he could not then tell whether the ship would arrive at *London* or *Bristol*, he could not accept at that time: on which *Allen* said that he would leave the bill upon this condition, that in the event of the defendant's not accepting it as from the day when it was presented, he should be at liberty to note it for non-acceptance as from that time: to this the defendant assented, and the bill was accordingly left at his house till a future day, when *Allen* called again, in company

Sproat v. Mathews,
1 Term R.
182.

with the plaintiff, to know whether the defendant would accept the bill or not, who, on being pressed to accept it, said that the bill was a good one, and would be paid, even if the ship were lost. *Allen* immediately on this carried the bill to a notary public, and had it noted for non-acceptance from the time when it was first left with the defendant. The ship afterwards arrived safe at the port of *London*, and the defendant disposed of the cargo. This being a conditional acceptance, the conduct of the plaintiff was held to have been a waiver of it, and to have precluded him from holding the defendant to his engagement.

Though an agreement to accept, on condition of a certain fund being consigned to the acceptor for the discharge of the bill, may amount to an acceptance on the performance of the conditions, yet, if the indorsee take the fund out of the hands of the drawee, he discharges him from his engagement.

Mason v.
Hunt, Dougl.
284. 297.
||Chitt. on
Bills, 191.
(7th ed.)||

Rowland Hunt, in *Dominica*, agreed with a house there, that his partner, *Thomas Hunt*, in *London*, should, on a cargo of tobacco being consigned to him, with the bills of lading, and an order for insurance, accept such bills as that house should draw on him, at the rate of 80*l.* per hhd., from ninety days to six months' sight: insurance for the sum of 3600*l.* was ordered on forty hhds. of tobacco, which *Thomas Hunt* procured for a premium of 303*l.* He afterwards received a letter, advising him of six bills of exchange being drawn on him for 3200*l.*, in consequence of *Rowland Hunt's* agreement, payable to one of the partners of the house, on account of forty hhds. of tobacco, and indorsed by him to *Mason*. The bills arrived, and were presented for acceptance. *Thomas Hunt* refused to accept them, on an apprehension that the tobacco was not worth the money at which it was valued. After a negotiation of some days, *Mason* took the bill of lading for the forty hhds. and the policy of insurance out of the hands of *Thomas Hunt*. The tobacco afterwards arriving, was received and sold by the plaintiff *Mason*, and produced only 1400*l.* The occasion of this difference between the real produce and the valued price did not appear. Under the direction of Lord *Mansfield*, a verdict was given for the defendant; and on an application for a new trial his Lordship expressed himself thus:—An agreement to accept may in many instances amount to an acceptance: but an agreement is still but an agreement, and if it be conditional, and a third person, knowing of the conditions annexed to the agreement, take the bill, he takes it subject to such agreement. Here there were many things specified as the conditions of the acceptance—the number of hhds. to be delivered—of a certain value rated by the hhd.—the insurance—the bills of lading—the consignment. On the face of the agreement, I thought at the trial, and still incline to think, that the meaning of the parties was, that tobacco should be consigned which should be worth 80*l.* per hhd.: this fell immensely short of that sum. It is plain the *Hunts* never meant to be in advance, and I think so great a difference in the value such a fraud as to entitle the defendants to relief against the agreement

agreement. But as to this the rest of the court have doubted, chiefly because there is no evidence to shew how the decrease in the value arose, whether from the inferiority of the quality, or the fluctuation in the market. But the rest of the court are extremely clear that the subsequent conduct of the plaintiff makes an end of the whole, and I think the reasons are unanswerable. As to that part of the case, it stands thus: the *Hunts* say, "We are not bound; this is an imposition:—the tobacco is of inferior value. The letter represents it as worth 80*l.*, the insurance makes it 90*l.* per hhd., and it turns out not to be worth 40*l.*" If *Mason* had meant to say, "You are liable, and shall pay the bills," what would his conduct have been?—He would have left the policy of insurance and the bills of lading in their hands, and sued them upon the acceptance. The temptation to accept was the commission on the consignment, and they were to have the security of the goods and the insurance. But the plaintiff undoes all this, and says, "Then I will take all from you, security, commission," &c. This was saying, "I will stand in your place, but not so as to be answerable for more than the produce of the tobacco." It is impossible the defendants could mean to accept without any benefit or security. We are all clear that this made an end of the agreement.

Though the receipt of part from the drawer or indorsor be no discharge to the acceptor for more than the part received, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a discharge to the drawer and indorsors in the one case, and to the indorsors in the other, unless due notice be given of the nonpayment of the residue; for the receipt of part from the maker or acceptor without notice, is construed to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional, to pay in default of the original debtor, on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker will not discharge the drawer or indorsors; for it is for their advantage that as much should be received from others as may be.

The receipt of part from an indorsor is no discharge of the drawer or preceding indorsor, for more than the part received.

||Gould v. Robson, 8 East, 580. Walwyn v. St. Quintin, 1 Bos. & Pul. 652.||

||Satisfaction of a bill or note as to one of several partners is a satisfaction as to all; and if a person is a partner in two firms, satisfaction as to one firm is so as to both.||

One *Scaiston* drew a note, by which he promised to pay to one *Pitfield*, or order, the sum of 200*l.*, and indorsed it to *Hull*. *Hull* brought an action against *Scaiston*, in which he held him to special bail; *Hull* recovered interlocutory judgment against *Scaiston*, on which his bail paid the debts and costs, amounting to 220*l.* 15*s.* *Hull* executed an instrument between himself on the one part, and the bail on the other, reciting the note, and that he had recovered interlocutory judgment on it against

1 Ld. Raym.
744. Kelloock
v. Robinson,
2 Stra. 745.
cited
1 Wils. 48.

Bull. N.P. 271.
cites Johnson
v. Kenyon,
C. B. Hil.
5 G. 5.

Vide Johnson
v. Kenyon,
2 Wils. 262.

Jacaud v.
French,
12 East, 517.

Hull v. Pitfield,
1 Wils. 46.

Scraiston : that the bail had purchased the note, and paid the debt and costs; in consideration of which *Hull* assigned over to them the note and the interlocutory judgment, with a power of attorney to make use of *Hull's* name to sue the indorsor, and covenanted, in the common manner, not to do any act to hinder the bail from recovering the money on the note. An action was afterwards brought in *Hull's* name against *Pitfield* the indorsor, on which these circumstances were stated; and the court held the indorsor was discharged by the payment by the bail in the former action, as much as if the drawer had paid the money himself.]

7. *Of the Protest : And herein,*

1. Of the Necessity and Validity of the Protest.

Mar. 27.
1 *Ld. Raym.*
743.

[A protest is made for non-acceptance, nonpayment, and also for better security. This last is usual when a merchant, who has accepted a bill, happens to become insolvent, or is publicly reported to have failed in his credit, or absents himself from 'Change before the bill he has accepted has become due, or when the holder has any reason to suppose it will not be paid; in such cases he may cause a notary to demand better security, and on that being refused, make protest for want of it; which protest must, as in other cases, be sent away by the next post, that the remitter or drawer may take the proper means to procure better security.]

Leftley v.
Mills, 4 Term
R. 175.
|| And see *Gale*
v. Walsh,
5 Term R.
239. *Orr v.*
Maginnis,
7 East, 359. ||
The noting is

a minute made by the officer upon the bill itself, in consequence of the drawee's refusing to accept or pay, as the case may be, consisting of his (the officer's) initials, the month, the day, and the year, with his charges for minuting. The protest itself is a solemn declaration afterwards drawn up by the officer, that the bill has been presented for acceptance or payment, which was refused, and that the holder intends to recover all damages, which he, or the deliverer of the money to the drawer, may sustain on account of the non-acceptance.

Molloy, 279.
6 Mod. 80.
Salk. 151.
pl. 17. 2 *Ld.*
Raym. 992.
|| (a) In practice, however, the plaintiff recovers interest against a drawer or indorser of an inland bill on proof of due notice, without proving a protest; and it has recently been decided, that a protest is not essential to the recovery of interest. *Windle v. Andrews*, 2 Barn. & A. 696.; and see *Clitty on Bills*, (7th ed.) 218. ||

A protest does not raise any debt, but only serves to give formal notice that the bill is not accepted, or accepted and not paid; and this by the common law was and is still necessary on every foreign bill, before the drawer can be charged; but it was not required on any inland bill before the statute of 9 & 10 W. 3. c. 17.; nor does the want of it since that statute destroy the remedy which the party had before against the drawer, but only deprives him of interest and costs against the drawer, unless there be notice by protest, as that statute prescribes. (a)

He to whom the bill is payable must regularly resort to the drawee, and desire him to accept the bill, before there can be a protest; but if he be dead, or cannot be (a) found, these are good causes for protesting the bill. Also, if after acceptance the drawee die, there is to be a demand of his executors or administrators, and in default of payment, a protest, and in case the money become due before an executor or administrator can be appointed, yet this delay is sufficient cause to protest the bill. Molloy, 285. (a) Alleging in pleading, that the party on whom the bill was drawn *non fuit inventus*, is sufficient to entitle the party to a protest, without shewing that enquiry was made after him; for this shall be intended, being according to the custom of merchants, and is therefore the usual form of pleading in those cases. Carth. 510. ||But an allegation of insolvency as an excuse for non-presentment would be impertinent. Per Lord *Ellenborough* C. J. in *Howe v. Bowes*, 16 East, 112. 1 Maul. & S. 555. and see *Camidge v. Allenby*, 6 Barn. & C. 373.||

But if he to whom the money is to be paid dies, there can be no protest before probate of his will or administration granted; for none but his executors or administrators can give a legal discharge or acquittance for the money, and consequently none others can sue for or demand the same; and though security be offered to indemnify the drawee against the executors or administrators, yet is he not obliged to accept thereof, being a matter left entirely to his own discretion, to judge and determine on the sufficiency of such security; and in this case it is said, that if a public notary protest the bill, an action on the case lies against him. Molloy, 285.

[Where the drawee cannot be found at the place mentioned in the bill, or has absconded, protest is to be made for non-acceptance in the same manner as if acceptance had been refused on presentment. Mal. 265.]

So also, if the drawee offer an acceptance differing from the tenor of the bill, and the holder be inclined to admit it without giving up his claim on the other parties, he must protest it for that cause; as, if the drawee offer an acceptance for part, the holder may permit him to accept in that way; but then he must cause it to be protested for non-acceptance of the whole, and send the protest to his correspondent, that he may endeavour to procure security for the remaining sum. When the bill becomes due, the holder must present it for payment, and may receive the sum for which it was accepted, and write a receipt for so much on the bill; but he must protest it for nonpayment of the rest, and send back the protest with the bill.] Mar. 17, 18.

If a bill be left with a merchant to accept, which is (b) lost or mislaid, he to whom it is payable is to request the merchant to give him a note for the payment, according to the time limited in the bill; otherwise there must be two protests, the one for non-acceptance, and the other for nonpayment; and though such note be given, yet if the merchant happens to fail there must be a protest for the nonpayment, in order to charge the drawer. Molloy, 281. (b) Where a bill is casually lost, and no new one can be had, and the party on whom it is drawn does not insist on

having the original bill, but refuses payment for another reason, a protest made on a copy sufficient. Show. 164.

The protest is usually made by some public notary, and such protest is *primâ facie* good evidence that the bill was not accepted, Molloy, 281 Skin. 272. pl. 1.

cepted, or, if accepted, that it was not paid, and sufficient to put the proof on the other side.

Comb. 155.

And as, by the custom of merchants, public notaries usually protest bills, it hath been held, that pleading *protestavit seu protestari causavit* is sufficient; and that the party may plead *protestavit*, and give in evidence that the public notary did it.

Per Buller J.
in *Leftley v.*
Mills, 4 Term
R. 170.;
||*sed qu.?*||

[The demand of payment of a *foreign* bill must be made by the notary public himself, and not by his clerk; and even in the case of an *inland* bill, it is doubtful, whether the demand, as the foundation of the protest made in consequence of the statute of W. 3. above mentioned, can be made by the notary's clerk, or by any other person than the notary himself.]

Cromwell v.
Hynson,
2 Esp. 511.
Robins v.
Gibson,
5 Camp. 534.
1 Maul. & S. 288.

||If a man draw or indorse a bill on this country abroad, and afterwards comes here, a notice to him here need not be accompanied by the protest, or any memorial of it:—at least he cannot object to such notice, unless he applied for the protest on receiving the notice.||

2. At what Time to be made; and therein of giving Notice to the Drawer of the Drawee's Refusal, so as to entitle the Party to Principal, Interest, and Costs.

Molloy, lib. 2.
c. 10. § 15. 17.
and 51. Vent.
45. Skin. 411.
||Gale v.
Walsh,
5 Term R.
239.||

A protest on a foreign bill of exchange is absolutely necessary to entitle the party to recover against the drawer, not only interest and costs, but likewise the principal sum; and for this purpose the bill must be presented in a reasonable time; and in case of refusal of acceptance, or in case the drawee cannot be found, it must be protested in reasonable time, and notice of such protest, as also notice of a protest after acceptance and non-payment, given to the drawer in a reasonable time; for though the drawer is bound to the party to whom the bill is payable, till payment, be actually made, yet it is with this condition and proviso, says *Molloy*, that protest be made in due time, and a lawful and ingenuous diligence used for obtaining payment of the money. And the reason hereof is, that the drawer might have had effects, or other means of his upon whom he drew, to reimburse himself the bill, which since, for want of timely notice, he hath remitted or lost, it were unreasonable he should suffer through the holder's neglect. But as to the exact time herein, the law hath not determined it, but the same is to be left to a jury, who are to govern themselves according to the customs of merchants in these cases, and the usages of particular (a) countries.

(a) It is said, that in France, if a bill be not presented in two months, the drawer is not answerable; and in Holland in so many posts. Show. 165.

6 Mod. 80, 81.
Salk. 131.
pl. 17.
2 Ld. Raym.
992.
Comb. 384.
Carth. 510.
Show. 518.

As to inland bills, though a protest was not necessary by the common law, in order to sue the drawer, and is only now necessary by the statute 9 & 10 W. 3. c. 17. and 3 & 4 Ann. c. 9. *ut supra*, to entitle the party to interest and costs, yet convenient notice must be given by the party to whom the bill is payable, to the drawer, of the drawee's refusal of payment; and if any damage accrue to the drawer for want of such notice it must be

borne

See ante page 564

borne by the person to whom the bill is payable. But this must also be left to a jury (a), who are to determine herein, according to the circumstances and the custom of merchants.

[(a) The practice certainly was formerly, as here stated,

to leave the reasonableness of the time in which payment was to be demanded to the jury. But as this was productive of endless uncertainty, it is now considered as a question of law arising out of the fact. *Metcalfe v. Hall*, *B. R. Trin.* 22 G. 5. *Bull. N.P.* 275. *Appleton v. Sweetapple*, *B. R. Mich.* 23 G. 5. *Bayley on Bills*, 75. *Tindal v. Browne*, 1 *Term R.* 167.; and see *Robson v. Bennett*, 2 *Taunt.* 594. *Darbishire v. Parker*, 6 *East*, 11, 12. *Parker v. Gordon*, 7 *East*, 586. The periods of time within which bills are to be presented are, however, still unfixed. The only rule that can be applied is, that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be foreign or an inland one, whether it be payable at sight, or so many days after, or in any other manner.]

A. drew a bill on B., payable in three days; B. broke; the person to whom the bill was payable kept it by him four years, and then brought *assumpsit* against the drawer; and *per Treby C. J.*,—When one draws a bill of exchange he subjects himself to the payment, if the person on whom it was drawn refuses either to accept or pay; yet that is with this limitation, that if the bill be not paid in convenient time, the person to whom it is payable shall give the drawer notice thereof; for otherwise the law will imply the bill paid, because there is a trust between the parties; and it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when in the mean time all reckonings and accounts are adjusted between the drawer and the drawee.

Salk. 127. pl. 7. *Allen v. Dockwra*, at *Guildhall*.

[Where the payment of a bill is limited at a certain time after sight, it is evident that the holder must present it for acceptance, otherwise the time of payment would never come: it does not appear, however, that any precise time within which this presentment must be made has in any case been ascertained: but it must be done as soon as, under all the circumstances of the case, it conveniently can be. (b)]

Kyd on Bills, 117. *Campbell v. French*, 6 *Term R.* 212. (b) See *Goupy v. Harden*, 162. (7th ed) *]]*

7 *Taunt.* 162. *Fry v. Hill*, 7 *Taunt.* 597.; and see *Chit. on Bills*,

Whether the holder of a bill payable at a certain time after the date be bound to present it for acceptance immediately, or whether he may wait till it become due, and then present it for payment, is a question which seems never to have had a direct judicial determination (c): in practice, however, it frequently happens that a bill is negotiated and transferred through many hands without acceptance, and not presented to the drawee till the time of payment, and no objection ever made on that account.

Mar. 12. *]](c)* But see *Orr v. Maginnis*, 7 *East*, 262. where *Lord Ellenborough C. J.* held, that the holder of a bill of

exchange is not bound to present it for acceptance until due; and see *Johnson v. Collint* 1 *East*, 99. *]] Vide Burr.* 2671. 1 *Term R.* 715.

Where, indeed, a bill is remitted to a factor or agent to procure acceptance, for the benefit of his principal, it is the duty of the factor to use all diligence to have it accepted, and to give advice to his principal of the event, that he may take the proper steps in case of non-acceptance; and the factor may be liable to make good any loss to his principal arising from his negligence: but this does not affect the bill itself, nor the right of the principal on it.

Mar. 12, 13. *Beawes*, 454.

Blesard and
Hirst,
Burr. 2670.
Goodall v.
Dolley,
1 Term R.
712.; ||and see
per Lord
Ellenborough
C. J. in Orr
v. Maginnis,
7 East, 362.||

Blesard v.
Hirst, Burr.
2670. ||(a) But
the objection
of a want of notice may be waived. Lundie v. Robertson, 7 East, 231. Gibbon v. Coggon,
2 Camp. 188.||

Goodall v.
Dolley,
1 Term R.
712.

Burr. 2670.
||Stevens v.
Lynch,
2 Camp. 333.
Hopley v.
Dufresne, 15 East, 276, 277.||

1 Term R.
712.

Mar. 17.;
||and see
Paton v.
Winter,
1 Taunt. 422.
Per Bayley J.
in Sebag v. Abithol, 4 Maul. & S. 466.||

Metcalf
v. Hall,
B. R. Tr.
22 G. 3.
||Pocklington

v. Silvester, Sittings at Guildhall after Trin. Term, 57 G. 3. Robson v. Bennett, 4 Taunt. 588.
Rickford v. Ridge, 2 Camp. 537. Reynolds v. Chettle, 2 Camp. 596. Bayley on Bills, 194,
195. Camidge v. Allenby, 6 Barn. & C. 375.||

Muilman v.
D'Eguino,
2 H. Bl. 569.

If, however, the holder in fact present the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding parties to whom he intends to resort for nonpayment: to the drawer, that he may know how to regulate his conduct with respect to the drawee, and make other provision for the payment of the bill; and to the indorsors, that they may severally have their remedy in time against the parties on whom they have a right to call: and if, on account of his delay, any loss accrue by the failure of the preceding parties, *he* must bear the loss.

Thus, if in the mean time the drawer fail, the holder cannot call on the payee indorsor, because *he* can have no remedy against the drawer. (a)

of a want of notice may be waived. Lundie v. Robertson, 7 East, 231. Gibbon v. Coggon, 2 Camp. 188.||

So, also, if the drawee fail the holder cannot recover against either the drawer or indorsor, because, if he could, a loss must fall on one of them, as the drawer can have no remedy against the drawee.

Nor will it make any difference, though the indorsor, from an ignorance of the law, thinking himself bound to make good the money, promise afterwards to take up the bill at some future time.

Much less can the indorsor be bound by a proposal to discharge the bill by instalments, made after the return of the bill for nonpayment, under an ignorance of acceptance being refused; more especially if that proposal be rejected by the indorsee.

If an acceptance varying from the tenor of the bill be offered by the drawee, the holder acquiescing must send the same notice to the preceding parties as if acceptance were refused, otherwise he cannot have recourse to them; for to admit of such acceptance without notice is to give credit to the acceptor.

It seems established, that the next day after a banker's draft is given is the stated time allowed by law for demanding payment, in order to exonerate the holder from the consequences of the drawer's insolvency.

Although no precise rule can be laid down as to the time when bills payable at sight, or so many days after, are to be presented for acceptance, yet it is said that if the holder do not present them he ought to put them in circulation. If he keep them by him, and do neither, he is guilty of laches, and cannot recover on them.

We have seen above, that it is the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply that payment has

been

been had, and it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee.

The same diligence, and the same attention to the usual rules of negotiation, is required from the party who takes a bill by way of security for an antecedent debt, as from one who receives it in the common course of business, or in solution of a debt. A contrary opinion appears to have prevailed in *Scotland*, and was sanctioned by the decisions of the courts of that country. Thus, a bill drawn by *A.* upon and accepted by *B.*, payable twelve months after date, was given to *C.*, by way of security for the payment of a bill which had been indorsed by *A.* to *C.*, and had been dishonoured. In the receipt which *C.* gave for the bill so given in security, it was declared, that it was in no respect to exonerate the acceptors of the original bill, or any of the parties thereby bound, till actual payment of the bill given in security was made. Almost three years elapsed without *C.*'s taking any one step to obtain payment of this last bill. About that time the acceptors failed, upon which *C.* demanded payment of the original bill from the parties whose names appeared upon it, and on their refusal he instituted a suit against them in the Court of Session, and obtained two interlocutors in his favour. Upon appeal to the Lords of this country, these interlocutors were reversed, and the defenders were assolized.

Reed v.
Coats,
Dom. Proc.
Feb. 21.
1794.

The time of payment of a bill is the last of the three days of grace, and on that day the money must be demanded; and if the last day be *Sunday* (a), or a great holiday, the demand must be made on the second.

Tassel v.
Lewis,
1 Ld. Raym.
743. Cole-
man v. Sayer,

2 Stra. 829. *Vide* Beawes, 461. ||(a) So by the stat. 7 & 8 G. 4. c. 15. § 2. If the day upon which a bill of exchange or promissory note becomes due be a fast or thanksgiving day, such bill or note is to be payable on the day next preceding.||

And the holder is not bound to wait till the last moment of the last day of grace, for the undertaking of the acceptor is to pay the bill on demand on any part of the last day of grace.

Lefley v.
Mills,
4 Term R.
175.

The three days of grace are allowable on promissory notes, as well as upon bills of exchange.

Brown v.
Harraden,
4 Term R.

148. ||Different countries vary in the number of days of grace allowed: as to the rule at Ham-
burgh, see *Goldsmith v. Shee*, *Goldsmith v. Bland*, *Bayley*, 199.||

A presentment either for payment or acceptance must be made at seasonable hours: and seasonable hours are the common hours of business in the place where the party lives to whom the presentment is to be made.

It is not enough to say in the notice, that the drawee or maker refuses, is insolvent, or has absconded; but it must be added, that the holder does not intend to give him credit. (b) The purpose of giving notice is not merely that the indorsor should know that default has been made, for he is chargeable only in a secondary degree; but to render him liable it must be shewn that the holder looked to him for payment, and gave him notice that he did so. A case might easily be imagined, where the in-

As to bills,
vide 1 Stra.
441. 515.
Dagglish v.
Weatherby,
2 Bl. Rep.
747. As to
notes, *vide*
1 Stra. 549.
2 Stra. 1087.

dorsor

Tindal v. Brown,
1 Term R. 170. ||(b) The notice should at least contain an intimation that payment has been refused by the acceptor. Hartley v. Case, 4 Barn. & C. 359.||

dorsor might have notice from the holder, and yet would not be liable; as, if that notice contained circumstances which shewed that the indorsee had given time and credit to the acceptor or maker.

It is therefore necessary that notice should come from the indorsee himself: it is not sufficient that the indorsor should be informed by some third person, as by the drawee or maker, that he does not choose to accept, or cannot pay.

Rosher v. Kieran,
4 Camp. 87.
Stewart v. Kennet,
2 Camp. 177.
Wilson v. Swabey,
1 Stark. Ca. 54. and see Edwards v. Dick, 4 Barn. & A. 212.

|| It has, however, been held, that notice from the acceptor to the drawer that he has not been able to pay the bill, and that it is in the plaintiff's hands, is sufficient: that might, perhaps, be on the ground that the acceptor wrote for the plaintiff, and as his agent. A notice from the holder or any other party will enure to the benefit of every other party who stands between the party giving the notice and the person to whom it is given.||

Mar. 16.

With respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice: but if, on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties to whom notice is to be given reside at a different place from the holder and drawee, is, that notice must be sent by the next post. Under the same circumstances, the same rule obtains in the case of nonpayment.

1 Term R. 169.

So, also, in case the drawee or maker has absconded, or cannot be found, notice of these circumstances, either in case of non-acceptance or nonpayment, must be sent by the first post.

1 Term R. 410.
||(b) And the bankruptcy of the drawer will not excuse notice, but it must, it seems, be given to him, his assignee or trustee.
Rhode v. Proctor,
4 Barn. & C. 517.; and as to the requisite diligence in attempting to give notice, see Bateman v. Joseph, 2 Camp. 461. Beveridge v. Burgess, 3 Campb. 262. Crosse v. Smith, 1 Maul. & S. 545. Goldsmith v. Bland, Bayley on Bills, 224. (4th ed.)||

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that, if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. (b) But if the drawer have no effects in the other's hands, then he cannot be injured for want of notice; and if it be proved on the part of the plaintiff, that, from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know whether he had effects in the hands of the drawee or not: and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice, that it has been dishonoured.

Bickerdike v. Bollman,
1 Term R. 405.

A question arising on the validity of a commission of bankrupt, on account of the insufficiency of the debt due to the petitioning creditor, the facts appeared to be these: the bankrupt being indebted

debted to the petitioning creditors in the sum of 115*l.* 3*s.* 8*d.* on the 15th of *September* 1784, drew a bill for 20*l.* on the defendant, "who, till the time of the bankruptcy and of the bill becoming "due, was a creditor of the bankrupt," payable to the petitioning creditors, two months after date, and paid it to them on account of part of their debt: the bill was presented for payment on the 18th of *November* following, and dishonoured. No notice, however, was ever given by the petitioning creditors to the bankrupt, or left at his house; a commission issued against the drawer on the 20th of *November*, on which he was declared a bankrupt in the afternoon of the 24th; that commission was afterwards superseded, and another commission was issued on the petition of the parties, on the amount of whose debt the present question arose. If the petitioning creditors, by not giving notice to the bankrupt of his bill being dishonoured, had made the bill their own, their debt was reduced within 100*l.*, and then the commission could not be supported: but if notice was not necessary, the bill was not paid; their debt remained as it originally was, and the commission was valid. On the principles before stated, the court held, that notice in this case was not necessary, and therefore the commission was good.

|| *Legge v. Thorpe*, 12 East, 171. ||

|| It is, however, no excuse for not giving notice to the drawer that he had no effects in the drawee's hands when the bill was drawn or became due, if he had effects on their way to the drawee; unless the drawer gets back those effects, and would stand indebted in the amount to the drawee if he paid the bill.

Rucker v. Hiller, 5 Camp. 217. 16 East, 45; and see 5 Camp. 334. *Cory v. Scott*, 3 Barn. & A. 619. *Norton v.*

And the want of effects is no excuse, if the drawer would be entitled, on taking up the bill, to sue either the acceptor or any other party.

Pickering, 8 Barn. & C. 610., which seem to overrule *Walwyn v. St. Quintin*, 1 Bos. & Pull. 652.; and see *Brown v. Maffey*, 15 East, 216.

If the drawer had effects in the hands of the drawee at the time when the bill was drawn, it has been held he is entitled to notice of non-acceptance, although at the time when the bill was presented for acceptance, and from thence until presentment for payment, he had not any.

Orr v. Maginnis, 7 East, 359.

So, if he had effects in the hands of the drawee when the bill was presented for acceptance, it has been held he will be entitled to notice of non-acceptance, although he was indebted to the drawee greatly beyond the amount of such effects. ||

Blackhan v. Doren, 2 Camp. 503.; and see further on this subject, *Bayley*, 241. (4th ed.)

Yet, though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the indorser if no notice was given him of the bill being dishonoured; for though the drawer may have received no injury, the indorser, who must be presumed to have paid a valuable consideration for the bill, probably has.

1 Term R. 714.

Though, in the case where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a subsequent promise by him to discharge the bill, yet where he had

Rogers v. Stephens, 2 Term R. 715.

||In more recent cases it has been decided, that a payment

of part, or a promise to pay, or "to see it paid," &c. made by the person insisting on the want of notice after he was aware of the laches, amounts to a waiver of the laches of the holder, and admits his right of action. See *Horford v. Wilson*, 1 Taunt. 12. *Lundie v. Robertson*, 7 East, 251. *Taylor v. Jones*, 2 Camp. 105. *Gibbon v. Coggon*, 2 Camp. 188. *Wood v. Brown*, 1 Stark. 217. *Hopes v. Alder*, 6 East, 16.||

See *Rogers v. Stephens*, 2 Term R. 714.

Molloy, 284. *Show*, 164. S. P., that the third day is the day of grace.

But where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether want of notice can be waived.]

Merchants generally allow three days after a bill becomes due for the payment, and for nonpayment within three days protest is made, but is not sent away till the next post after the time of payment is expired, and if *Saturday* be the third day no protest is made till *Monday*.

||And now by 7 & 8 G.4. c.15. §1., where bills of exchange or promissory notes becoming due on the day preceding *Good Friday* or *Christmas-day* are dishonoured, notice thereof may be given on the day *after* such *Good Friday* or *Christmas-day*.||

[But there is a difference between foreign and inland bills in this respect: the former must be presented for payment *before* the expiration of the last day of grace, and in time to have the protest sent off the same night, if the post then sets out; but on inland bills, the protest cannot be made till *after* the expiration of three days, and notice may be sent at any time within *fourteen* days after the protest.

Leftley v. Mills, 4 Term R. 170.

Darbishire v. Parker, 6 East, 5. *Smith v. Mullett*, 2 Camp. 208.; and see *Chit. on Bills*, 225. (7th ed.)

||With reference to the rule as to giving notice of nonpayment, it seems that each party is entitled to a day to notify the dishonour to his immediate indorser; but that if the notice is to be given by the post, it may be sent off by the next convenient (not the next possible) post, when the parties do not reside in the same place; and when they do, then by the post, so as to be received on the day after that on which the party giving notice was first informed of the dishonour of the bill.||

To the constitution of a bill of exchange, it is not necessary that the words "value received" should be inserted, and the want of these in a foreign bill cannot deprive the holder of the benefit of a protest; but that benefit in case of nonpayment is not given to inland bills which want these words, and therefore they cannot be protested for nonpayment: for the act of Queen Anne provides, that "where these words are wanting, or the value is less than twenty pounds, no protest is *necessary* either for non-acceptance or nonpayment."

In foreign bills, there is no distinction between those payable at such a time after *date*, and after *sight*; but the statute confines the benefit of protest on inland ones to those payable after *date*; so that in *strictness* there can be no protest on those payable after *sight*: and this has been lately so adjudged.

In

In foreign bills, where the acceptance is in words only, or in some collateral writing, a protest may be made for nonpayment, as well as if the acceptance had been in writing on the bill: but the statute of *William* confines the protest for nonpayment to those bills on which the acceptance is written; and therefore, in order to have the benefit of a protest for nonpayment, where the acceptance is collateral, the holder must protest for non-acceptance.

Leftley v. Mills,
4 Term R.
170.
Vide Mar. 17.

But in practice a protest is hardly ever made for non-acceptance of an inland bill; it is only noted for non-acceptance, and if not paid when due, it is frequently protested for non-payment: however, notice must be given of the non-acceptance and noting, otherwise the holder takes the risk upon himself.

In the case of a foreign bill, noting alone for non-acceptance will not be sufficient, it must also be *protested* for non-acceptance; nor will the omission to make such protest be supplied by a subsequent protest for nonpayment.]

Rogers v. Stephens,
2 Term R.
715. || See
Orr v.

Maginnis, 7 East, 561. *Robins v. Gibson*, 1 Maul. & S. 288. ||

Interest upon a bill of exchange commences from the demand made (a); and therefore if there was no demand made till action brought, defendant may plead tender and refusal, and *uncore prist*, and so discharge himself of interest; but if it be the defendant's fault that demand could not be made, as if he were out of the kingdom, there, want of demand ought not to prejudice the plaintiff.

|| (a) This must be understood of a bill or note payable on demand, for if it be payable at a certain period after date,

interest runs from the time when it becomes due, and if the bill or note is expressly payable "with interest," then interest commences at the date. *Burr.* 1077. 1 Stark. Ca. 452. 507. *Bayley on Bills*, 279.; and that a jury are not bound to give interest where it is only recoverable as damages, see 2 Barn. & A. 505. 1 Dow. & Ry. 16.; and see further, as to interest, *Chitt. on Bills*, 420. *et seq.* (7th edit.)]

[Wherever interest is allowed, and a new action cannot be brought for it, which is the case on bills of exchange and promissory notes, the interest is to be calculated up to the time of signing final judgment.

2 Burr.
1086.

Where a bill indorsed over is not duly paid, the indorsee may charge the indorsor with interest, exchange, and other incidental expenses, beyond the amount of 5 per cent., if such charges be reasonable, warranted by usage, and not made a colour for usury: thus, the constant course has been, with respect to bills returned protested from *India*, to allow 10s. per pagoda, which includes interest, exchange, and all other charges; and this, notwithstanding the current price of exchange at which the bill was discounted may have been greatly below 10s., as, at 6s. 6d.: and the indorsee will also be entitled to interest at 5 per cent. from a reasonable time after notice given to the indorsor of the bill having been returned unpaid.]

Auriol v. Thomas,
2 Term R.
52. || *Ex parte Jones*,
17 Ves. 332.
1 Rose, Ca.
29. S. C. ||

8. *Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.*

It seems to be agreed, that against the drawer an action of debt, or a general *indebitatus assumpsit*, will lie, for he having received

Hard. 485.
Vent. 152.
Lev. 298.

2 Keb. 695.
713. 758. 822.
Salk. 125.
pl. 2.
2 Lutw. 1594.
Skin. 255.
pl. 5.
6 Mod. 129.;
||and see
Bishop v.
Young,
2 Bos. & Pul. 80.||

ceived the money, the law raises a contract, and lays him under an obligation to pay it. But it hath been adjudged, that neither an action of debt, nor an *indebitatus assumpsit*, will lie against the acceptor of a bill of exchange, and that therefore the remedy against him must be by a special action on the case, founded on the custom of merchants: for the acceptance is only a collateral engagement to pay the debt for another, in the same manner as a promise by a stranger to pay, &c. if the creditor will forbear his debt.

Priddy v.
Henbrey,
1 Barn. & C.
674.

||In a late case, however, where all the former decisions were fully considered, it was decided that debt is maintainable by the drawer of a bill against the acceptor, where the bill is payable to the drawer or his order, and is expressed to be for *value received*.||

Vent. 155.
(a) So, if
goods deli-
vered. Roll.
Abr. 32.

But though a general *indebitatus assumpsit* will not ||(except under the above circumstances)|| lie against the acceptor of a bill of exchange, yet if *A.* delivers money to *B.* to pay over to *C.*, and gives *C.* a bill of exchange drawn upon *B.*, and *B.* accepts it, *C.* may have an *indebitatus assumpsit* against *B.* (a) as having received money to his use, but must not declare only upon the bill of exchange accepted.

Co. Lit. 182.
2 Inst. 404.
Yelv. 136.
4 Co. 76.
Cro. Car. 501.
Hard. 486.
Salk. 125.
pl. 2. 127. pl. 7.
Lutw. 235.
Carth. 85.
269.
5 Mod. 567.

As to the manner of declaring on a bill of exchange, this is said to have varied, the declaration in some cases being general, sometimes special and laid with an express promise, and at other times without; but it seems to be now settled, that the custom of merchants concerning bills of exchange being part of the common law, of which the judges will take notice *ex officio*, it is unnecessary to set forth the custom specially in the declaration, and that it is sufficient to say, that such a person, according to the usage and custom of merchants, drew the bill.

1 Burr. 324,
325.

Show. 127. 5 Mod. 226. Ld. Raym. 175. 281. 575. 759. 774. 10 Mod. 287.

[In stating a bill or the note, regard must be had to the legal operation of each respectively.

Vere v. Lewis,
3 Term R.
183. Minet
v. Gibson,
id. 485.
Collis v.
Emet, 1 H.
Bl. 315;
||and see
Gibson v.
Hunter,
2 H. Bla. 187.

It has been decided, that the legal operation of a bill or of a note, payable to a fictitious payee, is, that it is payable to the bearer; and therefore, if that decision be right, it is proper, in the statement of such a bill, to allege that the drawer thereby requested the drawee to pay so much money to the bearer; in the statement of such a note, that the maker thereby promised to pay such a sum to the bearer. Or in such a case the plaintiff may state all the special circumstances, and if the verdict correspond with them, he will be entitled to recover.

||(*b*) It is not
necessary to
aver that he
made no
order, for no
such order appearing, it must be presumed he made none. Smith v. McClure, 5 East, 476.||

A bill or note payable to the order of a man may, in an action by him, be stated as payable to himself, for that is its legal import: or it may be stated in the very words of it, with an averment that he made no order. (*b*)

If a note purport to be given by two, and be signed only by one, a declaration generally, as on a note by that one who signed it, will be good; for the legal operation of such a note is, that he who signed it promised to pay.

On a note to pay jointly *and* severally, a declaration against one in the terms of the note will be good.

Where a note is given by two, to pay jointly *or* severally, the payee may sue both or either; if he sue both, he may declare on the note in the words of it jointly *or* severally: but if he sue either of them singly, it was formerly held, that he could not declare in that way, but that he must state the note as given only by one, and that the joint *or* several note would be good evidence to support such a declaration.

But the doctrine in the latter case has been since over-ruled; and it is now held, that in an action on a joint *or* several promissory note, against one, a declaration that he and another made their promissory note, by which they *jointly or severally* promised to pay, is good; for if *or* must be understood as a disjunctive, the election, whether the note shall be joint or several, is in the person to whom it is given, and by suing one he shews his election to consider it as a several note: but in this case, the true construction of the word *or* is, that it is synonymous with *and*. They both promise that *they or one* of them shall pay; therefore the liability is on *both*, and on *each*. The nature of the transaction forces this construction.

And if the note had been joint only, and it had been stated as a several one, no advantage could have been taken of this but by a plea in abatement.

¶ And if one of several makers of a promissory note be an infant, he should not be sued, nor should the declaration state that he was a party.¶

Where the payment of a bill or note is limited at a certain time after the date, it must be stated as being made on the day of the date, that it may appear on the face of the declaration at what time it became due; if the bill have no date, as on the day when it issued, or the first day the plaintiff had knowledge of its existence; for an instrument not dated must be considered as dated at the time of the delivery. (a)

Drury v. De Fontaine, 1 Taunt. 131.¶ 2 Ld. Raym. 1082.

But in stating the bill or note it is not necessary to allege that it bore date, though that be generally done; it is sufficient that the date appear by implication, which it does from the allegation, that on such a day the drawer made the bill or note.

In stating the drawing of a bill or note, it is unnecessary to say that the drawer subscribed it with his own handwriting, though that is generally done (b), the allegation that he made his bill of exchange or promissory note, and, in the case of the former, that he directed the bill to the drawee, by which he requested him to pay, and in the case of the latter, that by such note he promised

Semo.
1 Burr. 525.

Burchell v.
Slocock,
2 Ld. Raym.
1545.

Butler v.
Malissey,
Stra. 76.
Neale v.
Ovington,
2 Ld. Raym.
1544. 2 Stra.
819.

Rees v. Abbot,
Cowp. 852.,
¶ and see Chit.
on Bills,
538, 539.
(7th ed.)¶

Ibid. per
Buller J.

Burgess v.
Merrill,
4 Taunt. 468.

1 Stra. 22.
¶ (a) See Co.
Lit. 46. b.
4 Barn. & C.
903. It is no
legal objection
to a bill that
it is dated on
a Sunday.

2 Show. 422.

Ereskine
v. Murray,
2 Ld. Raym.
1542, 1543.
Taylor v.
Dobbins,
1 Stra. 399.

2 Ld. Raym.
1543. Elliot
v. Cooper,
2 Ld. Raym.
1576.

||(b) In a count upon a bill, these words are now always omitted; as to the danger of using them, see *Helmley v. Loader*, 2 Camp. 450. *Levy v. Wilson*, 5 Esp. Ca. 180. *Jones v. Mars*, 2 Camp. 505.||

Vide 12 Mod.
546.; ||and see
2 Chit. on
Plead.(4th ed.)
150.||

If the bill was in fact drawn by a servant, by the authority of a master, it is sufficient to state it as drawn by the master himself, unless the subscription be alleged, and then it must be stated according to the truth of the case, that the servant, by the authority of his master, drew and subscribed the bill on his master's account.

Vide 12 Mod.
564. ||(a) But
in the case of
an acceptance
by an agent, it
must be shewn that he was legally authorised by the principal. *Johnson v. Mason*, 1 Esp. Ca. 90.||

The same observations apply to the case of an indorsement or acceptance by the servant, by the authority, and on the account of his master. (a)

Vide Morg.
Prec. 43.

||Meux v.
Humphrey,
8 Term R.
25.||

2 Ld. Raym.
1484. ||(b) In
Mason v.
Rumsey,
1 Camp. 584.
it was deter-
mined that a
bill drawn upon a firm, and accepted by one partner only in his name, will bind the firm.||

Where partners are concerned in the drawing, negotiating, or accepting of a bill or note, the usual way of introducing the partnership is to mention it by way of inducement, and to state that one of them, according to the custom of merchants, subscribed, accepted, or indorsed the bill for the partnership account: but the allusion to the custom is not absolutely necessary; nor is it absolutely necessary that it should be directly charged that the partner acting for the rest subscribed, accepted, or indorsed for the partnership; it is sufficient if, on the whole, it appear to have been so. (b)

Essington

v. East,
2 Ld. Raym.
810.

1 Salk. 130.

Wegerslofe

v. Keene,

1 Stra. 224.

||See Chit. on

Bills, (7th ed.)

Where a bill is drawn in sets, and the action is brought on the first, the usual way of stating the request to the drawee is, "that he requested him to pay that first of exchange (second and third not paid), following the very form of the bill;" and then it is not necessary, in the subsequent part of the declaration, to aver that the second and third were not paid, for if either of them was paid that would be a sufficient defence at the trial.

507. note (1).||

Ereskine v.

Murray,

2 Stra. 817.

2 Ld. Raym.

1542. ||(c) If

the acceptance be conditional, it must be declared on specially, with an averment that the condition has been performed. *Langston v. Corney*, 4 Camp. 176. *Swan v. Cox*, 1 Marsh. 176.||

In an action against the acceptor, it must be alleged that he accepted the bill, for the acceptance is the foundation of the action; but the manner of acceptance need not to be alleged. (c)

1 Ld. Raym.

564, 565.

574, 575.

1 Salk. 127.

129.

Carth. 459.

||Wynne v.

And if the acceptance be alleged generally without any specification of time, evidence of acceptance after time of payment will maintain the declaration, though the acceptance be alleged to have been according to the tenor and effect of the bill, for this shall be construed as a general promise to pay the money, and the words, "according to the tenor and effect of the bill," shall be rejected

rejected as surplusage; but if the acceptance be alleged to have been *before* the time of payment, perhaps evidence of an acceptance after will not do.

Raikes,
3 East, 521.
Forman
v. Jacob,
1 Stark. 45. ||

|| It was formerly held in actions against the acceptors of bills of exchange, where a particular place for payment was pointed out in the body of the bill, that it was necessary to allege and prove presentment at that place (*a*); but in a recent case (*b*), where the declaration stated the bill of exchange to have been drawn payable to the order of the drawer in *London*, and accepted by the defendant at *London*, according to the usage of merchants, it was decided that averment and proof of presentment in *London*, or of excuse for non-presentment in *London*, were unnecessary, since the case fell within the new act, 1 & 2 G. 4. c. 78. ||

(*a*) Hodge v. Fillis, 3 Camp. 467. Bayley on Bills, (4th ed.) 25.
(*b*) Selby v. Eden, 3 Bing. 611.; and see a similar decision in K. B. Bayle v. Bird, 6 Barn. & C. 531.

In an action against the drawer or indorser of a bill, or against the indorser of a note, it is absolutely necessary to state a demand of payment from the acceptor of the bill or the maker of the note (*c*), and due notice of refusal given to the party against whom the action is brought; for these circumstances are absolutely necessary to entitle the plaintiff to maintain his action; and a verdict will help him on a writ of error.

Rushton v. Aspinall, Dougl. 654.
|| Esdaile v. Sowerby, 11 East, 117.
Bowes v. Howe, 16 East, 115.

S. C. 5 Taunt. 30. (*c*) Since the stat. 1 & 2 G. 4. c. 78. to make a bill of exchange payable at a particular place only, the acceptance should run thus: — "Accepted, payable at, &c. *only*, and "not otherwise or elsewhere." ||

|| But on the principle that the plaintiff should not state more of the bill than is essential to his title, it is not necessary, in an action against the drawer or indorser of a bill, to state that the drawee accepted it; if, however, it be so stated, as the averment is unnecessary, it need not be proved. ||

Tanner v. Bean, 4 Barn. & C. 312., overruling Jones v. Morgan, 2 Campb. 474.

Due notice of the dishonour of a foreign bill can only be by protest, yet the omitting to allege a protest in the declaration is only matter of form; notice being alleged generally, it shall be presumed to have been given with all the necessary formalities; and if these be not proved at the trial, the plaintiff cannot recover.

Salomons v. Stavelly, B. R. M. 24 G. 3. Doug. 684. in the notes.

It is not necessary, in an action against an indorser, to state that the indorsee demanded the money of the drawer of a bill, or the first indorser of a note, because such demand is not necessary to be made in order to complete the title of the indorsee.

Whether the drawer of a bill, or the indorser of a bill or of a note, receiving the bill or the note in the regular course of negotiation before it has become due, can maintain an action on it, against the acceptor or maker, in the character of indorsee, seems undecided: that such actions have been brought, has been incidentally said from the bench; but the only case in which it is directly held that the drawer may maintain an action in the character of indorsee, is no authority to establish this point: for there it appears that the bill was protested for nonpayment before the indorsement; and a more recent case, determined on principle,

Per Ash-hurst J.
Tr. 14 G. 3. Louviere v. Laubray, 10 Mod. 56. Beck v. Robley, Tr. 14 G. 3.

B. R. 1 H.
Bl. 89. in the
notes. ¶ See
Bishop v.
Hayward,
4 Term R.
470.
Bayley, 262.¶

Vide Sy-
monds v.
Parminter,
1 Wils. 185.
Vide Morg.
Prec. 45.

44. 50. ¶ Cowley v. Dunlop, 7 Term R. 571. Bosanquet v. Dudman, 1 Stark. Ca. 5.¶

2 Show. 180.

1 Wils. 185.

Vide Morg.
Prec. 44.

Cox v. Earle,
5 Barn. & A.
450.

Bishop v.
Hayward,
4 Term R.
470.

Starkey v.
Cheeseman,
1 Ld. Raym.
538.
1 Salk. 128.
Carth. 409.

1 Vent. 155.
Vide 1 Salk.
24.

1 Term R.
276.

Tatlock v.

ple, clearly shews that a drawer or indorsor cannot maintain an action against the acceptor in the character of indorsee, where the indorsement is after the refusal of payment; because, when a bill is returned unpaid, either on the drawer or indorsor, its negotiability is at an end.

The action, therefore, in which the drawer or indorsor, after payment of the money in default of the acceptor, may recover, the first against the acceptor, and the latter against any of the preceding parties, must be brought in their original capacity as drawer or indorsor, and not as indorsee.

In this action, after stating the drawing of the bill, the delivery, the necessary indorsements, the presentment for acceptance, and the acceptance or refusal to accept, it must be further stated, that at the proper time it was presented to the acceptor for payment, who refused, or that the acceptor could not be found; and if on a foreign bill, a protest for nonpayment may be stated; then that it was returned to the plaintiff, and that the defendant had notice of the premises.

It may also be stated, that the plaintiff paid the contents of the bill, and, in the case of a protest, the costs, interest, and damages arising from the delay; but this does not seem absolutely necessary; that the bill was returned to the plaintiff implies payment by him.

¶ In an action upon a bill with several indorsements, it is sufficient for the plaintiff, who has paid the bill under protest for the honour of one of the indorsors, to state that he paid the bill according to the usage and custom of merchants, without stating that he had paid it to the last indorsee.¶

One who has indorsed a bill or note cannot, in general, maintain an action on a re-indorsement to him, against the party to whom he indorsed it.

It is not necessary, in any action on a bill of exchange or promissory note, to state an express promise by the defendant: the law implies a promise where the party is liable; and therefore it is sufficient, after stating the circumstances, to say, that by these he became liable to pay.

But it is usual to allege an express promise, after stating the liability, that no exception may be taken to the addition of other counts in *assumpsit*, which are usually added; for it is said, that where the declaration was upon the custom, and likewise on an *indebitatus assumpsit*, the judgment was arrested, which could not have been the case had an express promise been added to the count on the custom, because it is an established rule in pleading, that wherever the same plea may be pleaded, and the same judgment given on different counts, they may be joined in the same declaration.

Instead of bringing an action on the custom or on the statute, the

the plaintiff may in many cases use a bill or note only as evidence in another action; and where the instrument wants some of the requisites to form a good bill or note, the only use he can make of it is to give it in evidence; or if the count on the instrument be defective, he may give it in evidence, in support of some of the other counts for money had and received, or money lent and advanced, according to the circumstances of the transaction.

1 Esp. N. P. C. 245.; and see Selw. N. P. 6th ed. p. 377. n. (62.)

A bill is presumptive evidence of money lent by the payee to the drawer, and a note of money lent by the payee to the maker, and both, consequently, of money had and received to the use of the holder, whether they be payable to the bearer, or to the order of the payee.

Shaw, B. R. Hil. 39 G. 5. Chit. on Bills, 327. n. (c), 6th ed.

And also of money paid by the holder to the use of the drawer or maker.

An acceptance also is *prima facie* evidence of money had and received by the acceptor to the use of the holder, and of money paid by the holder to the use of the acceptor, and an indorsement of money lent by the indorsee to the indorsor.

id. 182. Thompson v. Morgan, 3 Camp. 101. Bayley, 288, (4th ed.)

He who transfers a bill or note without indorsement, gives no additional credit to the instrument, and therefore cannot be sued on the instrument itself; nor is he liable to answer in any species of action to any holder but him to whom he immediately transferred it, and to him only for the consideration on which it was given, whether for work and labour, goods sold and delivered, money lent and advanced, or any other legal consideration.

But if the party who took the bill or note did not use due diligence to obtain payment from the acceptor or maker, nor give due notice of their default to the party from whom he received it; the latter may either plead, or give in evidence, the bill or note, to an action on the original consideration.

Holt, N. P. C. 313. Camidge v. Allenby, 6 Barn. & C. 373.

The holder of the bill or note may sue all the parties who are liable to pay the money, either at the same time or in succession; and he may recover judgment against all, if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be staid in any one action, but on payment of the debt and costs in that action, and the costs in all the others in which he has not obtained judgment. (a)

acceptor, the drawer, and the indorsors, at the same time, the practice is for the court to stay the proceedings in the action against the drawer, or any one of the indorsors, upon payment of the amount of the bill, and the costs of that particular action; but the action against the acceptor will only be stayed on the terms of his paying the costs in all the actions, he being the original defaulter. Smith v. Woodcock, 4 Term R. 691. If, however, the acceptor suffer judgment to pass against him by default, he can only be charged with the costs of the particular action against himself. The King v. the Sheriffs of London, 2 Barn. & A. 192.; and see Chit. on Bills, 368, 369.

Harris, 3 Term R. 174.

See Alves v. Hodgson, 7 Term R. 241.

Tyte v. Jones, 1 East,

58. n. (a).

Wilson v.

Kennedy,

p. 377. n. (62.)

Vide Grant

v. Vaughan,

3 Burr. 1516.

Smith v.

Kendall

6 Term R. 124.

Carr v.

n. (c), 6th ed.

Tatlock

v. Harris,

3 Term R.

174.

Vere v. Lewis,

288, (4th ed.)

Chamberlyne

v. Delarive,

2 Wils. 355;

and see

Beeching

v. —,

6 Barn. & C. 373.

Vide Golding

v. Grace,

2 Bl. Rep.

749.

[(a) Where

separate

actions are

brought

against the

2 Vesey, 115.

But though he may have judgment against all, yet he can recover but one satisfaction. But though he be paid by one, he may sue out execution for the costs in the several actions against the others.

Windham v. Wither.

Idem v. Trull,
1 Stra. 515.

And if he have recovered judgment in more than one action, a tender of the principal recovered in one, and the costs in all the rest, will prevent him from taking out execution; and it will be considered as a contempt of the court, if he take out execution against more than one.

Macdonald v.
Bovington,
4 Term Rep.
§25.

Macdonald drew a bill of exchange for 20*l.* on *Bovington*, who accepted it; the bill afterwards came into the hands of *Thompson*, who recovered judgment against *Bovington*, and charged him in execution. *Bovington* having obtained his discharge under the Lords' act in that suit, *Thompson* sued *Macdonald* the drawer, and recovered the amount of the bill, on which *Macdonald* sued *Bovington* on his acceptance, and charged him in execution. On a rule to discharge *Bovington* out of custody, it was contended, that he had satisfied the debt, by being charged in execution at the suit of *Thompson*, and that he was not liable to be sued again for the same sum. But the court said, that nothing could be more clear than that this was not a satisfaction of the debt as between these parties, though it was as between the defendant and *Thompson*: that to the holder it was a mere *formal* satisfaction, and not like actual payment: that the present plaintiff, having been obliged to pay the amount of the bill since the defendant was charged in execution at the suit of *Thompson*, had a right to have recourse to this defendant as acceptor; for that by this payment a new cause of action arose against the defendant, without regard to what had passed in the former action.

The plea generally pleaded to this action is that of *non assumpsit*: but the defendant may, if the truth will warrant him, plead *non assumpsit infra sex annos*; for by statute 21 Jac. 1. c. 16. actions on the case, except upon *accounts* between merchants, must be brought within six years: and by the express provision of the statute of Queen Anne, all actions on promissory notes must be brought within the same time as is limited by the statute of James, with respect to actions on the case.

§ 2.

||See tit. *Limitation of Actions.*||a W. & M.
Mod. 514.

But an acknowledgment of the debt, or a promise to pay, made within six years of the commencement of the action, will take the case out of the statute.

To an action on the case on a bill of exchange against the defendant as acceptor, he pleaded, that after acceptance he gave a bond in discharge of it: it was held that this plea was bad, because it amounted to the general issue; for the debt on the bill being extinguished by the bond, the defendant ought to have pleaded *non assumpsit*, and to have given the bond in evidence.

1 Ld. Raym.
444. Jenys
v. Fowler,
Stra. 946.

In an action against the acceptor, it is a general rule that the drawer's hand is admitted, because the acceptor is supposed to be acquainted with the writing of his correspondent, and by his acceptance

acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn. (a)

Price v. Neil, 3 Burr. 1554.
1 Bl. Rep. 390.
Maul. & S. 15. ||

||(a) Even though the drawer's name has been forged. See Bass v. Clive, 4

On a bill payable to bearer, there is no person through whom the holder derives his title; in an action against the acceptor, therefore, he has only to prove the handwriting of the acceptor himself.

In an action against the acceptor of a bill payable to order, the plaintiff must prove the handwriting of the payee or first indorser; and this, though it were on the bill at the time it was accepted: if his indorsement be special to "another person," or to "another, or his order," the same rule, on the same principle, applies to the indorsement of that other person, as it does to the indorsement specifically made of every subsequent indorser, between the payee and plaintiff. If the indorsement of the payee be general, the proof of his handwriting is sufficient; that of any other of the indorsors is not requisite, though all the subsequent indorsements be stated in the declaration; for by indorsing generally, the payee has shewn his order to be, that the bill should be payable to any subsequent holder; and accordingly it has been shewn, that any such subsequent holder may declare as the indorsee of the first indorser, or of that indorser who first indorses in blank: but in this case, in order to render the evidence correspondent to the declaration, all the subsequent names must be struck out, either at the time of the trial or before.

Smith v. Chester, 1 Term R. 654.
||Macferson v. Thoytes, Peake's Ca. 20.
Bosanquet v. Anderson, 6 Esp. Ca. 43.
Sedforth v. Chambers, 1 Stark. Ca. 326. ||

In an action by an indorsee against the drawer, the same rules obtain with respect to proof of the handwriting of the indorsors as in an action against the acceptor. (a)

Vide Collis v. Emmet, 1 H. Bl. 515.

acceptor's hand-writing need not be proved, even though an acceptance is averred. Tanner v. Bean, 4 Barn. & C. 512. ||

||(a) But the

That of the drawer himself must of course be proved: it must also be proved that the plaintiff has pursued that diligence with respect to the drawee, and given such notice to the drawer of the default of the former, as we have seen to be necessary on his part to entitle him to have recourse to the latter. (b)

||(b) The action against the drawer, it is to be observed, lies immediately upon non-accept-

ance. Ballingalls v. Gloster, 5 East, 481. ||

From the rule that, in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the first indorser, and of all those to whom an indorsement has been specially made, has arisen the question which has so long agitated the commercial world on the subject of indorsements, in the name of fictitious payees.

The result of the cases upon this point seems to be, that in all cases, where the holder of such a bill declares against the acceptor, as on a bill payable to the bearer, it is sufficient to maintain the action, that he should prove, 1. That the payee was fictitious; and, 2. That the defendant knew this at the time when he accepted the bill:—or, 1. That the payee was fictitious; and, 2. That the defendant had given a general authority to the

Minet v. Gibson, 5 Term R. 485. Gibson v. Hunter, 2 H. Bl. 288.
||and see Bayley on Bills, (4th ed.) p. 27. ||

drawer, &c. to draw bills upon him in the name of fictitious payees.

1 Ld. Raym.
174.

Stra. 444.

2 Burr. 675.

¶Free v.

Rawlings,

Holt, C. N.

P. 550.

Critchlow v.

Parry, 2 Camp. 182. Chaters v. Bell, 4 Esp. Ca. 210.¶

In an action by an indorsee against an indorsor, it is not necessary to prove either the hand of the drawer or of the acceptor, or of any indorsor before him against whom the action is brought; for, by his indorsement, he virtually undertakes to every subsequent holder, that the names of the drawer, acceptor, and previous indorsors are really in the handwriting of those to whom they respectively purport to belong.

¶See *ante*, and

Darbishire v.

Parker, 6 East,

10, 11, 12.¶

The same diligence also, with respect to the drawee, and the same notice to the defendant as indorsor, must be proved in this action as in that against the drawer, every indorsor being, with respect to subsequent indorsees or holders, a new drawer. But proof of a demand from the drawer, and notice of nonpayment by him, is not necessary.

1 Ld. Raym.

745. ¶(a) An

indorser hav-

ing been sued by the holder, and paid the money to him, may recover it from the acceptor as

money paid to his use. Pownal v. Ferrand, 6 Barn. & C. 439.¶

Where the action is by an indorsor (a) who has paid the money, proof must be given of the payment.

Vide Louviere

v. Laubray,

10 Mod. 56,

57. Simmonds

v. Parminster,

1 Wils. 185.

In an action by the drawer against the acceptor, it is necessary to prove the handwriting of the latter: demand of payment from him, and refusal; the return of the bill, and payment by the plaintiff: but it does not appear necessary to prove, that the acceptor had in his hands effects of the drawer; his acceptance is presumption that he had, and if he had not, the proof must lie upon himself.

Vide 3 Wils.

18.

In an action on the case by the acceptor against the drawer, the plaintiff must prove the handwriting of the defendant, and payment of the money by himself, or something equivalent to that, such as his being in prison in execution.

12 Mod.

545.

Gilb. L. E.

118. ¶2 Stark.

on Ev. 266.¶

In actions against the drawer or indorsor, the protest is sufficient evidence that the bill is not paid; and the mere production of the protest is sufficient; it is not necessary to prove either the writing of the notary, or to give any account how the plaintiff had the protest; for that would be destructive to public commerce, and throw too great a difficulty on transactions of this kind: and beyond seas, it is said, that it is sufficient to shew the court the protest without producing the bill itself; but here in general the bill itself must be shewn, as well as the protest, because the whole declaration must be proved, which cannot be without giving the bill in evidence.

Gilb. L. E.

119.

Hart v.

King,

12 Mod.

509.

But in an action against the drawer of a bill which was lost, it was held by *Holt* C. J., that proof of the defendant's having owned that he had made the bill was sufficient.

¶But it is now settled that an action cannot be maintained on a lost bill. *Hansard* v. *Robinson*, 7 Barn. & C. 90.¶

With respect to a promissory note, the same rules, of what is necessary to be proved, apply as in a bill of exchange; the maker being in the place of the acceptor; the payee, after indorsement,

dorsement, in that of the drawer ; and the indorsors and indorsees the same in each.

In general, direct proof is required of the signature of those parties whose indorsement must be proved : but with respect to the party himself against whom the action is brought, proof of other circumstances may be sufficient to supply the place of actual proof of his signature ; particularly confession. Thus, where the defendant was sued as indorsor of a note, and it was proved that a person to whom application had been made to discount it sent it to the defendant, who looked on it and said it was his hand, and that the note, which had some months to run, would be paid when due ; the Chief Justice would not permit the defendant to shew forgery, by similitude of hands, because that would tend to destroy all negotiation of bills and notes. But he seemed inclined to have admitted actual proof of forgery, if the defendant could have given it ; but this he was unable to do, and the plaintiff had a verdict.

So, where a letter was produced under the defendant's hand, in which he wrote to a friend that he had received a bill of exchange from the drawer on the acceptor, bearing date such a day, and payable to him or order six months after date, and in all these circumstances the bill agreed with the letter, though no sum was mentioned in the letter, this was thought sufficient evidence that the defendant had had the bill in question in his possession ; and to shew that he had indorsed it over it was proved, that he had said he had come to town to hasten the trial of a cause brought against him on an indorsement he had made on a bill of exchange, and that in fact he had brought down this very cause by proviso.

But where, in an action against any one party, proof of the signature of another is necessary to support the action against the defendant, that proof must be direct ; confession of the party whose signature it purports to be, will not be sufficient evidence. Thus in an action against the drawer or acceptor of a bill, or maker of a note, a confession of an indorsor that he indorsed the bill or note will not be proper proof of the indorsement.

But where an action is brought against one, on a joint and several promissory note, signed by him and others, proof of payment by one of the others of interest and part of the principal, within six years before the action brought, will be sufficient to bind the defendant, and take the case out of the statute as to him.

Where a bill is accepted, or a bill or note is drawn or indorsed by one of two or more partners, on the partnership account, proof of the signature of the partner accepting, drawing, or indorsing, is sufficient to bind all the rest.

Carvick v. Vickery, Dougl. 653. Gilb. L. E. 117. ||Shirreff v. Wilkes, 1 East, 48. Swan v. Steele, 7 East, 210. Ridley v. Taylor, 13 East, 175. Chit. on Bills, 29, 30. See tit. *Partners, ante.*||

Ld. Hardwicke.
Cooper v. Le Blanc, 2 Str. 1051.
||Leach v. Buchanan, 4 Esp. Ca. 226.||

Dale v. Lubbock, 1 Barnard. B. R. 198.

Barnes, 436.
Hemmings v. Robinson ; ||see, however, Maddocks v. Hankey, 2 Esp. Ca. 647.||

Whitcomb v. Whiting, Dougl. 652.
||Halliday v. Ward, 3 Camp. 52.
Burleigh v. Stott,

8 Barn. & C. 56. and see tit. *Limitation of Actions.*||

Pinkney v. Hall, 1 Salk. 126.
1 Ld. Raym. 175.; vide

Where a servant has a general authority to draw, accept, or indorse bills or notes, proof of his signature is sufficient against the master; but his authority must be proved.

Comb. 450.

Subsequent assent, it seemeth, is evidence of authority.
 ||Courteen v. Touse, 1 Camp. 43. n. (a). Neal v. Irving, Esp. C. 61. Watkins v. Vince, 2 Stark. Ca.; 568.; and see 2 Stark. on Ev. 58.; and head *Master and Servant*, and *Principal and Agent*, ante.||

12. Mod.

346.

Anonymous
 v. Harrison.

A general custom of the servant's signature, and payment by the master, is sufficient proof of a general authority; and a general authority will continue to bind the master till its determination be generally known. Therefore, if a servant, having authority, draw a bill of exchange in so short a time after he is dismissed, that the world cannot take notice of his being out of service; or, if he were a long time out of service, but that kept so secret that the world could not take notice of it, the bill in those cases will bind the master.

1 Barnard.

B. R. 198.

||Scott v.

Lifford,

9 East, 347.

1 Campb. 246. Smith v. Mullett, 2 Camp. 208. Hilton v. Fairclough, 2 Camp. 635. Walter v. Haynes, 1 Ry. & Moo. 149. Mann v. Moors, *id.* 250. Stark. on Evid. v. 2. 260. Phillips on Evid. V. 2. 21.||

Where notice is to be given by the post, it seemeth that proof of putting the letter into the post is sufficient, that being in general all that is in the plaintiff's power to prove.

Bevis v.

Lindsell,

B. R. 2 Stra.

1149.

Green v.

Hearne,

5 Term

Rep. ||Shep-
 herd v.

Charter,

4 Term R.

275.||

Where the defendant suffers judgment by default, and the plaintiff executes a writ of enquiry; it is sufficient for the latter to *produce* the note or bill, without any proof of the defendant's hand: this was determined so long ago as the 14th G. 2. in a case in the King's Bench, where the plaintiff having offered *collateral* evidence to prove the defendant's hand, the court not only held that this was sufficient, but said, that the note being set out in the declaration, was admitted by the default, and that the only use of producing it was, to see whether any money was indorsed on it as paid.

Ruled Anon.

B. R.

Hil. 26 G. 3.

Bayley, 67.

Rashleigh v.

Salmon, C. B. Trin. 29 G. 3. 1 H. Bl. 252.: ||for the cases where the court will, and will not make this reference, see Tidd's Pract. 619. (8th edit.)||

On such judgment, a writ of enquiry is not necessary, for the court on application by the plaintiff will, if no good reason shewn to the contrary, refer it to the proper officer to ascertain the damages and costs, and calculate the interest.]

||(N) Of the Provisions for the Encouragement of Shipping and Navigation.

1. *What Foreign Produce must be brought Home in British Ships.*

See Abbott on
 Shipping,
 (5th edit.)
 Append. No. 8.

THE various statutes lately in force relating to the customs having been repealed, and their provisions extended and consolidated by the 6 G. 4. c. 105., which as a consequence repealed the laws relating to the encouragement of *British* shipping and *British* seamen, the 6 G. 4. c. 109., intituled "An act for the encouragement of *British* shipping and navigation," was passed, which

which enacts, (a) that masts, timber, boards, salt, pitch, tar, tallow, resin, hemp, flax, currants, raisins, figs, prunes, olive-oil, corn, or grain, pot-ashes, wine, sugar, vinegar, brandy, and tobacco, being the produce of *Europe*, shall not be imported into the United Kingdom to be used therein except in *British* ships, or in ships of the country of which the goods are the produce, or in ships of the country from which the goods are imported.

(a) § 2.

And that (b) goods the produce of *Asia*, *Africa*, or *America*, shall not be imported from *Europe* into the United Kingdom, to be used therein, except goods, the produce of places in *Asia* or *Africa*, within the *Straits of Gibraltar*, or of the dominions of the Emperor of *Morocco*, imported from places in *Europe*, within the *Straits of Gibraltar*, goods the produce of places within the limits of the *East India Company's* charter, which (having been imported into *Gibraltar* or *Malta* in *British* ships) may be imported from *Gibraltar* or *Malta*, and bullion, diamonds, pearls, rubies, emeralds, and other jewels or precious stones.

(b) § 3.

And (c) goods the produce of *Asia*, *Africa*, or *America* shall not be imported into the United Kingdom to be used therein in foreign ships, unless they be the ships of the country in *Asia*, *Africa*, or *America*, of which the goods are the produce, and from which they are imported, except goods the produce of the dominions of the Grand Seignor in *Asia* or *Africa*, which may be imported from his dominions in *Europe*, in ships of his dominions, raw silk and mohair yarn, the produce of *Asia*, which may be imported from the dominions of the Grand Seignor in the *Levant* seas in ships of his dominions, and bullion.

(c) § 4.

Provided, (d) that all manufactured goods shall be deemed to be the produce of the country of which they are the manufacture.

(d) § 5.

And it is further enacted, (e) that no goods shall be imported into the United Kingdom from the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, except in *British* ships. And (g) no goods shall be exported from the United Kingdom to any *British* possession in *Asia*, *Africa*, or *America*, nor to the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, except in *British* ships.

(e) § 6.

(g) § 7.

And (h) no goods shall be carried coastwise, from one part of the United Kingdom to another, except in *British* ships. Nor (i) shall any goods be carried, except in *British* ships, from any of the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, to any other of such islands; nor from one part of any such islands to another part of the same island. Nor (k) shall goods be carried except as aforesaid from any *British* possession in *Asia*, *Africa*, or *America*, to any other of such possessions, nor from one part of any of such possessions to another part of the same. Nor (l) shall goods be imported into any *British* possession in *Asia*, *Africa*, or *America*, in any foreign ships, unless they be ships of the country of which the goods are the produce, and from which the goods are imported.

(h) § 8.

(i) § 9.

(k) § 10.

(l) § 11.

By

§ 12. By § 12. of the same act it is further enacted, that no ship shall be admitted to be a *British* ship, unless duly registered and navigated as such; and that every *British* registered ship (so long as the registry of such ship shall be in force, or the certificate of such registry retained for the use of such ship,) shall be navigated during the whole of every voyage (whether with a cargo or in ballast), in every part of the world, by a master who is a *British* subject, and by a crew whereof three fourths at least are *British* seamen; and if such ship be employed in a coasting voyage from one part of the United Kingdom to another, or on a voyage between the United Kingdom and the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, or from one of the said islands to another of them, or from one part of either of them to another of the same, or be employed in fishing on the coasts of the United Kingdom, or of any of the said islands, then the whole of the crew shall be *British* seamen.

§ 13. The statute then makes an exception in favour of vessels under fifteen tons, which are to be admitted to navigate in the rivers and upon the coasts of the United Kingdom, and its possessions abroad, without being registered; and the same provision is extended to *British* built vessels, under thirty tons, employed in the *Newfoundland* fishery.

§ 16, 17. It then specifies the qualifications necessary to constitute the master and seamen *British*; the scale on which the *British* seamen shall be proportioned to the tonnage of the vessel; and what foreigners may be declared *British* seamen.

2. As to the registering of British Vessels.

See *Abbott on Shipping*, part i. chap. 2. (5th edit.)

This act does not appear to differ from the repealed act, 4 G. 4. c. 41., except by the introduction of two clauses, relating to the repairs and manning of British ships, introduced to prevent the bad effects of combinations amongst shipwrights and seamen. As to the principal difference between this new act and the old registry acts, see *post*, 589, 590.

By the 6 G. 4. c. 110. § 2. it is enacted, “ That no ship or vessel shall be entitled to any of the privileges or advantages of a *British* registered ship, until the person or persons claiming property therein shall have caused the same to be registered in manner thereinafter mentioned, and shall have obtained a certificate of such registry from the person or persons authorized to make such registry, and grant such certificate as thereinafter mentioned.” The form of the certificate is given in the act.

§ 5. And by § 5. it is further enacted, “ That no ship or vessel shall be registered, or having been registered, shall be deemed to be duly registered by virtue of that act, except such as are wholly of the built of the United Kingdom, or of the *Isle of Man*, or of the islands of *Guernsey* or *Jersey*, or of *Gibraltar* or *Heligoland*, which belong to his majesty, his heirs or successors, at the time of the building of such ships or vessels, or
“ such

“ such ships or vessels as shall have been condemned in any
 “ Court of Admiralty as prize of war, or such ships or vessel,
 “ as shall have been condemned in any competent court as
 “ forfeited for the breach of the laws made for the preven-
 “ tion of the slave-trade, and which shall wholly belong, and
 “ continue wholly to belong, to his majesty’s subjects, duly en-
 “ titled to be owners of ships or vessels registered by virtue of
 “ that act.”

And lastly, by § 25. it is further enacted, “ That all and
 “ every person and persons who shall apply for a certificate of
 “ the registry of any ship or vessel shall, and they are thereby
 “ required, to produce to the person or persons authorized to
 “ grant such certificate a true and full account, under the hand
 “ of the builder of such ship or vessel, of the proper denomin-
 “ ation, and of the time when and the place where such ship or
 “ vessel was built, and also an exact account of the tonnage of
 “ such ship or vessel, together with the name of the first pur-
 “ chaser or purchasers thereof (which account such builder is
 “ thereby directed and required to give under his hand on the
 “ same being demanded by such person or persons so applying
 “ for a certificate as aforesaid); and shall also make oath before the
 “ person or persons thereinbefore authorized to grant such cer-
 “ tificate (which oath he or they is or are thereby authorized
 “ to administer), that the ship or vessel for which such certificate
 “ is required is the same with that which is so described by the
 “ builder as aforesaid.”

§ 25.

By § 14. & 15. no registry is to be made, or certificate granted,
 until an oath be taken and subscribed in the form set forth in
 the statute. This oath, in the case of individuals, is to be made
 by the owner, if only one; if two owners, and both resident
 within twenty miles of the place of registry, by both; if both, or
 either, are resident at a greater distance, by one only; if more
 than two owners, by the greater part, not exceeding three, if re-
 sident within twenty miles, unless a greater number shall be
 desirous to join in taking the oath; or by one, if all, or all ex-
 cept one, are resident at a greater distance; and if the required
 number do not attend, oath must further be made by such as do
 attend, that the absent are not resident within twenty miles, and
 have not wilfully absented themselves to avoid taking the oath,
 or are prevented by illness from attending. The oath to be
 made thus contains the name of the ship, her port, and master,
 the description of the ship, the name, occupation, and residence
 of every part-owner, with other particulars, tending to prove
 them to be subjects of his majesty; and concludes with a posi-
 tive averment, that no foreigner, either directly or indirectly,
 hath any share or interest in the ship; if the ship belong to a
 corporate body, the oath is to be made by the secretary or other
 proper officer of such body; and instead of the names and de-
 scriptions of the owners, he is to state the name and description
 of the company or corporation to which the ship belongs.

§ 14, 15.

At

§ 21. At the time of obtaining the certificate, a bond must be executed by the master, and such of the owners as personally attend, to be approved of and taken by the person authorized to make the registry, in a penalty varying in proportion to the burden of the ship, but never exceeding 1000*l.*; but if the master cannot attend at the time of registry, by reason of the absence of himself and the ship at some other port, a separate bond may be given by him at the port where the ship may then be, which shall be transmitted to the port where the ship is to be registered; and the two bonds shall be of the same effect as if the parties had bound themselves jointly and severally in one bond; and every such bond is to be as a security that the certificate shall not be lent, sold, or disposed of, but solely used for the service of the ship for which it is granted; and in case the ship be lost, captured, or destroyed, or otherwise prevented from returning to the port to which she belongs, or shall have forfeited the privileges of a *British* ship, or been condemned for illicit trading, or have been taken in execution for debt and sold accordingly, or sold to the crown, or have been registered *de novo*, the certificate, if preserved, shall be delivered up, within one month after the arrival of the master in any port in his majesty's dominions, to the collector and comptroller of some port in *Great Britain* or the *Isle of Man*, or of the *British* plantations, or to the governor and so forth of *Guernsey* and *Jersey*; and if any foreigner shall have purchased or become entitled to the whole or a part of the ship, the certificate must be given up at the time and place mentioned in the statute, which vary according to the different circumstances therein mentioned.

§ 29. In the case of a prize ship, or a ship condemned for breach of the laws for the prevention of the slave-trade, the owner must produce a certificate of the condemnation under the hand and seal of the judge of the court, and an account, in writing, of all the particulars contained in the form of the certificate of registry, made and subscribed by one or more skilful persons to be appointed by the court to survey the ship, and must also make oath of the identity of the ship.

§ 32. The property in every ship, of which there are more than one owner, shall be taken and considered to be divided into sixty-four parts or shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares, and no person shall be entitled to be registered as an owner in respect of any proportion of a ship which shall not be an integral sixty-fourth part or share; and, upon the first registry, the owners who take the oath required by this act before registry be made, shall declare upon oath the number of such parts or shares held by each owner, and the same shall be so registered accordingly.

§ 34. And whenever any ship which hath been registered before the 31st *December* 1823, (*viz.* the day on which the act passed in that year for the registering of vessels came into operation), and shall
not

not have been registered *de novo* since that day, and before the commencement of this act (*viz.* 5th January 1826), shall be registered *de novo*; the number of shares held by each owner shall be registered as far as the same be practicable; and to that intent, the owners who shall take the oath required by this act before registry be made shall produce the bills of sale or other titles of themselves and of the other owners, in order that the number of such shares held by each of them may be ascertained and registered accordingly; and if the registry of such ship then in force shall be the first registry, and the shares of any of the owners shall remain the same as they were at the time of such registry, and the owners or any one of them who shall attend to take the oath required by this act before the registry be made shall be the same as were the owners or one of them who took the oath before such first registry was made, such original owner or owners, instead of producing the bills of sale, shall declare upon oath, to the best of his or their knowledge and belief, the number of shares held by him or them, or by any other original owner or owners whose proportionate property in such ship shall have remained unchanged; but if, at the time of such registry *de novo*, such owner or owners shall make oath of their inability to produce the bill or bills of sale, or to give certain account or proof of the share or shares of the other previous owners, or some or any one of them, in such case the collector and comptroller may register the ship without requiring the shares of such owners to be declared and specified.

These are some of the principal enactments of this statute; it also contains very ample provisions as to the manner in which vessels shall be admeasured, and the tonnage ascertained previous to registry (*a*); for the registry *de novo* of vessels where the certificate has been lost (*b*); as to the number of persons who may be owners of any ship at one time; as to the officers by whom the registry is to be made (*c*); and the place at which it is to be made (*d*); the preservation of the name (*e*); the transfer of the property (*g*), and other matters, for which the reader is referred to the statute itself, and to the fifth edition of *Abbott on Shipping* (*h*), where the provisions of the statute are correctly and luminously abstracted, and arranged under eighteen heads; and the effect of the alterations made by this new act is there considered, with reference to the cases on the old statutes.

The most important points of difference between the regulations of this new act and those of the old statutes are—that it is no longer necessary to recite the certificate of registry in a *contract* for sale of the ship, and that in a bill of sale or other instrument, intended to operate as a transfer of the property, it is sufficient to recite the principal contents of the certificate; and a provision is introduced with a view to prevent the effect of certain errors in the recital (*i*): that the indorsement on the certificate is to be made by the public officers instead of the party transferring (*k*): that a mortgagee or trustee for payment of debts is not to be deemed an

See some slight alterations made by 7 G. 4. c. 48. (a) § 16 to 20. (b) § 55, 56. (c) § 5. (d) § 5. 11, 12, 50. (e) § 2. (g) § 31, 37, 58, 59, 40, 44, 45, 46, and 7 G. 4. c. 48. § 36. (h) 5th ed. p. 29. *et seq.* (i) § 36. See *Westerdale v. Dale*, 7 Term R. 506. *Rolls-ton v. Smith*, 4 *id.* 161. *Cappadoce v. Condor*, 1 Bos. & Pul. 485. *Abbott*, 51. (k) § 37. See

owner,

Moss v. Charnock, 2 East, 399.
 Moss v. Mills, 5 East, 144.
 Heath v. Hubbard, 4 East, 110.
 Bloxam v. Hubbard, 5 East, 107.
 Hubbard v. Johnston, 3 Taunt. 177.
 Hayton v. Jackson, 8 East, 511.
 Palmer v. owner (*l*), nor his interest to be affected by the subsequent bankruptcy of the mortgagor or assignor on the ground of reputed ownership (*m*): that the specific share of any part-owner (and which is required to be one or more sixty-fourth parts) must be mentioned in the registry, except in case of partners in trade, whose interest is to be considered as partnership property (*n*): that only thirty-two persons shall be entitled to be legal owners, as tenants in common, with a provision for the equitable title of minors, legatees, creditors, &c.; and a provision also for joint-stock companies (*o*): that more extensive powers are given for a registry *de novo*, and that copies of affidavits and entries in the books of the custom-house are made evidence, in order to prevent the necessity of the attendance of public officers to produce the originals. (*p*)

Moxon, 2 Maul. & S. 43. Richardson v. Campbell, 5 Barn. & A. 196. Hodgson v. Brown, 2 Barn. & A. 427. How far the difficulties arising in the above cases may be removed by the new enactments, see Abbott, p. 51, 52. Under the old acts it was decided that the omission of the public officer did not invalidate a transfer of the property. Ratchford v. Meadows, 3 Esp. Ca. 69. Heath v. Hubbard, 4 East, 110. Underwood v. Miller, 1 Taunt. 387. The provisions of the old statutes were not confined to transfers of property to a stranger, but applied to a transfer by one part-owner to another. Speldt v. Lechmere, 15 Ves. 588.; a decision which appears manifestly applicable to the new statute. Abbott, 52. A conformity to the old statutes was held requisite to the validity of a bill of sale, by way of mortgage or security. Wilson v. Heather, 5 Taunt. 642. (*l*) § 45. See Abbott, 53. (*m*) § 46. See Hay v. Fairbairn, 2 Barn. & A. 193. Monkhouse v. Hay, 4 B. Moo. 549. (*n*) § 52. (*o*) § 53. (*p*) § 43. See Stokes v. Carne, 2 Camp. 359. Fraser v. Hopkins, 2 Taunt. 5. Tinkler v. Walpole, 14 East, 226.; and see, as to the effect of this new provision, Abbott, p. 66. (5th edit.)

3. As to the Laws of Quarantine.

A notice of the laws of quarantine does not properly come under a head entitled "*Of the Provisions for the Encouragement of Shipping and Navigation*," though it relates to its regulation; a short notice is, however, necessary, if it were merely to refer the reader seeking for information to the statute on the subject.

By the 6 Geo. 4. c. 78., reciting the expediency of repealing the several laws relating to the performance of quarantine, and to make other provisions in lieu thereof, it is declared, in the first place (*a*), what vessels shall be liable to quarantine, and the regulations thereon.

By § 3. power is given to the privy council to order vessels, therein described, to go to certain places without being liable to quarantine.

And § 4. empowers the Lord-Lieutenant of *Ireland* to give directions by proclamation where vessels shall perform quarantine.

Sect. 8. specifies the signals which masters of vessels liable to quarantine, on meeting other vessels at sea, or being within two leagues of the United Kingdom, or *Guernsey*, &c., are, under a penalty for non-performance, to make. And § 9. specifies the signals they are to make when the plague or other infectious disease is on board.

By

By subsequent sections, penalties are imposed upon masters and pilots offending against the act. And § 14. enacts certain regulations for better ascertaining whether vessels be actually infected, or the persons on board liable to the orders touching quarantine.

By § 18., reciting "that disobedience or refractory behaviour
" in persons under quarantine, or liable to the performance of it,
" or in other persons who may have had any intercourse or com-
" munication with them, may be attended with very great danger
" to his majesty's subjects," certain regulations are enacted for punishing disobedience or refractory behaviour in persons under or liable to quarantine, or persons having intercourse with them. And § 19., after providing that persons quitting vessels liable to perform quarantine, &c. may be seized, specifies the proceedings to be had thereon. The act then goes on to make provision for the opening and airing of goods liable to perform quarantine, and to enact a variety of useful regulations ancillary to the performance of quarantine, for which the reader is referred to the act itself. ||

MISNOMER AND ADDITION.

THE names of men, at this day, are only sounds for distinction's sake, though perhaps they originally imported something more, as some natural qualities, features, or relations; but now there is no other use of them but to mark out the families or individuals we speak of, and to difference them from all others; since, therefore, they are the only marks and *indicia* of things which human kind can understand each other by, we must see what certainty the law requires herein, and what the effects and consequences are of the omission of the name, or false specification of the party; and this we shall do under the following heads: —

(A) What Names are considered as the same.

(B) What Names and Additions are required by Law, and must be truly inserted: And herein,

1. *Of the Difference between the Christian Name and Surname.*
2. *Of the Addition of the Estate or Degree.*
3. *Of the Addition of the Mystery.*

4. *Of*

4. *Of the Addition of the Town, Hamlet, Place, or County.*
5. *Of Additions which are only Conveyances to the Action.*

- (C) Where the Name is truly put at first, and afterwards varied from.
- (D) Of the Difference between a Mistake in Grants, Obligations, &c. and Judicial Proceedings.
- (E) At what Time the Mistake must be taken Advantage of, and how the same is salved.
- (F) Of the Manner of taking Advantage of and pleading a Misnomer or Want of Addition.
- (G) Who may take Advantage thereof.

(A) What Names are considered as the same.

Cro. Jac.
225. 2 Roll.
Abr. 135.
Piers Griffith
v. Hugh Mid-
dleton.

IF two names are in an original derivation the same, and are taken promiscuously to be the same in common use, though they differ in sound, yet there is no variance; and therefore where *Piers Griffith* brought an *audita querela*, to which an outlawry was pleaded by the name of *Peter Griffith*, the plea was allowed; for it appears by acts of parliament, that *Piers* and *Peter* have been used promiscuously, as signifying the same person.

2 Roll. Abr.
135. Leon.
147.

So, *Saunders* and *Alexander*, *Jane* and *Joan*, *Jean* and *John*, *Garret*, *Gerat*, and *Gerald*, are the same names.

2 Roll. Abr.
135. Palm. 71.
||Shakespeare
and Shake-
peare are not
id. son., 10 East, 85.||

But *Ralph* and *Randall*, *Randolphus* and *Randalphus*, *Sibel* and *Isabella*, have been held to be distinct names; and so of others, in which there is a substantial variance in sound, original, and common use.

2 Roll. Abr.
135. *Vide*
head of
Amendment
and *Jeofail*.

So, *Agnes* and *Anne* are different names; and therefore if one declare against *J. S.* and *Agnes* his wife, and on the record of *nisi prius* it is *Anne* his wife, this is a material variance, and not amendible.

2 Roll. Abr.
156. 3 Keb.
278.
Mod. 107.

If there are two *English* names that are distinct, and one *Latin* name for them both, such name shall serve for both; as *Jacobus* for *James* and *Jacob*, although two distinct *English* names.

Scott v.
Soans, 3 East,
111.

||The defendant being sued by the name of "*Jonathan*, otherwise *John Soans*," is no cause of *demurrer* to the declaration, for *non constat* that it is not all one Christian name.||

(B) What Names and Additions are required by Law, and must be truly inserted: And herein,

1. *Of the Difference between the Christian Name and Surname.*

IF the christian name be wholly mistaken, this is regularly fatal to all legal instruments, as well declarations and pleadings as grants and obligations; and the reason is, because it is repugnant to the rules of the christian religion, that there should be a christian without a name of baptism, or that such person should have two christian names, since our church allows of no re-baptizing: and therefore if a person enters into a bond by a wrong christian name, he cannot be declared against by the name in the obligation, and his true name brought in an *alias*, for that supposes the possibility of two christian names; and you cannot declare against the party by his right name, and aver he made the deed by his wrong name; for that is to set up an averment contrary to the deed; and there is this sanction allowed to every solemn contract, that it cannot be opposed but by a thing of equal validity; and if he be empleaded by the name in the deed, he may plead that he is another person, and that it is not his deed. (a)

the one name as the other, and give in evidence the defendant's actual subscription by that name.] ||See *Gould v. Barnes*, 3 Taunt. 504. But whether a man is known in the world by a particular name, depends upon his having been called so, not merely upon one or two occasions, but a plurality of times. *Per Lord Ellenborough C.J.* in *Mestaer v. Hertz*, 3 Maul. & S. 453. ||

But, though persons cannot have two christian names at one and the same time, yet they may, according to the institution of the church, receive one name at their baptism, and another at their confirmation; for though it allows no re-baptizing to make double names, yet it doth not force men to (b) abide by the names given them by their godfathers, when they come themselves to make profession of their religion.

the name of Francis. (b) But a person, by taking a new name of confirmation, does not lose his name of baptism. 6 Mod. 115, 116. Salk. 6. pl. 15. 2 Ld. Raym. 1015, 1016.

||If the defendant have two christian names, and they be transposed, as if he be baptized *Richard James*, and be called in the declaration *James Richard*, it is a misnomer, and may be pleaded in abatement. ||

The mistake of the surname does not vitiate, because there is no repugnancy that a person should have different surnames; and therefore if *John Gape* enters into an obligation by the name of *John Gate*, he may be empleaded by the name in the deed, and his real name brought in by an *alias*, and then the name in the deed he cannot deny, because he is estopped to say any thing contrary to his own deed. (c)

The declaration must be of the name in the obligation, with an *alias* of the real name; for the declaration must shew the cause of complaint as it is; therefore it must in all things follow the obligation, and the intent of the *alias* is only to shew he has

Cro. Jac. 553 640.
Owen, 107.
Dyer, 279.
5 Co. 43.
Poph. 57.
Noy, 135.
Cro. Eliz. 57. 222.
[(a) But if plaintiff sues defendant by the name he subscribed to the bond, &c. and defendant pleads a misnomer, plaintiff may reply he is as well known by

Co. Lit. 3.
2 Roll. Abr. 135. Judge Gawdy's case, who was christened by the name of Thomas, and confirmed by

does not lose his name of baptism. 6 Mod. 115, 116. Salk. 6. pl. 15. 2 Ld. Raym. 1015, 1016.

Jones v. Macquillin, 5 Term R. 195.

3 H. 6. 25.
2 Roll. Abr. 146.
[(c) See *Bonner v. Wilkin-son*, 5 Barn. & A. 682. ||

Dyer, 273.
Buls. 216.
[Gould v. Barnes, 3 Taunt. 504.

Caumont v.
Prevost,
1 Chit. 512.¶

been differently called from the name in the obligation; and therefore if a man oblige himself by the name of *J. S. esq.*, and afterwards he be made a knight, the plaintiff may declare against *J. S. knight, alias J. S. esq.*

2 Hawk. P. C.
c. 25. § 68.

It is said, that a person cannot take advantage of a mistaken surname in an indictment, either by plea in abatement, or otherwise, notwithstanding such surname have no affinity with his true one, and he was never known by it. And in this respect an indictment differs from an appeal, whereof it is certain, that a misnomer of a surname may be pleaded in abatement as well as any other misnomer whatsoever.

2. Of the Addition of the Estate or Degree.

2 Inst. 665.
2 Roll. Abr.
469. Show.
592. Comb.
180.

It seems that the common law in no case required any other description of a person than by his christian name and surname, unless he were of the degree of a knight or some higher dignity; but the names of dignity were always required, being marks of distinction imposed by public authority, and therefore making up the very name of the person to whom they are given. And they are of two sorts: 1st, Such marks of distinction as exclude the surname, so that the persons may not seem to be of any common family; and such are the names of earls, dukes, &c. 2dly, Such marks of distinction as are also imposed by the supreme power, and parcel of the name itself, but do not exclude the surname; such as knight, baronet, &c. And these marks of distinction were always to be made use of as part of the name in all legal proceedings; and so curious was the law herein, that if a plaintiff in any action gained a new name of dignity, pending a writ, he made it abateable. But this inconvenience is remedied by 1 E. 6. c. 7. § 3., by which it is enacted, “That if any plaintiff, in any manner of action, shall be made a duke, archbishop, marquis, earl, viscount, baron, bishop (a), knight, justice of either bench, or serjeant at law, depending the same action, that such action for such cause shall not be abateable or abated.”

(a) But it hath been holden, that the dignity of a baronet is not within the statute, because there was

no such dignity at the time of the making of it. Sid. 40. Lit. Rep. 81. Cro. Car. 104.

2 Inst. 666.

But names of worship, such as esquire, gentlemen and yeomen, since they are only names of distinction in popular use, and not given by the public authority of the supreme power, the law doth not count them parcel of the name, and therefore were not necessary at common law.

2 Inst. 670.
2 Roll. Rep.
225.

[This statute is to be taken strictly, and confined to those cases where process of outlawry

In the time of H. 5. it was perceived, that the christian and surname were not sufficient denominations of persons, and did not sufficiently avoid the confusion that might happen by the mistake of persons; and that an innocent person might, upon a process of execution, be distrained upon having the same name with the real defendant: therefore, by the 1 H. 5. c. 5. it is enacted, “That in every original writ of actions personal, appeals and indictments, and in which the exigent shall be awarded
“to

“ to the names of the defendants in such writs original, appeals
 “ and indictments, additions shall be made for their estate or
 “ degree, or mystery, and of the towns or hamlets, or places
 “ and counties of the which they were or be, or in which they
 “ be and were conversant; and if by process upon the said ori-
 “ ginal writs, appeals or indictments, in the which the said addi-
 “ tions be omitted, any outlawries be pronounced, that they be
 “ void, frustrate, and holden for none; and that before the out-
 “ lawries pronounced, the said writs and indictments shall be
 “ abated by the exception of the party, wherein the said addi-
 “ tions be omitted.”

writ, *Boats v. Edwards*, 1 Doug. 227., a party can no longer plead in abatement of the original writ, the want of addition; for such plea is not pleadable until afteroyer. *Desbons v. Head*, 7 East, 283.]]

By this law the name of (a) worship was made equally necessary in these actions, as the name of dignity was before.
 an esquire the addition of gentleman, *et sic e converso*. Bro. Addition, 44. Esquire and gentleman no variance. Fortesc. Rep. 354.

This law doth not extend to the names of plaintiffs, for they were in no mischief or danger to be mistaken, nor does it extend to real or mixt actions; because here the possessors were em-pleaded who were sufficiently specified, and so no other mark of distinction is needful; besides, no man can in the process possibly be grieved, because there is no process but of distress upon the land, and no (b) imprisonment at all in these actions.
 lies for the king, yet, because the original is in the reality, the defendant shall have no addition within this act. 2 Inst. 665. — So, there needs none in an inferior court where process of outlawry does not lie. Moor, 554. pl. 478. — Nor needs there any in any action where out-
 lawry does not lie. Bro. Addition, 2.

|| But where the plaintiff misnames himself, the defendant may plead the misnomer in abatement.]]
 Stafford (Mayor, &c.) v. Bolton, 1 Bos. & Pul. 44.

As to the estate and degree required by the statute to be added, we must observe, that estate is defined by the civilians the capacity of moral persons; for, as natural persons have a certain space in which their natural existence is placed, and in which they perform their natural actions, so have persons in a community a certain state or capacity, in which they are supposed to exist, to perform their moral acts, and exercise all civil relations; and therefore where one, who is neither by birth, office, creation, or reputation, an esquire or gentleman, is named, with either of these additions; or where a gentleman by birth, who follows a trade or husbandry, is named with the addition of the trade or husbandry, and not of gentleman (c); or where a peer, who has more than one name of dignity, is not named by the most noble; or where a gentlewoman is named spinster, or a yeoman is named gentleman; and such matter is pleaded in abatement, and found for the person who pleads it, the writ shall abate.

lies; therefore want of proper addition is not pleadable to an information in nature of a *quo warranto*. Rex v. Brough, 1 Wils. 244.]
 || And now, sinceoyer cannot be had of an original

(a) But it is said to be no fault to give
 (b) In an assise, if the disseisin be found with force, so that a *capias pro fine* and *exigent*

2 Inst. 665.
 6 Mod. 85.
 (c) *Sed qu.* If such exception would now be allowed? — A trader may be sued by his degree, or by his trade; and if by his degree, the writ shall not abate unless he shews he has a higher degree. Stra. 556. 816. Ld. Raym. 1541.

Cro. Car. 371.
Jon. 346.

It hath been adjudged to be a good plea in abatement to a writ or indictment against one by the name of *J. S.* knight, that he is a baronet and no knight.

Carth. 14.
Jeffereys
v. Snow.
Comb. 65.
S. C.

So, in trespass against the defendant by the name of *William Snow*, baronet, who pleaded in abatement, that at the time of the bill purchased he was, and yet is a knight and baronet; and because he is not called knight as well as baronet, he prayed judgment, &c.; upon demurrer to this plea, the court were of opinion that it was good.

Leon. 249.
Cro. Eliz. 542.
Vide Stra. 850.
S. P.

So, if a man be empleaded by the name of *J. S.* where he is garter king at arms; this is not good, because it is not only a name of office, but of dignity and grant, made to him by the words, *creamus, coronamus, and nomen imponimus*, &c.

2 Inst. 666.

A bishop may be described by the name of his bishoprick, without the addition of his surname; but a parson must be empleaded by christian and surname, and not *John*, parson of *D.*, because bodies politic are founded by public authority to political ends; therefore the bishop, the superintendent of the diocese, is made a body politick to subserve all the purposes of government in the care of religion; and it is not thought necessary to give every person such a capacity.

2 Inst. 668.
Theol. lib. 6.
c. 15.
§ 12, 13.
||(a) But now
see the act
of Union.||

A bishop of an *Irish* diocese may be as well described by the addition of his bishoprick, as an *English* bishop may by the addition of an *English* one; but it seems clear, that no one can be well described by the addition of a temporal dignity in *Ireland* (a), or any other nation besides our own; because no such dignity can give a man a higher title here than that of esquire.

2 Inst. 667.
2 Hawk.
P. C. c. 23.
§ 110.

The degree of a serjeant at law is certainly a good addition; and so, as is generally holden, is a degree in either university; yet a doctor in divinity may be described by the addition of clerk, as well as by that of doctor. *Armiger, generosus*, yeoman, labourer, are good additions of the estate and degree of a man, but not of that of a woman. *Generosa*, widow, single woman, wife of *J. S.* spinster, are good additions of the estate and degree of a woman; and, as some say, spinster (b) is a good addition for the estate and degree of a man; but neither burgess, citizen, nor servant, are good additions, as being too general.

(b) *Sed quæ?*

Salk. 7. pl. 16.
2 Hawk.
P. C. c. 23.
§ 106.

If several defendants, of different names, have the same addition, it is safest to repeat the addition after each name; and if a father have the same name and addition with his son, the writ against the son is abateable, unless the addition of *puisne* be added to the other additions: but, if a father alone be a defendant, there is no need of the addition of *eigne*: also, if the son be declared against in *custodiâ mareschalli*, there is no need of the addition of *puisne*, unless the father be also in the custody of the marshal.

2 Leon. 183.
Cro. Eliz. 583.
Dyer, 88.
|| 1 Saund.
14 a. note (1).
1 Leach, C. C.
420.||

It hath been held a fatal fault, to apply the addition to the name which comes under the *alias dictus* only, and not to the first name; but it is said not to be material, whether any addition be put to the name which comes under the *alias dictus*, or not; because what is so expressed is not material.

The additions of the estate, degree, and mystery of the party are not sufficient, unless they be the same which he had at the time of the writ. And in this respect, such additions differ from that of place, which is sufficiently shewn by naming the defendant late of such a place.

2 Hawk. P. C. c. 23. § 107.

Also, it must plainly appear that the addition is referred to the party; and therefore it is not well expressed by the addition of his mystery, naming him *B. A.*, son of *A. of C.*, butcher; because butcher refers to *A.* rather than to the son.

2 Inst. 670.
2 Hawk. P. C. c. 23. § 108.
2 Hal. Hist. P. C. 177.

3. *Of the Addition of the Mystery.*

It seems agreed, that the word *mystery* includes all lawful arts, trades, and occupations; and that if one, under the degree of a gentleman, have divers of such arts, trades, or occupations, he may be named by any of them.

2 Inst. 668.

The additions of this kind which are said to be clearly good, are those of husbandman, merchant, broker, tailor, point-maker, smith, miller, carpenter, cook, brewer, baker, butcher, parish-clerk, mercer, fishmonger, dyer, schoolmaster, scrivener, and such like.

2 Hawk. P. C. c. 23. § 114.
2 Hal. Hist. P. C. 176.

The additions of this kind, which are said to be clearly insufficient, are those of maintainer, extortioner, thief, vagabond, heretic, common informer, and such like.

2 Hawk. P. C. c. 23. § 115.

But the following additions of this kind are said to be questionable:—

2 Hawk. P. C. c. 23. § 116.

1st, Farmer (*a*); which by the better opinion seems to be an insufficient addition; because if any mystery be implied in the notion of it, it is that of husbandry, of which husbandman is the proper addition.

(a) *Sed qu.* If this addition is not now frequently

used, and, as being well understood, not objected to?

2dly, Chamberlain, butler, and pantler; which are holden to be insufficient additions, because they denote only a special kind of officer or servant, and imply nothing which, in the common understanding of the words, comes under the notion of a mystery; and from this ground it seems to follow, that neither groom nor page are good additions, and yet in some of the old books they seem to have been so admitted.

2 Hawk. P. C. c. 23. § 117., and several authorities there cited.

3dly, Hostler; which hath been holden to be a good addition, and seems properly enough to come under the notion of a mystery; and though it hath been resolved, that any one who keeps an inn may be sued by the addition of a labourer, upon the custom of the realm, for want of due care of the goods of his guests; because whoever keeps a common inn is, in that respect, liable to answer for such defects, by whatsoever addition he may be styled; yet this does by no means prove that such person may not as well be sued by the addition of hostler, but only that he may be sued as well under any other addition.

2 Hawk. P. C. c. 23. § 118.

4. *Of the Addition of the Town, Hamlet, Place, or County.*

2 Hawk.

P. C. c. 23.

§ 119.

2 Hal. Hist.

P. C. 175.

(a) On special original

It is a good addition of this kind to name the party late (a) of such a town; in which respect this addition differs from that of the estate, degree, or mystery; and it is said, that if a defendant be named of *A.* and late of *B.*, it is sufficient to prove either addition.

against *A.* *nuper de London*, merchant, he pleaded he had for four years been commorant at *B.* and traversed that at the time of the writ, *vel nuper tunc, vel unquam postea*, he was of *London* and made affidavit; but the plea was set aside on motion. *Cortisos v. Mienoz*, *Str.* 924. [In *Shelly v. Wright*, *Barnes*, 338., it is said not to be usual to set aside such a plea upon motion; but that the plaintiff ought to demur.

2 Inst. 669.

Dyer, 215.

Cro. Jac.

167.

2 Hawk.

P. C. c. 23.

§ 130.

The addition of place is sufficiently shewn by naming the defendant *de Londino*, or *de Norwico*; but not by naming him *Londini*, or *Bristolæ*, for that imports only that he belongs to such town, but not that he lives there; nor by naming him of a town which is not a county of itself, without shewing the county. If it name him of a parish which contains several towns, he may plead such matter in abatement; for the statute says, that the addition shall be of the town or hamlet; but a parish shall be intended to contain no more than one town, unless the contrary be shewn.

2 Hawk.

P. C. c. 23.

§ 121.

If there be two towns in a county, the one called *Great Dale*, the other *Little Dale*, and the defendant be named only of *Dale*; he may plead, that there are two *Dales* in the county, called *Great Dale* and *Little Dale*, and none without an addition; and as some say, he may plead that there is no such town as *Dale*, either in this case, or where there is but one town called *Little Dale*, and he is named of *Dale*.

Jenkins, 163.
pl. 12. Bonner v. Wilkinson, 5 Barn. & A. 682.

|| But if he enter into an obligation describing himself in it of *Dale* only, he shall be estopped from pleading that there is *Great Dale* and *Little Dale*, &c. for he cannot contradict his own deed.||

2 Hawk.

P. C. c. 23.

§ 122.

If a defendant live in a hamlet, which is so far part of a town, that those who live in it are indifferently styled sometimes of the hamlet, and sometimes of the town; it seems to be in the election of the plaintiff, to name him either of the hamlet or of the town.

2 Hawk.

P. C. c. 23.

§ 123.

If a defendant live in a place known by a special name, out of a town or hamlet, he may be named of such place.

2 Hawk.

P. C. c. 23.

§ 124.

The habitation of the wife is sufficiently shewn by shewing that of the husband. (b)

— (b) The place where defendant is *conversant* is sufficient, though not *commorant* nor inhabitant. *Barnes*, 162.

5. *Of Additions which are only Conveyances to the Action.*

Vide tit.

Executors
and Admin-
istrators.

When any particular character or relation gives any person rights and privileges, or makes him subject to any burden; to demand the one, or be liable to the other, the particular character or relation ought to be set forth; for since it is the cause of the action, it must certainly be material; and therefore when persons

sons sue or are sued as heirs, executors, or administrators, they must be named as such, for these are necessary conveyances or inducements to the action, which if mistaken is fatal.

But, where the inducement is not necessary, but surplusage only, as, if an action of detinue of charters be brought against *J. C.*, and the writ be *præcipe J. C. filio et heredi of R. C.* and be count of a bailment to the defendant himself; the defendant plead, that he was son and heir to *W. C.* and not to *R. C.*, this is no good plea, because he is charged with an injury done by himself. But if he had been charged upon any covenant of his ancestors, as their representative, there, the periphrasis, or inducement, must have been rightly formed; for otherwise the plaintiff doth not entitle himself to his action; and, there, this had been a good plea.

Vide tit. Heir and Ancestor, Cro. Eliz. 533.

If this inducement be not at first in a declaration, yet if it afterwards appear that the party is charged as executor, this is sufficient; as, if an action of covenant be brought against *J. S.*, executor, and he be not named at first *J. S.* executor of the last will and testament; but afterwards it be shewn, that the testator did covenant and bind himself, his executors, &c. and made *J. S.* his executor, and died; and a breach be assigned; this is sufficient, without a formal nomination.

Saund. 111. Dean v. Guire.

If an action of account be brought against a parson, they need not call him parson of *Dale*; but, if an assize be brought against a parson or prebend, for land that he hath in right of his church, he must be named parson or prebendary of the said church.

2 Inst. 666.

So, if an attorney of the Common Pleas bring a writ of debt, he need not name himself attorney; but if he bring a writ of privilege, he ought.

Vide head of Privilege.

(C) *Where the Name is truly put at first, and afterwards varied from.*

THE name must be truly put at first; for if that be omitted, there is a complaint against no person; therefore, where, in an *assumpsit*, *J. Law* declares thus; *J. L. queritur de Thom. Saunders, &c. cum in consideratione quod idem J. L. would marry the daughter of the said Thomas Saunders, super se assumpsit to pay him 100*l.*, the declaration is bad, though after a verdict, because it does not say *prædict.* Thom. Saunders *super se, &c.* for nobody is expressly charged with assuming; and when it is indifferent whether there can be an injury, or no, it is not by the court to be supposed. (a)*

Cro. Eliz. 915. Law v. Saunders.

(a) But as the pleadings are now in English, the pronoun *he* been sufficient.

would have been used, and, referring to the last antecedent, would have

But if the plaintiff counts against *J. S.*, *quod præd. J. S.* was seised of the manor of *Dale*, without saying *prædict. J. S.* or *de manerio prædict.*; this, after a verdict, shall be taken to be so; for he being named to be seised, and this by verdict being found, it is necessary it should be intended *J. S.* mentioned, for here it cannot possibly be taken indifferently either way.

Cro. Eliz. 192. Watts's case.

Hob. 527.

Cro. Jac. 662.

Cro. Eliz. 865.

Vide tit.

*Amendment
and Jeofail.*

Cro. Eliz. 459.

Franson v.

Delamere.

If *J. W.* declares against *T. W.* and the judgment is *quod prædict. T. recuperet*, *T.* shall be amended and made *John*; and *note*, that by the statute 16 & 17 Car. 2. c. 18. it is expressly provided, that judgment shall not be reversed for any mistake in christian name or surname, in any declaration, plaint, or pleading.

But this must be understood where the record is before them, for otherwise it may be very fatal to a just cause; as, if *A.* brings an *assumpsit* against *B.* and declares he was bail for him at the suit of *W. Adderly*; and the defendant assumed to save him harmless, and that the plaintiff was taken in execution, and paid the debt; upon *non assumpsit* pleaded it was found, that the defendant was arrested by the same *William Adderly*, but that he declared against him by the name of *William Adderby*, and the plaintiff became bail for him, &c. In this case the opinion of the court was, that the defendant was not chargeable; for *Adderby* and *Adderly* shall not be intended the same person, at whose suit the plaintiff became bail; for the verdict hath no credit against a record, and therefore it cannot reconcile the difference that appeared to be between the records; but in this case, if it had been before the court, it might have been amended.

Cro. Eliz. 865.

Hob. 527.

Cro. Jac. 632.

If the surname in the judgment differs from the surname in the declaration, yet it shall be amended; for in the judgment the christian name need only be mentioned, and the surname is redundant, and then *utile per inutile non vitiatur*; as, if a declaration be against *John Morgan Wolf*, and the judgment be against *John Morgan*, this is well enough: so, if a declaration be *Henry Skinner*, and judgment be entered *quod Henricus Soiner recuperet 10l.* assessed by the jury, and *5l. eidem Henrico Skinner de incremento*, this is well enough.

Cro. Eliz. 57.

Deputy v.

Sprat.

The variance of the surname in the process to the sheriff destroys not the verdict; otherwise it is in the variance of the christian name; for, when any man is named by two different surnames on record, it shall be intended he has two different surnames, as by law he may have; therefore, if a *venire facias* be to one by the the name of *George Thompson*, and in the *distringas* he be named *Gregory Thompson*, and he appear and be sworn, the verdict is not good; but if there be two different surnames in the record, they shall be intended his real names, and then the verdict shall not be avoided; as, if a man be named in the *venire facias* *Thomas Barker of B.*, and in the *distringas* *Thomas Carter of B.*, and he appears and is sworn, and tries the issue, the verdict is good notwithstanding.

Roll. Abr.

196.

3 Buls. 18.

Hob. 64.

Brownl. 174.

So, if the christian name be wrong in the *distringas*, or in the panel returned, or in the panel of the jury sworn, if it can be proved to be the same man that was intended to be returned in the *venire*, having there his right christian name, it may be amended.

(D) Of the Difference between a Mistake in Grants, Obligations, &c. and Judicial Proceedings.

IF the christian name be wholly mistaken, this, as hath already been observed, is not only fatal in judicial proceedings, but also in grants, obligations, &c.; and therefore if *Edward* obliges himself by the name of *Edmund*, it is ill.

But in grants, &c. if there be such sufficient marks of distinction, that the grant would be good without any name at all, there a mistake of the christian name or surname, being only surplusage, will not vitiate, according to the rule *utile per inutile non vitiatur*; and therefore a grant to *George* Bishop of *Norwich*, where his name is *John*; or to *Henry* Earl of *Pembroke*, where his name is *Robert*, is good. (a)

¶ Where the mayor, aldermen, bailiffs, and citizens of *Carlisle* declared in covenant on a deed made by the ancestor of the defendant, granting them a watercourse, by name of the "mayor and aldermen, and capital citizens of *Carlisle*," it was held that the corporation being a prescriptive one, and having had different names, the defendant was estopped by the deed from denying that the corporation was known by the name contained in the deed, at the time of the execution of it.

So, where a corporation, named "The wardein and poore of the hospital of the Holie Trinitie in *Croydon*, of the foundation of *John Whitegift*, Archbishop of *Canterbury*," conveyed land by the name of the "wardein and poore of the hospital of the Holie Trinitie in *Croydon*," the variance in the name was held immaterial.

So, the mayor, jurats, and commonalty of *Rye* were held to take lands under a devise to the "mayor, jurats, and town council of *Rye*."¶

So, a grant to a man and his wife is good, without naming her by the name of baptism: so, if a grant be made to *T.* and *Elen* his wife, where, in truth, her name is *Emlyn*, yet the grant is good; for being called the wife of *T.* reduces it to a sufficient certainty.

So, in a devise, though the christian name be mistaken, yet, if there be a sufficient specification of the party, the devise is good; because it must be construed according to the intent of the deviser; and therefore if a devise be made to *Abraham*, the eldest son of *B.*, where his name is *William*, this is a good devise.

But in pleading, in these cases, the christian name ought to be shewn; for the death of the individual is a good plea in abatement, which often falls out where the same office, dignity, or relation continues in another.

If there be father and son of the same name, and the father grant an annuity by his name, without any addition, it shall be intended the grant of the father; and if the son, being of the same

Co. Lit. 5.
Dyer, 279.
pl. 9. Cro.
Jac. 558.
Owen, 107.

Co. Lit. 5.
2 Roll. Abr.
45. ¶ 1 Saund.
R. 340. a. ¶
[(a) So in
judicial pro-
ceedings.
1 Stra. 516.]

Mayor, &c.
of *Carlisle* v.
Blamire,
8 East, 487.

Croydon
Hospital v.
Farley,
6 Taunt. 467.
2 Marsh. 174.

Attorney
General v.
Mayor of *Rye*,
7 Taunt. 546.
1 Moo. 267.

Co. Lit. 5.
2 Roll. Abr.
45.

Leon. 18.
Vide tit.
Devise.

Co. Lit. 5.

Perk. § 57.

same name with his father, grant an annuity, without any addition, yet the grant is good, for he cannot deny his own deed.

2 Roll. Abr. 44. If *A.* be created an herald, and in the patent he be called *Chester*, a grant or obligation made to him by the name of *Chester* is good; for this sufficiently distinguishes him from other men.

Cro. Jac. 574. If a grant be made to a father and his son, he having but one son, the grant is good for the apparent certainty of it: but, if the father has several sons, or, if a grant be made to a man's cousin or friend, these are void for uncertainty.

Perk. § 40. If *J. S.*, reciting by his deed that his name is *J. S.*, by the same deed grants an annuity by the name of *Tho. S.*, this is a good grant; for the writ shall be brought upon the whole deed.

Perk. § 43. So, if *J. S.* knight, reciting by his deed, that he is a yeoman, grants an annuity, the grant is good.

Carth. 400. A grant to a duke's eldest son by the name of a marquis, or to the eldest son of a marquis by the name of an earl, &c. is good, because of the common courtesy of *England*, and their places in heraldry.

Buls. 21. So, where a conveyance was made of a reversion to *Ralph Evers*, knight, Lord *Evers*, and he brought an action of covenant, to which the defendant pleaded, that at the time of the grant he was not *cognitus et reputatus per nomen mil.*, it was held to be no good plea; for the person is sufficiently expressed by Lord *Evers*, and the addition of knight, though false, doth not take away the description of the true person.

Carth. 440. But it was adjudged in *C. B.*, and affirmed by three judges in *B. R.*, where the party set forth his title to an advowson, by virtue of letters patent granted to *A.*, *tunc armigero et postea militi*, and upon oyer of the letters patent it appeared, that the grant was made to *A.*, knight, that it could not be intended the same person, because knight is a name of dignity, but *armiger*, or esquire, a name of worship; and if he is afterwards made a knight, the name of esquire is thereby extinguished, and, consequently, that a grant made by the king to *A.*, knight, when there was no such man a knight, was a void grant.

him by the name of *knight*, *et sic vice versâ, si constat de personâ ut res magis valeat*, &c.—And note, this judgment was reversed in parliament, because it was only a mistake in the pleader, the party being in truth a knight at the time of the grant. Carth. 440.

(E) At what Time the Mistake must be taken Advantage of, and how the same is solved.

Roll. Abr. 780. IT seems agreed, that he who would take advantage of a misnomer, or the want of a proper addition, must do it before he pleads to issue; for the addition is ordained by the statute, that the party who happens to be outlawed may have notice; but if he appears and takes no exception, *constat de personâ*, and he thereby waives any benefit he may have by the misnomer or want of addition.

2 Roll. Rep. 225. Johnson's case. 2 Hal. Hist. P. C. 175. Sid. 247. Keb. 885. Show. 394. Comb. 188. Carth. 207. Lil. Ent. 509. ||Taunton Market v. Kimberley, 2 W. Black. 1120. Rogers v. Boehm, 2 Esp. 702.||

The defendant was served with process by the name of *Dubois*, plaintiff entered an appearance for him, and obtained judgment by default; and on motion to set aside the judgment, upon an affidavit that his name was *Davois*, the court refused it, and said, that such kind of motions would destroy all pleas in abatement; since the last act enabling the plaintiff to appear for the defendant, his appearance by the name of *Dubois* is the same as if entered by the defendant himself.*

name, and plaintiff declares against him by that name, the court will not, on motion, stay proceedings for irregularity, but leave defendant to plead variance. — So, if it is in the addition of his degree or mystery. 2 Wils. 293.

Pasch. 7 G. 2.
in *B. R.*
Halcok v.
Dubois.

* If defendant is served by a wrong name, appears by his true

¶ And a defendant is estopped by the recognizance of bail entered into for him by the name in which he is sued, from pleading a misnomer, though he himself be no party to the recognizance.¶

Meredith v.
Hodges,
2 New R.
453.; and see
Murray v.
Hubbart, 1 Bos. & P. 654.

(F) Of the Manner of taking Advantage of and pleading a Misnomer or Want of Addition.

ALTHOUGH a defendant may, by pleading in abatement, take advantage of a misnomer when there is a mistake in the writ or declaration, as to the name of baptism or (a) surname, yet in such a plea he must set forth his right name, so as to give the plaintiff a better writ.

allow the party's plea of misnomer, both as to his surname and as to his christian name; for he that pleads misnomer for either, must in the same plea set forth what his true name is, and then he concludes himself; and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself. 2 Hal. Hist. P. C. 176.—That the party accused may take advantage of the misnomer, or want of addition, but yet he must plead over to the felony; but though such plea be found for him, he is not to be discharged, but must be indicted over again; neither shall such plea, if found against him, be peremptory, but he shall be tried on his plea in chief. 2 Hawk. P. C. c. 34.

Finch. 363.
9 H. 5. 1. pl. 3.
(a) That the safest way in criminal cases is to

Also, he who pleads in abatement, must not only set forth his right name, but must also allege, that by such name he was known and called at the time of the purchase of the writ.

Gouldsb. 86.
Skin. 620.
pl. 4.
Salk. 6.
pl. 15. 4 Mod. 347.

He who will take advantage of the misnomer of his christian name, addition, or surname, must do it upon his arraignment; and the entry must be special, viz. *super quo venit Robertus Williams, qui indictatus est per nomen Johannis Williams, et dicit quod ubi in indictamento supponitur quod quidam Johannes Williams, vi et armis, &c. Ipsius nomen est Robertus et non Johannes*; for if he should say, *venit predictus Johannes Williams*, he concludes himself, and cannot plead that his name is *Robert*.

Hal. Hist.
P. C. 175.

So, where the defendant pleaded misnomer in abatement in this form, *et predict J. Germyn* (with an *n* at the end) *venit et defend., et dicit*, that his name is *Germyn* (without an *n*) and not *Germyn prout, &c.* and upon demurrer to this plea it was adjudged against him; for that he had admitted his name to be *Germyn*, by his appearing

Carth. 207.
Tallent v.
Germyn;
¶ and see
Roberts v.
Moon,
5 Term R.

487. Docker
v. King,
5 Taunt. 652.
Tidd's Pract.
637. (9th ed.)||

appearing and making defence by that name; but that if he would have taken advantage of the misnomer, he should have pleaded in this manner: *et Johannes Germy, qui per nomen J. Germyn superius implacitatur, venit et dicit quod*; for this default a *respondas ouster* was awarded.

Mich. 9 G. 2.
in *B. R.*
Humberston
v. Cotteral.

So, where the defendant was sued by the name of *Edward Cotteral*, and pleaded in abatement that his name was *John*, but introduced his plea, and the aforesaid — *Cotteral* (leaving out his christian name) comes and defends the force and injury, when, and so forth; it was held, that the defendant saying *et predict.* — *Cotteral*, must be understood *et predict. Edwardus Cotteral*, by which he confesses his name to be *Edward*; and if he would have taken advantage of the misnomer, he should have said, *et Johannes*, who was sued by the name of *Edward*.

Haworth v. Spraggs,
8 Term R.
515. Docker
v. King, 5 Taunt. 652.

|| And the defendant in a plea of misnomer in abatement must give his surname as well as his true christian name, although his true surname be used in the declaration.||

Trin. 10 G. 2.
in *B. R.*
Read v.
Mature.
Cases temp.
Hardw. 286.
S. C.

If there be a mistake in the christian name and surname, the defendant may take advantage of both, and his plea on that account shall not be held to be double; as, where trover was brought against the defendant by the name of *Christopher Mature*, and he pleaded in abatement, that his name was *John Metter*, and that he was known by that name; *absque hoc*, that he was named by the name of *Christopher Mature*; on demurrer to this plea, because of duplicity, and because no *venue* was laid where he was baptized, it was held, 1st, That there being a mistake in both names, the defendant could not take advantage thereof, in a better manner than he has done; for he is not bound to admit one of the names right, which if he did, he would not then give the plaintiff a better writ, the *prænomen* and *cognomen* being only one description of the same person; and though there is no precedent, where misnomer has been pleaded both in the christian name and surname, yet that may be because it is a matter that has rarely happened; and for this were cited 1 *Lutw.* 10. *Thom. Ent.* 1. 1 *Salk.* 6. 2d, That there was no necessity of laying a *venue*, this being a matter relating to the person, which must be tried where the action is laid; and for this were cited *Rast. Ent.* 29. *Hern's Plead.* 9. 1 *Salk.* 6. 6 *Mod.* 115.

(a) *Boats v. Edwards*,
1 Doug. 227.
(b) *Deshons v. Head*,
7 East, 283.
(c) *Gray v. Sidneff*,
3 Bos. & P. 595.

|| Nooyer is now grantable of an original writ (a), the effect of which has been to prevent a plea in abatement of the writ for want of the defendant's addition; for no such plea can be pleaded until after oyer. (b) And it is unnecessary to insert the defendant's addition of place or degree in any declaration. (c)

(d) 1 Chitt. R.
598.; and see
4 Moo. 517.
1 Bro. & B. 529.

A bill of *Middlesex* and notice thereto describing defendant as Mr. A., without stating his christian name, is irregular. (d)

And in the King's Bench, where the party arrested was described in the process and affidavit to hold to bail, by the initials of his christian name only, the court ordered the bail-bond to be delivered up to be cancelled, and the defendant discharged upon entering a common appearance. (a) And in that court where the christian name of the defendant is omitted in a bailable writ, the court on motion will set it aside for irregularity; but where it is omitted in serviceable process, they will leave the party to his plea in abatement. (b) So, in the Common Pleas, if a defendant be arrested by the initials of his christian name only, and sign a bail-bond in a similar manner, the Court will discharge him on entering a common appearance, on his undertaking to bring no action. (c) But where by a writ of *capias* the sheriff was directed to take Messrs. C. and D. without mentioning their christian names, and they afterwards signed a bail-bond in their christian and surnames, the court held the irregularity waived (d), and every subsequent writ of *alias*, &c. must correspond with that which has gone before in the names of the parties. (e) But a misnomer may be cured by altering the writ, and getting it resealed before the return. (g) And where process is sued out against four defendants, one of whom is misnamed, it may be served upon the three whose names are right; and if the name of the other be afterwards altered, and the writ amended, it is good against all. (h)

(a) 4 Barn. & A. 536.

(b) 6 Barn. & C. 165.

(c) 6 Moo. 264. and see 3 Bing. 296.

(d) 4 Moo. 517. 1 Bro. & B. 529. (e) 3 Term R. 660. (g) 1 Chitt. R. 521.

(h) *Id.* 398. a.

When defendant has been arrested by wrong name, the court will order the bail-bond to be delivered up to be cancelled. (i)

(i) 4 Maul. & S. 360. 8 Moo. 526. 1 Bing. 424.

If a person enter into a bond by a wrong christian name and be sued thereon, he should be sued by that name, as a declaration against him by his right name, stating that he executed the bond by a wrong name, is bad. (k)||

(k) 5 Taunt. 504.; and see further, Tidd's Prac. 447.449. (9th edit.)

2 Saund. R. 209. a. b. (5th edit.)

(G) *Who may take Advantage thereof.*

THE defendant, though his name is mistaken, is not obliged to take (l) advantage of it; and therefore if he be empleaded by a wrong name, and afterwards empleaded by his right name, he may plead in bar the former judgment, and aver, that he is *una et eadem persona*.

(l) J. Villars, who pretended himself to be Earl of Buckingham, was arrested

by the name of J. Villars, armiger; and, on motion, the court gave him leave to put in bail, without joining in the recognizance, and thereby not estop himself. Salk, 3. pl. 7. pl. 17. 7 Mod. 58.

So, if a person be indicted and acquitted of a crime, and afterwards be indicted for the same offence, in which second indictment the crime is described to be the same in substance, with some variation of the name, addition, &c., he may make good the variance, by averring that he was the same person meant in both.

2 Hawk. P.C. c. 35. § 3.

If a person killed be described by his proper name and surname

2 Hawk. P.C.

- c. 35. § 3. surname in the first indictment, and by a different surname in the second, such variance may also be helped by an averment, that the person so differently named was one and the same person; to which it is advisable to add, that he was known as well by the name in the first, as by that in the second indictment.
- 2 Hawk. P.C.
c. 34. § 3. If a defendant appear *gratis*, and by attorney, to an information, he may plead a misnomer in abatement, as well as if he had appeared in person; for if he be not the person intended, his plea may be rejected, and judgment signed by *nihil dicit*; but the attorney general, by accepting his plea, admits him to be the defendant, and shall not afterwards say, that it doth not appear but that the plea might be put in by a stranger.
- Lutw. 36. One defendant cannot plead misnomer of his companion; for the other defendant may admit himself to be the person in the writ.
- 2 Hal. Hist.
P.C. 177. So, if several persons be indicted for one offence, misnomer, or want of addition of one, quasheth the indictment only against him, and the rest shall be put to answer; for they are in law as several indictments.

MONOPOLY.

(A) Monopoly, what it is, and how restrained by the Common Law.

(B) How restrained by Statute.

(A) Monopoly, what it is, and how restrained by the Common Law.

3 Inst. 181.
Noy, 182.

(a) Monopoly and engrossing differ only in this, that the first is by patent from the king, the other by act of the subject, between party and party; but are both equally injurious to trade, and the freedom of the subject, and therefore are equally restrained by the common law. Skin. 169.

A MONOPOLY is described by my Lord *Coke* to be an institution or allowance by the king by his (a) grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.

Hawk. P.C.
c. 79. § 2.
Townsend's
Collection of
Proceedings

And therefore all grants of this kind, relating to any known trade, are made (b) void by the common law, as being against the freedom of trade, discouraging labour and industry, restraining persons from getting an honest livelihood by a lawful employment,

employment, and putting it in the power of particular persons to set what prices they please on a commodity; all which are manifest inconveniences to the public.

in Parliament, 244, 245.
(b) And it is held to be further restrained by the common law, by subjecting those who are guilty thereof to a fine and imprisonment for the offence, as being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom; and it is said, that there are precedents of prosecutions of this kind in former days. 3 Inst. 181. 2 Inst. 47. 61.

And upon this ground it hath been resolved, that the king's grant to any particular corporation, of the sole importation of any merchandize, is void, whether such merchandize be prohibited by statute or not.

2 Roll. Abr. 214.
3 Inst. 182.
2 Inst. 61.

Hence also it seems, that the king's charter, empowering particular persons to trade to and from such a place, is void, so far as it gives such persons an exclusive right of trading, and debarring all others. And it seems now agreed, that nothing can exclude a subject from trade but an act of parliament.

Raym. 489.
2 Chan. Ca. 165. Vern. 127. Sands v. East India Company.
Skin. 165. pl. 2. 226. 234. 3 Mod. 126.

Also, it hath been adjudged, that the king's grant of the sole making, importing, and selling of playing cards, is void; notwithstanding the pretence, that the playing with them is a matter merely of pleasure and recreation, and often much abused, and therefore proper to be restrained; for since the playing with them is, in itself, lawful and innocent, and the making of them an honest and laborious trade, there is no more reason why any subject should be hindered from getting his livelihood by this than any other employment.

11 Co. 84.
Moor, 671.
Noy, 173.
2 Inst. 47.

And for the like reasons, also, it hath been resolved, that the grant of the sole engrossing of wills and inventories in a spiritual court, or of the sole making of bills, pleas, and writs in a court of law, to any particular person, is void.

2 Roll. Abr. 212.
Jon. 231.
3 Mod. 75.
Vern. 120. 130.
10 Mod. 107. 131. 133.

But it seemeth clear, that the king may, for a reasonable time, make a good grant to any one of the sole use of any art invented, or first brought into the realm, by the grantee.

Noy, 182.
Hawk. P. C. c. 79. § 6.

Also, it seems to be the better opinion, that the king may grant to particular persons the sole use of some particular employments; (as of (a) printing the Holy Scriptures, and law-books, &c.) whereof an unrestrained liberty might be of dangerous consequence to the public.

Mod. 256.
3 Keb. 792.
3 Mod. 75.
and the authorities to the last paragraph but one. (a) The reasons hereof given are, that the invention of printing was new; that it concerned the state, and was matter of public care; that it was in the nature of a proclamation, and none could make proclamations but the king; that as to law-books, the king has the making of judges, serjeants, and officers of law; that they are printed in a particular language and character, with abbreviations, &c. *Vide* 2 Chan. Ca. 67. Skin. 234. || See, as to the copyrights grantable by the crown, tit. *Prerogative* (F), and Godson on Patents and Copyright, b. 3.||

|| Where a monopoly is intended for the public good, it cannot be exercised by the grantee for his mere private advantage, without regard to the rights and interests of the public. Therefore, where the *London Dock Company* having built warehouses

Allnutt v. Inglis, 12 East, 527.

in

in which wines were deposited, upon payment of such a rent as they and the owners agreed upon, afterwards accepted a certificate from the board of treasury under the warehousing act 43 G. 3. c. 132. whereby, it became lawful for the importers to lodge and secure wines there without paying the duties in the first instance, and it did not appear that there was any other place in the port of *London* where the importers had a right to bond their wines; it was held that such monopoly was enjoyed by them for the public benefit, and that they were bound by law to receive the goods into their warehouses for a *reasonable* hire and reward. *Qu.* whether, having accepted such certificate, they could afterwards repudiate it at pleasure?||

(B) How restrained by the Statute.

BY the 21 Jac. 1. c. 3. it is declared and enacted, "That all monopolies, and all commissions, grants, licences, charters and letters patents to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of any thing within this realm, or *Wales*, or of any other monopolies, and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters whatsoever, any way tending to the instituting, strengthening, furthering, or countenancing of the same, or any of them, are altogether contrary to the laws of this realm, and so are and shall be utterly void, and of none effect, and in nowise to be put in ure and execution."

And § 2. "That all persons, bodies politic and corporate whatsoever, shall be disabled and incapable to have, use, exercise, or put in ure any monopoly, or any such commission, grant, or licence, &c., or other thing tending as aforesaid, or any liberty, power, or faculty, grounded or pretended to be grounded upon them or any of them."

And it is further declared and enacted, by § 3., "That all monopolies and all such commissions, grants, and licences, &c., and all other things tending as aforesaid, and the force and validity of them ought to be and shall be examined, heard, tried, and determined by and according to the (a) common laws of this realm, and not otherwise."

(a) In the construction hereof it is held by my Lord *Coke* that all matters of

this kind ought to be tried in the courts of common law only; and not at the Council-table, or in the court of Chancery, or any other court of like nature. 3 Inst. 182. But for this *vide* Jurisdiction of the Court of Chancery, tit. *Courts and their Jurisdiction*.

And it is further enacted, by § 4., "That if any person shall be hindered, grieved, disturbed, or disquieted, or his goods or chattels any way seised, attached, distrained, taken, carried away, or detained by occasion or pretext of any monopoly, or of any such commission, grant, or licence, &c., or other matter or thing tending as aforesaid, and will sue to be relieved in any of the premises, he shall have his remedy for the same at the common law, by action grounded on the said statute, to be heard
"and

“ and determined in the King’s Bench, Common Pleas, or Exchequer, against the party by whom he shall be so hindered or grieved, &c., or by whom his goods shall be so seized or attached, &c.; wherein every such person, which shall be so hindered or grieved, &c., or whose goods shall be so seized or attached, &c., shall recover three times so much as the damages which he sustained by means of such hinderance, &c., and double costs; and in such suits, or for the staying or delaying thereof, no essoin, protection, wager of law, aid-prayer, privilege, injunction, or order of restraint, shall be in anywise prayed, granted, admitted, or allowed, nor any more than one imparlance; and if any person shall, after notice that the action depending is grounded upon the said statute, cause or procure any action at the common law grounded thereon to be staid or delayed before judgment, by colour or means of any order, warrant, power, or authority, save only of the court wherein such action shall be depending; or after judgment shall cause or procure the execution to be stayed or delayed by colour or means of any order, warrant, prayer, or authority, save only by writ of error or attain, that then the said person or persons so offending shall incur a *præmunire*.”

It is said, that the first branch of this last clause, relating to the delay of causes of this kind before judgment, not only extendeth to the Privy Council, Chancery, Exchequer Chamber, and the like, but also to those who shall procure any warrant from the king for such purpose; and it is said, that the latter branch, relating to the delaying of execution after judgment, extendeth even to the judges of the court where the cause is depending.

3 Inst. 183.

But it is provided by § 6., “ That no declaration, in the statute mentioned, shall extend to any letters-patent, and grants of privilege for the term of fourteen years, or under, of the sole working or making of any manner of (a) new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters-patent and grants, shall not use; so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters-patent, or grant of such privilege, but that the same should be of such force as they should be if the said act had never been made, and of none other.”

(a) Manufactures newly brought into the realm from beyond sea are included, though they had been long practised there before; for the statute speaks of new manufactures within this realm, and was made to encourage new devices useful to the

kingdom; and whether learnt by travel or study, it is the same thing. 2 Salk. 447. || A mere scientific principle does not come within the word “ manufacture,” and cannot be the subject of a patent. *Boulton v. Bull*, 2 H. Bl. 463. *Hornblower v. Boulton*, 8 Term R. 98. *Rex v. Wheeler*, 2 Barn. & A. 345. *Hull v. Thompson*, 2 B. Moo. 451. ||

It hath been resolved, that no new invention, concerning the working of any manufacture, is within the meaning of this exception, unless it be substantially new, and not barely an additional improvement of an old one. (b)

3 Inst. 184.

|| (b) As to the novelty requisite, see *Rex v. Arkwright*,

Dav. Pat. Ca. 129. Manton v. Moore, ibid. 533. Brunton v. Hawkes, 4 Barn. & A. 540. *Thompson v. Forman*,

v. Forman, 2 B. Moo. 424. Rex v. Cutler, 1 Stark. Ca. 354., and see 3 Mer. 629.; and that the invention must not have been previously used, see Wood v. Zimmer, 1 Holt. Ca. 58. If an improvement is made by adding *new* combinations to an old machine, the patent must be only for the new part. *Bovill v. Moore*, Dav. Pat. Ca. 361. 2 Marsh, 211.||

3 Inst. 184.

Also, it hath been holden, that a new invention to do as much work in a day by an engine as formerly used to employ many hands, is not within the said exception; because it is inconvenient, in turning so many labouring men to idleness.

3 Inst. 184.

Also, it seems clear, that no old manufacture, in use before, can be prohibited in any grant of the sole use of any such new invention.

And it is farther provided, § 7. "That nothing in the said act contained shall extend to any grant or privilege, power or authority whatsoever, before the said act made, granted, allowed, or confirmed by any act of parliament, so long as the same shall continue in force."

Provided also, § 9. "That nothing in the said act contained shall be in anywise prejudicial to any city, borough, or town corporate within this realm, concerning any grants, charters, or letters-patent to them made, or concerning any custom used by or within them, or unto any corporations, companies, or fellowships of any art, trade, occupation, or mystery, or to any companies or societies of merchants within this realm, erected for the maintenance, enlargement, or ordering of any trade or merchandize, but that the same charters, customs, corporations, &c. and their liberties and immunities, shall be of such force and effect as they were before the making of the said act, and of none other; any thing before in the said act contained to the contrary in anywise notwithstanding."

And it is further provided, § 10. "That nothing in the said act contained shall extend to any letters-patent, or grants of privilege concerning printing, nor to any commission, grants, or letters-patent concerning the digging, making, or compounding of saltpetre, or gunpowder, or the casting or making of ordnance, or shot for ordnance; nor to any grant or letters-patent of any office erected before the making of the said statute, and then in being and put in execution, other than such offices as had been decried by proclamation; but that all such grants, &c. shall be of the like force and effect, and no other, as if the said act had never been made."

But it is enacted, by 16 Car. 1. c. 21. "That it shall be lawful for all persons, as well strangers as natural-born subjects, to import any quantities of gunpowder whatsoever, paying such customs and duties for the same as by parliament shall be limited; and that it shall be lawful for all his majesty's subjects of this realm of *England* to make and sell any quantities of gunpowder at his pleasure, and also to bring into this kingdom any quantities of saltpetre, brimstone, or any other materials for the making of gunpowder; and that if any person shall put in execution any letters-patent, proclamations, edict, act, order, warrant, restraint, or other inhibition whatsoever, whereby the importation of gunpowder, saltpetre, brimstone,

"or

“or other the materials aforementioned, shall be any ways prohibited or restrained, he shall incur a *præmunire*.”

And it is further provided by the said statute of 21 Jac. 1. c. 3. § 11, 12. “That nothing in the said act contained shall extend to any commission or grant concerning the digging, compounding, or making of alum or alum-mines, &c., nor concerning the licensing of the keeping of any tavern or selling of wines, to be spent in the mansion-house, or other place in the tenure or occupation of the party selling the same; and a further provision is made in the latter part of the statute, for some particular grants to particular corporations and persons, as *Newcastle-upon-Tyne*,” &c.

But it is said, that the said clause relating to alum was needless, because all such mines belong, of course, to the persons in whose grounds they are, and therefore no privilege concerning them can be granted but in the king's own ground. 3 Inst. 185.

|| See farther, as to Patents, tit. “PREROGATIVE,” (F), and Godson on Patents, *passim*. ||

MORTGAGE.

(A) Of the Original and several Kinds of Mortgages:
|| And herein of Mortgages by Deposit of Deeds. ||

(B) What shall be deemed a Mortgage, or an Estate redeemable.

(C) Of the Nature of a Mortgage, as to the distinct Interests of the Mortgagor and Mortgagee.

(D) Of the legal Performance of the Condition.

(E) Of the Equity of Redemption and Foreclosure:
And herein,

1. *Who may redeem, and by whom the Mortgage Money shall be paid.*
2. *To whom the Mortgage Money shall be paid.*
3. *Of the Precedency and Right of Redemption, where there are several Mortgagees or Incumbrancers: And herein of their Remedies against each other, as well as against the Mortgagor.*
4. *How far the purchasing in a precedent Mortgage or Incumbrance will protect such Purchaser, and entitle him to a Precedency of Redemption.*
5. *Of the Equity which must be done by him who would redeem to the Person against whom a Redemption is prayed.*

6. *At what Time the Redemption must be.*

7. *Of the Manner of Redeeming and Foreclosing.*

(F) Mortgagees and their Assignees, how to account, and what Allowances to make.

(A) Of the Original and several Kinds of Mortgages :
 ||And herein of Mortgages by Deposit of Deeds.||

Camæus, 11,
12.

||See Mr. Bul-
ler's note
Co. Lit. 205.
Justin. Cod.
1.4. t. 54.
§ 2. 7.||

THE notion of mortgaging and redemption seems to be of Jewish extraction, and from the *Jews* derived to the *Greeks* and *Romans*: the plan of the *Mosaic* law constitutes a just and equal agrarian, that the lands may continue in the same tribes and families, and the people might not be diverted by any exotic acts and inventions from the exercise of agriculture, in which innocent employment they were to be continually educated; and therefore whoever were compelled by want to sell, could transfer no estate in the lands farther than to the next general jubilee, which returned once in fifty years; wherefore they computed till the jubilee, and according to the distance from thence such was the interest that could be transferred to the buyer. But the vendor had power at any time to redeem, paying the value of the lands to the jubilee. But though he did not redeem at the year of jubilee, yet the lands then came back again free to the vendor and his heirs.

Justin. 592.

But our notion of mortgaging and redemption seems to have come more immediately from the civil law, and therefore it will be necessary herein to consider the distinctions in that law between pledges and things hypothecated.

The *pignus* or pledge was, when any thing was obliged for money lent, and the possession passed to the creditor.

*Vide tit. Bail-
ment.*

The *hypotheca* was, when the thing was obliged for money lent, and the possession remained with the debtor. Now in case of goods pignorated, the creditor was obliged to the same diligence in keeping them as he used about his own; so that if the goods were lost by the negligence of the creditor, an action lay as for a deposit; for the property being transferred to the creditor for a particular purpose, he was to keep them as his own.

Digest, lib. 20.
tit. 6.
Corvin. 269,
270, 271.

If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; and if the money was not paid, the creditor had his *actio pignoratitia*, or *hypothecaria*, which, when he had pursued, and obtained sentence thereon, he might sell the pledge as his own property. But there was this difference between the *actio pignoratitia* and *hypothecaria*; that the *actio pignoratitia* was only on the person of the debtor to foreclose him, because the *pignus* was already in the possession of the creditor; but the *actio hypothecaria* was *tam in rem quam in personam*, and was given *ad pignus prosequendum contra quemcunque possessorem*; because herein the creditor had not the possession of
 the

the pledge, but it remained to the debtor. Until sentence was obtained in these actions, the creditor could not obtain the property of the pledge; and if the money was paid before sentence, the pledge was subject to redemption; and where the same thing was pledged to several, those were said to be *potiores in pignore* to whom the things were first hypothecated.

If the money was tendered or paid to the creditor, the contract of pignoration was dissolved, and the debtor might have the pledge back as a thing lent. This seems to have introduced the notion among us of the debtor's right to redemption. And with them the usucaption, or the right of prescription, did not extinguish the pledge, unless a stranger had held it for thirty years, or the debtor had held it for forty years. Digest, lib. 20. tit. 6.

In the feudal law the rule was, *Feudalia, invito domino, aut agnatis, non recte subjiuntur hypothecæ, quamvis fructus posse esse, receptum est.* And the reason of this rule was, because the feud was filled with a tenant from the lord's original bounty, on whom he depended for his personal service in war and peace; and therefore the feudiary could not obtrude a tenant on him without his leave, who might be less capable of those services; and as the tenant could not originally alien without licence, so he could not mortgage. Corvin. 268.

But when a licence of alienation was given about the time of H. 3., and it became a maxim in law, that the purity of a fee-simple imported a power of disposing of it as the owner pleased; there were two ways of mortgaging lands introduced, which *Littleton* distinguishes by the names of *vadium vivum* and *vadium mortuum*.

The *vadium vivum* is, where a man borrows 100*l.* of another, and makes an estate of lands to him, till he hath received the said sum of the issues and profits of the lands; and it is called *vadium vivum* because neither the money nor the land dieth; for the lands are constantly paying off the money, and the lands are not left as a dead pledge, in case the money be not paid. This seems to have been the ancient way of pledging lands; for they held, that lands could not be hypothecated; and therefore they used to subject the *usufructus*, which continued originally during the life of the feudiary; but when there was a free liberty given of alienation, then the feudiary could pledge the *usufructus* of the land at pleasure. But because, in this way of pledging, the lender received his money by degrees, and in small parcels, which was very troublesome; and those that put money to usury are generally willing to receive the whole in a gross sum; therefore this way of pledging is now out of use. Co. Lit. 205. Vide Mad. Formulæ, 156.

The *vadium mortuum* is so called by *Littleton*, because it is doubtful whether the feoffer will pay the money at the day limited or not; and if he do not pay, then the land, which is but in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him; and if he do pay it, then the pledge is dead to the tenant of the land. Lit. § 332. Co. Lit. 205.

Mad. 318, 519. Of these mortgages there are again two sorts : 1st, Of the freehold and inheritance ; and 2d, Of terms for years.

1st, Of the freehold and inheritance ; and here the ancient way was to make a charter of feoffment, on condition, that if the feoffor, or his heirs, paid the sum to the feoffee, or his heirs, he should re-enter and re-possess ; and sometimes the condition was contained in the charter of feoffment, and sometimes it was defeazanced by another charter, as may be seen in the old forms.

Co. Lit. 226,
227.

For as a man might annex a condition to his feoffment, for *cujus est dare, ejus est disponere*, so he might annex a condition by another deed, bearing date and executed at the same time ; for, being executed at the same time, it is really but one and the same disposition, *que incontinenti sunt inesse videntur*. A defeazance or condition annexed indeed after the feoffment executed comes too late, because the livery *coram paribus* attesting the infeudation, in which there is no condition, the tenant must hold the land according to the tenure of the investiture : but rents, annuities, or warranties, that are things executory, may be defeated by defeazances made at the time of their creation, or any time after ; because there is not any necessity of the notoriety of livery to make an investiture ; and therefore, being created by deed only, they may be defeated or destroyed by deed alone.

Co. Lit. 221,
222.

These sorts of conveyances were subject to these inconveniences ; that if the money were not paid at the day, so that the estate became absolute, the estate was thenceforth subject to the dower of the feoffee, and all other his real charges and incumbrances ; for though if the feoffor performed the condition, then he might re-enter, and re-possess himself in his former estate, and, consequently, was in above all the charges and incumbrances of the feoffee ; yet, if he did not literally perform the condition, by payment of the money at the day, then the estate was legally subject to the charges and incumbrances of the feoffee, though the money were afterwards paid, and the estate re-conveyed to the feoffor.

Hard. 465.

But the courts of equity, as they grew in power, have set this matter right, and have maintained the right of redemption, not only against tenant in dower and the persons who come in under the feoffee, but even against the tenant by the courtesy, and lord by escheat, that are in the *post* ; because the payment of the money doth, in the consideration of equity, put the feoffor *in statu quo*, since the lands were originally only a pledge for the money lent.

As to mortgages by way of creating terms, this was formerly by way of demise and re-demise. As for example : *A.* borrowed money of *B.*, thereupon *A.* would demise the land to *B.* for a term of 500, &c. years absolutely, with common covenants against incumbrances, and for farther assurance, and then *B.* would the day after re-demise to *A.* for 499 years, with condition to be void on nonpayment of the money at the day to come : this manner of mortgaging came in after the 21 H. 8. c. 15. for falsifying recoveries when there was a fixed interest settled in terms for years ;
and

and was esteemed best for the mortgagor, to avoid all manner of pretension from the incumbrances and dower of the feoffee in mortgage; and was reputed best for the mortgagee, to avoid the wardship and feudal duties of the tenure, and was only inconvenient in this, that if the second deed were lost, there appeared to be an absolute term in the mortgagee.

But the common method now is this, *viz.* by a demise of the land for a term, under a condition to be void on the payment of the mortgage-money and interest; and a covenant is inserted at the end of such deeds, that, till the default shall be made in the payment of the money, the mortgagor shall receive the rents, issues, and profits, without account.

This has been ruled to create a tenancy at will (a) to the mortgagee; but if the mortgagor dies, the tenancy at will is determined till there is a receipt of interest from the heir, which seems to make him also tenant at will to the mortgagee. Raym. 147. [(a) The mortgagor is only like a tenant at will to the

mortgagee: his legal interest is inferior to that of a strict tenant at will. Dougl. 22. 282, 283.] [The relation of mortgagor and mortgagee is analogous in many points to other characters known to the law, but differing in some points from all. Mr. Justice Buller has observed, "It is quite sufficient to call them mortgagor and mortgagee, without having recourse to any other description, or to what they are most like." Birch v. Wright, 1 Term R. 383.; and *vide* the observations of the Master of the Rolls, in Cholmondeley v. Clinton, 2 Jacob & Walker, 179. 183. It is decided, that the mortgagor may be described in pleading as the tenant of the mortgagee. Partridge v. Bere, 5 Barn. & A. 604. His legal interest, after default, is that of a tenant by sufferance, not of a tenant at will. Doe v. Maisey, 8 Barn. & C. 767.: he may be ejected without notice, *ibid.*: as may his tenant, let in after the mortgage; and this either by the original mortgagee, or by his assignee. Thunder v. Belcher, 3 East, 449.: whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will. 4 Term R. 680.; and he is not entitled to the growing crops after the will is determined, as is the case of a tenant at will. 1 Term R. 383. There appears no ground for considering him tenant at sufferance before payment of interest, and tenant at will afterwards. See Coote's Law of Mortgages, 328, 329. The receipt of interest by the mortgagee has no resemblance to the receipt of rent by a landlord, so as to amount to an acknowledgment of tenancy; and the mortgagor may be ejected without notice, and without the privilege of reaping his growing crops, equally before payment of interest and afterwards. That the mortgagor cannot accurately be called a receiver for the mortgagee, *vide* 1 Term R. 383. *Ex parte* Wilson, 2 Ves. & B. 252. Nor are the characters of *cestui que* trust and trustee strictly analogous; for in general a trustee is not allowed to deprive his *cestui que* trust of the possession, but the mortgagor may assume the possession when he pleases, and equity will not restrain him. 2 Meriv. 359. It appears, according to the language of the Master of the Rolls, 2 Jac. & Walk. 183. that "the relation is perfectly anomalous, and *sui generis*."]

But now the last and best improvement of mortgages seems to be, that in the mortgage deed of a term for years, or the assignment thereof, the mortgagor shall covenant for himself and his heirs, that if default be made in the payment of the money at the day, then he and his heirs will, at the costs of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to such person or persons (to prevent merger of the term) as he or they shall direct or appoint; for the reversion, after a term of 50 or 100 years, being little worth, and yet the mortgagee, for want thereof, continuing but a termor, and subject to forfeiture, &c. and not capable of the privileges of a freeholder; therefore, where the mortgagor cannot redeem the land, it is but reasonable the mortgagee should

have the whole interest and inheritance of it, to dispose of as absolute owner.

1 Pow. Mortg.
12.

|| POWERS OF SALE. || — [Great inconvenience having been suffered by mortgagees, from the difficulty and delay attending bills to foreclose, a mode of contracting has been invented, by which the mortgagee may, after a given time, procure his principal and interest, by a sale of the mortgaged estates, without being under the necessity of applying to a court of equity. This is done by taking a conveyance of the fee to trustees in trust for the mortgagee for a term of years subject to redemption, with remainder to the trustees in trust, in default of payment at the time stipulated, to sell the estate, and to apply the purchase-money, after defraying the expenses incurred in discharging the trust, in payment of the mortgage-money, and interest, and then to pay over the residue to the mortgagor.]

Clay v.
Sharpe, Lib.
Reg. Mich.
1802, fo. 66.
Sugden, V. & P.
App. 20.
Cruise, Dig. 2.
105. Corder
v. Morgan,
18 Ves.
344.; and see
Clay v. Willis,
1 Barn. & C.
364.

|| Doubts have been entertained of the validity of these powers of sale without the concurrence of the mortgagor, or the sanction of a court of equity; but these doubts are now removed by two express decisions, which have established that the concurrence of the mortgagor in the sale is unnecessary; that his covenant with the mortgagee to join in a conveyance is not a contract of which a purchaser is entitled to the benefit; that a specific performance will be decreed against a purchaser who refuses to complete his purchase on account of the non-concurrence of the mortgagor; and that if a purchaser make such mortgagor a party to a bill for a specific performance, in order to procure his concurrence, his bill will be dismissed against the mortgagor, with costs.

1 Bro. C. C.
269.

(a) Fitzjames
v. Fitzjames,
Finch, 10.
(1673) is
earlier.

1 Bro. C. C.
269. note (a).

Ex parte
Whitbread,
19 Ves. 212.
1 Rose, 300.
Ex parte
Haigh, 11 Ves.
403.

Norris v.
Wilkinson,
12 Ves. 192.;
et vide Ex
parte Hooper,
1 Mer. 7.

MORTGAGES BY DEPOSIT OF DEEDS. — A peculiar species of mortgage has been allowed in modern times, and is now in frequent practice, *viz.* a mortgage by deposit of title-deeds. The case of *Russell v. Russell*, 1 Bro. C. C. 269. is said to be the first case, (a) in which it was decided that a mere delivery of the deeds of an estate, as a security for a loan, had the full effect of an equitable mortgage. The same principle was acted on by Lord *Thurlow* in the cases of *Featherstone v. Fenwick*, and *Harford v. Carpenter*, and is now the settled doctrine of courts of equity. The principle has, however, been repeatedly and strongly disapproved by subsequent judges, as being in direct contravention of the statute of frauds, 29 Car. 2. c. 3. § 4. in letting in parol testimony as to the terms and intention of the deposit, and opening a door to all the fraud and perjury which the statute meant to exclude. Lord *Eldon* has considered the decisions on the subject as amounting to a *repeal* of the statute; and Sir *William Grant* has expressed strong disapprobation of them; and both these judges, in admitting the doctrine to be now settled, have expressed their determination not to extend it beyond its present limits.

The deposit must be made for the purpose of a present and immediate security, and not for any other object; and, therefore, where the deeds were deposited merely for the purpose of a mortgage being prepared, and it was prepared but not executed, by reason of the death of one of the mortgagors, Sir *William Grant* held,

held, that the deeds not being delivered by way of immediate *pledge*, this was not an equitable mortgage.

The deposit will create an equitable mortgage for the debt *actually due*, although not a word passes at the time of the delivery.

Ex parte
Mountfort,
14 Ves. 606.
Ex parte

Langston, 17 Ves. 230. *Ex parte* Kensington, 2 Ves. & B. 83. Monkhouse v. Corporation of Bedford, 17 Ves. 381.

But a written agreement is always advisable.

Norris v.
Wilkinson, 12 Ves. 197.

And if it appears clearly upon evidence, or oath uncontracted, that such was the agreement, the deposit may be a security for future advances, as well as for the sum actually due. But Lord Chancellor *Eldon* disapproved of his decisions in thus extending the original doctrine, and said, that at all events it is not to be further enlarged.

Ex parte
Langston,
suprà; and see
Reid v. Tait,
Powell, Mort.
1052. b. (6th
ed.) *Ex parte*
Lloyd, 1 Glyn.
& J. 391. *Ex parte* Hooper, 1 Mer. 9.

The deposit may be made either with the creditor himself, or with some third person over whom the depositor has no controul; but it is not sufficient to deposit the deeds with the wife of the depositor, although they remain in a trunk of which the key is kept by her. Nor must they remain in the possession of the debtor, although he give a memorandum of deposit to the creditor; and deeds deposited with one person cannot be made a security for money due to another, unless the person holding the deeds be merely a trustee, and have not himself made any advance.

Ex parte
Coming, 9 Ves.
115.

An equitable mortgage by deposit of title-deeds shall have preference over a subsequent purchaser or mortgagee of the legal estate, *with notice*; and a purchaser was held affected with notice where the vendor had acknowledged that the deeds were in possession of another; for it was *crassa negligentia* that he did not make enquiry; and in this case the Lord Chancellor said, that so much was the equitable title from the possession of the deeds recognized at law, that if a man having made the deposit previously makes a title accordingly, only two minutes before he absconds, it is a legal title, and cannot be impeached; for though the legal act was done in contemplation of bankruptcy, it is protected by the previous equitable title.

Ex parte
Whitbread,
suprà.

Hiern v. Mill,
15 Ves. 114.

When the deposit is made for a particular purpose, that purpose may be enlarged by a subsequent agreement, without a re-delivery; as when deeds are deposited to secure advances by a banking firm, the deposit may be extended to advances made after a change of partners.

Ex parte
Kensington,
2 Ves. & B. 79.

A deposit by an agent, though in excess of his authority, may become an equitable mortgage if adopted and recognized by the principal.

Hope Insur-
ance Company
v. Mannings,
Powell, 1056. c.
(6th edit.)

Whether it is necessary that the deposit should include *all the title-deeds*, appears a somewhat doubtful question. In *ex parte Wetherell* the deeds deposited only affected a moiety of the estate, and brought the title down only to 1725, and the remainder were retained

Ex parte
Wetherell,
11 Ves. 398.

retained by the depositors, and came to their assignees on their bankruptcy. But it appeared that the mortgagees understood that the deeds related to the entirety; and as there was *evidence in writing* that the intention was to give a security on the whole estate, the Lord Chancellor decided expressly, *on the ground of the written evidence*, that the deposit had that effect.

Ex parte
Pearson and
Protheroe,
1 Buck. 525.

In a subsequent case, *A.* deposited his title-deeds, save the conveyance to himself, with *B.*, and afterwards deposited the deed of conveyance with *C.*, and became bankrupt. *B.* and *C.* and the assignees contended for priority; but Lord *Eldon* decided, that neither *B.* nor *C.*, nor both together, had an equitable mortgage.

Ex parte
Combe,
4 Madd. 249.

A parol agreement, to deposit a lease *when granted* as a security for an advance, will not constitute an equitable mortgage.

Ex parte
Warner,
19 Ves. 202. 1

An equitable mortgage of copyholds may be created by a deposit of a copy of court-roll.

Ex parte
Combe,
17 Ves. 369.

It should seem that if there be a written instrument, stating the terms on which a deposit is made, an inference contrary to it, founded on affidavit alone, will not be admitted. Such, at least, appears to be the principle on which the case of *Ex parte Combe* was decided. The case is not very accurately reported, but it should seem the facts were as follows: — *Meux* and Co. were creditors of *Morgan*, who for their security had executed a warrant of attorney to confess judgment, and had deposited the lease of his house with them. In *January*, 1810, *Meux* and Co. entered up judgment, and levied execution for 1560*l.* 6*s.* 5*d.* *Morgan* applied to *Combe* and Co. to lend him money to satisfy *Meux* and Co., and to supply him with beer, which they agreed to do; and *Morgan*, on the 20th of *January*, 1810, executed to them a warrant of attorney, with a defeazance, stating that *Combe* and Co. had that day lent him 1250*l.*, and that he had deposited with them the lease of the house, as a collateral security for the 1250*l.*, and further advances not exceeding 1500*l.* On the same day *Combe* and Co. paid off *Meux's* debt, and satisfied the law charges and sheriff's poundage, amounting in the whole to 1252*l.*; and thereupon *Meux* and Co. delivered to them the lease. On the 14th of *August*, *Combe* and Co. entered up judgment against *Morgan*, and levied execution for 1420*l.* 14*s.* But a commission of bankrupt issuing against him on that day, they withdrew their execution, and proved part of the debt for beer delivered, as a debt under the commission, and presented a petition, praying a sale of the leasehold premises for the payment of the residue of their debt; and they contended, that having paid off *Meux* and Co. they were entitled to stand in their place. An important fact is omitted in the report; *viz.* the time when the act of bankruptcy took place, but it must be presumed to have occurred previously to the 20th of *January*, 1810, for otherwise there seems no good reason why *Combe* and Co. might not have rested on the strength of the deposit made to themselves. The Lord Chan-
cellor,

cellor, however, dismissed the petition, on the ground that the petitioners were bound by the recital in the defeazance, *viz. that Morgan had deposited the deeds.*

If the creditor by his bill, or in case of bankruptcy by his petition and affidavit, insist that the deposit was made as a security for future advances, as well as for the debt then due, and the debtor deny the fact, the court will direct an enquiry by the master, or by the commissioners of bankrupt, in respect of what debt the deposit was made.

And if there is written evidence attending the deposit, the mortgagee will be entitled to the costs of his petition for a sale, but otherwise it seems not.

Trew, 5 Madd. 372.; *et vide* Anon. 2 Madd. 281. *Ex parte* Sikes, 1 Buck. Ca. 349. *Ex parte* Vauxhall Bridge Company, 1 Glyn. & J. 101. As to priority of equitable mortgagees with respect to the crown, see *Hawkins v. Ramsbottom*, 1 Price, 158. *Broughton v. Attorney General*, 1 Price, 216. *Casberd v. Ward*, 6 Price, 411. *Williams v. Medicott*, 6 Price, 495.

The deposit and lien may be transferred by delivering over the deeds to another party.||

to an equitable mortgagee's remedies in case of bankruptcy of the mortgagor, see Powell, 1060. a. (6th edit.)

Ex parte
Mountfort,
suprà.

Ex parte
Brightens,
1 Swanst. 3.

Ex parte
Smith, 1 Ves.
& B. 518. As
Powell, 1060. a.

(B) What shall be deemed a Mortgage, or an Estate redeemable.

HEREIN we may observe in general, that whatever clauses or covenants there are in a conveyance, though they seem to import an absolute disposition or conditional purchase, yet if, upon the whole, it appears to have been the intention of the parties, that such conveyance should only be a mortgage, or pass an estate redeemable, a court of equity will always construe it so.

As, where the condition of a mortgage is, that the mortgagor shall redeem during his life, or that the mortgagor and the heirs of his body shall redeem, yet equity will admit the general heir of such mortgagor to a redemption; because this can be no purchase, since there is a clause of redemption; and when the land was originally only a pledge for money, if the principal and interest be offered, the land is free; and it would be very hard, that it should be in the power of the scrivener, or griping usurer, by such impertinent restrictions, to elude the justice of the court.

If *A.* mortgage lands to *B.* worth 15*l.* per annum, for securing 200*l.*, and at the same time *B.* enter into a bond conditioned, that if the 200*l.* and interest is not paid within a year, then he to pay to *A.*, his executors or administrators, the further sum of 78*l.* in full for the purchase of the premises, &c., and *A.* die within the year, and the 200*l.* with interest not being paid at the day, the heir of *B.* pay the 78*l.* the next day after the mortgage is forfeited to the administrator of *A.*, yet *A.*'s heir may redeem, paying the 200*l.* and likewise the 78*l.* that was paid the administrator.

So, where *A.* for 550*l.* made an absolute assignment of a church

Vern. 183,
268. 394.
Preced. Chan.
95.

Vern. 53. 190.
2 Chan. Ca.
147. S. C.
Howard v.
Harris. ||*Spur-*
geon v. Collier,
1 Eden, 55.||

Vern. 488.
Willett v.
Winnel.

2 Vern. 84.

Manlove v.
Ball. || *Vide*
Sevier v.
Greenway,
19 Ves. 415.]

church lease for three lives to *B.*, and *B.* by writing under his hand agreed, that if *A.* paid 600*l.* at the end of the year, *B.* would re-convey; *B.* died, leaving *C.* his son and heir; two of the lives died, and the lease was twice renewed by *C.* and his father: though it was nearly twenty years since the conveyance was made, yet the Master of the Rolls decreed a redemption on payment of the 550*l.* and the two fines.

2 Vern. 520.
Jennings v.
Ward.

A. lends money to *B.* to carry on certain buildings, and takes a mortgage from him to secure 1600*l.* with interest; and, by another deed executed at the same time, takes a covenant from *B.* that he should convey to him, if he thought fit, ground-rents to the value of 1600*l.* at the rate of twenty years' purchase; and, on a bill brought to redeem, the Master of the Rolls decreed a redemption on payment of principal, interest, and costs, without regard to that agreement, but set aside the same as unconscionable; for a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any bye-agreement.

Bowen v. Ed-
wards, 1 Rep.
Ch. 222.
13 Car. 2.

[Again, where the plaintiff being seised in fee of the lands in question, worth 200*l.* per annum, mortgaged the same in 1637 to the defendant's father for 250*l.*, and agreed and also sealed a deed for the absolute sale thereof, if the money were not paid at the end of seven years; a redemption was decreed, notwithstanding; for the defendant's father, having exhibited a bill against the plaintiff for the land or the money, made it evident that it was only a mortgage originally, and being so at first, the subsequent agreement could not alter it.

Croft v.
Powell,
Comyns, 603.

And although a mortgagee have a power to mortgage or to sell the lands mortgaged absolutely, in case of failure of payment at a given time, a court of equity will, nevertheless, consider any conveyance by him to be subject to redemption, if it be evident from the *res gestæ* that the vendee did not depend upon the power; as, if the equity of redemption be excepted in the conveyances. Thus, a conveyance of lands was made, by lease and release, by *A.* to *B.* and his heirs, and by a defeazance, bearing date with the release, it was agreed that if *A.* repaid 1000*l.*, &c. borrowed of *B.* within a year from the date of the indenture, then *B.* should re-convey to him; but if he failed to pay the money within the year, then *B.* should mortgage or absolutely sell the lands, free from redemption, and out of the money raised by such mortgage or sale pay the said 1000*l.*, &c. and interest, and be accountable for the overplus to *A.* and his heirs. A fine was also levied to *B.* in order to bar *A.*'s wife of dower. Afterwards, the money not being paid at the time stipulated, *B.* agreed to convey the estate for a certain sum of money, and in the agreement, and also in the conveyances, an exception was made, and in such exception the defeazance was mentioned. And afterwards a question arose, Whether the purchaser had an absolute estate, or an estate redeemable? And it was contended that he had an absolute estate, for that the estate conveyed to *B.* was an absolute estate, and though there was a defeazance executed at the same time,

time, yet that was to have operation only within a twelvemonth, after which period *B.* was invested with a power to sell absolutely, free from all equity of redemption; consequently, it then became a trust for *B.* to sell, and where an estate was conveyed to trustees to sell, the vendee, by virtue of such sale, had an absolute fee, free from all charges and power of redemption. And the fine, it was said, passed the right of the then owners in the estate, and made it absolute. But it was answered, and resolved by the court, that the estate was redeemable, for the estate conveyed by *A.* to *B.* was, in its nature, a mortgage to him, and though the money was not paid within the year, yet the mortgagor might still have redeemed at any time while the estate continued in *B.*; and then, though *B.* had a power, on nonpayment within the year, to mortgage or sell in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what he might have done, but what he *had* done; and it was evident, that it was not *B.*'s intention to convey an absolute and indefeazable estate, for he had not conveyed it absolutely, and free from the equity of redemption; but had insisted upon having the defeazance inserted. If then, as was the case, *B.*, on nonpayment of the money within a year, stood as a trustee for *A.* subject to the defeazance, his (*B.*'s) vendee coming in with notice of that trust would stand in his place, and must be considered as taking the conveyance liable, in equity, to the performance of the trust; and the fine made no difference, for it only operated to strengthen the estate and free it from the dower of the wife, but it confirmed it *in statu quo*, and did not discharge it from the equity of redemption to which it was before liable.

It seems questionable whether a power of redemption can be set up upon a subsequent agreement, made after an absolute conveyance executed; for if it be a mortgage, it must be so *ab initio* on the original agreement. And, therefore, where one having the reversion expectant upon the determination of a lease for life, in an estate worth 1000*l.* per annum, conveyed it in fee to *W. R.*, in consideration of 1000*l.* and no more, and the tenant for life died, a pretence was set up that this conveyance was no more than a mortgage, because *W. R.* had declared *that he did not* know how long he should enjoy the estate, and that he would take his money again with interest: *sed dubitatur per curiam*; and one reason was, because matter subsequent will not make it a mortgage, if it was not so upon the original agreement.

But although courts of equity will not suffer the mortgagee to clog the redemption with any stipulation for a purchase, at a specific price agreed upon at the time of the loan, because the admission of such a practice would furnish an inlet to great fraud and imposition upon the mortgagor: yet, a mere agreement that, in case of sale, an opportunity of pre-emption should be given to the mortgagee, would, it seems, be decreed; but it must be claimed at a reasonable time; for, where *A.*, the plaintiff's brother, died, having previously mortgaged lands to *B.* by deed, containing covenants to re-convey upon six months' notice of payment of

Vide Coplestone v. Boxwill, 1 Chan. Ca. 1. 3 Salk. 241.

Orby v. Trigg, 2 Eq. Ca. Abr. 599. 24. S. C.

9 Mod. Ca. in
Law and Eq. 2.

of the principal and interest, and that in case the estate should be sold, *B.* should have the pre-emption; *B.* got the counterpart into his hands after *A.*'s death; then the plaintiff gave him six months' notice that he would pay off the mortgage, which he refused to accept; upon which the plaintiff exhibited his bill for a re-conveyance of the estate, having entered into articles for the sale of it; *B.* in his answer insisted on the covenant for pre-emption; but it appearing that neither the plaintiff nor purchaser knew any thing of this covenant, the counterpart of the deed having been in *B.*'s custody; that the plaintiff, on application for it, had been denied it, the mortgagee insisting only on payment, alleging the security was too narrow for the money lent, and threatening to foreclose, never having mentioned his claim to pre-emption until after the estate was sold; it was said, he ought not to set it up to the prejudice of the purchaser, having had time to claim it, if he had pleased, before the estate was sold; and it was decreed accordingly.

Barrel v. Sa-
bine, 1 Vern.
268.

A distinction hath been made by the Court of Chancery between contracts originally founded upon lending and borrowing money, with an agreement for a purchase in a certain event, and cases where, after a mortgage, a new agreement hath been entered into and executed by the parties for an absolute purchase, although there be a subsequent declaration that the mortgagor may have his estate upon payment of interest, principal, and costs; or, where a release of the equity of redemption is given with a collateral agreement to re-convey, upon re-payment of the purchase-money; and, in the latter cases, it hath been determined that no re-purchase shall be had, unless upon strict performance of the conditions stipulated. Thus, *A.* a joint-tenant with *B.*, her sister, made an absolute conveyance to *C.* in fee for 104*l.* which was admitted to be intended only as a mortgage; some time after, in 1708, those deeds were cancelled, and then *A.* in consideration of 184*l.* (including the 104*l.* paid by *C.*) conveyed the estate *ut suprà*, but with a farther covenant not to agree to any partition without *C.*'s consent. *B.* was in possession till 1710, when *C.* ejecting her out of her moiety, enjoyed it quietly till 1726, at which time *A.* brought a bill for redemption, to which *C.* pleaded himself an absolute purchaser. The receipts given for the money mentioned it to be purchase-money. In 1710, there was an agreement that *A.* might have the estate again, if desired, on payment of principal, interest, and charges. It was first heard before the Master of the Rolls, who dismissed the bill. Afterwards it came on before Lord Chancellor *Talbot*, who observed the case was very dark; the first deed was admitted to be a mortgage, the second was made in the same manner, excepting the covenant respecting the partition, which was the darkest part of the case; for to suppose that it was an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, made both the covenant and parties vague and ridiculous; but that it would be equally so, if the deed was supposed to be an actual conveyance, so that it was of no great weight, and ought to be laid out of the question;

Cotterel v.
Purchase, Ca.
temp. Talb. 61.

question; that he was inclined, upon the whole, to think the conveyance in 1708 was at first an absolute conveyance. The agreement, in 1710, for the re-purchase, shewed it was not redeemable at first; the acquiescence of sixteen years, upon *C.*'s possession, was a strong evidence of it; and his Lordship, upon the circumstances of the case, affirmed his Honour's decree.

So, lands in *Wales* were mortgaged for 400*l.*, and afterwards, neither principal nor interest being paid at the time limited, the mortgagee brought an ejectment, got possession of the premises, and then obtained a release of the equity of redemption from the mortgagor, upon payment of 350*l.* more; a note was given at the time of executing the release, that the releasee, on payment of the 750*l.* and all charges of repairs within a year by the releasor, should sell and convey to him the premises. Payment having been neglected for sixteen years, redemption was not allowed, the note being considered as an original agreement between the parties to sell and convey the premises upon the terms therein mentioned, but not that the releasor should be at liberty to redeem the same.]

|| But even where the equity of redemption is actually released to the mortgagee, the court will admit evidence that the release was made on a secret trust for the mortgagor's benefit, or that it was not intended to be an absolute sale. *Vernon*, a planter, being indebted to *Bethel*, his consignee, to a large amount on the mortgage of an *Antigua* estate, the former, in 1738, executed an absolute release to the latter of the equity of redemption, in consideration of five guineas, and *Bethel* remained in possession and receipt of the rents and profits. More than twenty years afterwards *Vernon* filed a bill for an account and redemption; and it appearing that *Bethel* had repeatedly admitted, by letter and by parol, to *Vernon* and other parties, that he was bound in honour and conscience, and by a voluntary promise, to restore the estate on payment of his debt, and that he stated his original application to be let into possession to be made partly in order "to save something for *Vernon's* family," the Lord Chancellor decreed an account and redemption.||

But if a man borrows money of his brother, and agrees to make him a mortgage, and that if he has no issue male his brother shall have the land; such an agreement, made out by proof, will be decreed in equity.

A., in consideration of 1000*l.*, made an absolute conveyance to *B.* of the reversion of certain lands after two lives, which, at that time, were worth little more; and by another deed, of the same date, the lands were made redeemable any time during the life of the grantor only, on payment of 1000*l.* and interest; *A.* died, not having paid the money; and it was held by my Lord *Nottingham*, that his heir might redeem, notwithstanding this restrictive clause; and that it was a rule, *once a mortgage and always a mortgage*, and that *B.* might have compelled *A.* to redeem in his lifetime, or have foreclosed him. But, on a re-hearing, Lord Keeper *North* reversed the decree on the circumstances of this case; for

Endsworth v. Griffith,
15 Vin. Abr.
467. pl. 18.
2 Eq. Ca. Abr.
595. pl. 6.
1 Brown's
Parl. Ca. 149.

Morley v. Elways,
1 Chan. Ca.
107.
Vernon v. Bethell,
2 Eden, 110.

Vern. 195.
per North
L. K.

Vern. 7.
214. 252.
Newcomb v. Bonham,
2 Vent. 564.
S. C. where it is said, that Lord *North's* decree was affirmed in the House of Lords.

it appeared by proof, that *A.* had a kindness for *B.*, and that he had married his kinswoman, which made it in the nature of a marriage-settlement: he likewise held, that *B.* could not have compelled *A.* to redeem during his life, which made it the more strong.

[Another exception hath been made to this general rule, namely, where a conditional conveyance is made, to be void upon payment of a sum certain, within a stipulated time, in contemplation of a settlement or family provision. Thus, *A.* seised of a copyhold in fee, surrendered it, upon his marriage, to the use of himself and his wife in special tail, remainder to her in fee, upon condition that if he paid 50*l.* at a day certain to the daughter that the wife had, then the whole surrender would be void. The day elapsed, the 50*l.* not paid, and the husband died without issue. On a bill to redeem, brought by his heir against a purchaser from the wife, the defendant pleaded that he was a purchaser for a valuable consideration without notice; and it was resolved, that this was not originally designed for a mortgage, but that the party, by settling it thus, had left it in his election, either to perform the condition by paying the money, or to let the settlement stand; he had chosen the latter, and the plea was allowed.

One, upon his marriage, covenanted that his wife should be paid 1000*l.* within two years after his death, and, for performance thereof, entered into a statute; but, prior to the covenant and statute, he had mortgaged part of the lands for 500*l.* for certain years. Afterwards he devised these lands to his wife and her heirs, if the 1000*l.* were not paid to her, according to the marriage-covenant, she paying off the said 500*l.* He died, leaving his wife executrix, to whose hands assets came; the 1000*l.* not being paid to the wife, she paid off the 500*l.* and had the mortgage-lands assigned to her. She then conveyed over the mortgage-lands in fee by fine and deed. The question was, Whether the heir of the covenantor could redeem, paying the 1000*l.* and the 500*l.* with interest upon discount of the profits? And the Lord Chief Baron was of opinion he could not; for the devise to the wife was absolute, if the 1000*l.* were not paid at the time appointed.

A distinction hath been likewise taken between mortgages and defeazable purchases, subject to re-purchases within a *time limited*, where the interest is taken by way of rent-charge; for, in the latter cases, the stipulations made between the parties must be strictly adhered to, or the estate of the grantee will become absolute. Thus, *I. S.* granted a rent-charge in fee of 48*l.* a year to *B.*, upon condition, that if *I. S.* should, at any time, give notice to pay in the consideration-money (being 800*l.*) by instalments, *viz.* 100*l.* at the end of every six months; and should, pursuant to such notice, pay the same and interest at any time during his lifetime, then the grant to be void. There was no covenant for *I. S.* to pay the money, and the rent-charge was much less than what the interest came to (interest being then 8 per cent.); *B.* had conveyed it over after *I. S.*'s death to a purchaser, with collateral security for quiet

King v.
Bromley,
2 Eq. Ca. Abr.
595. 598.

Sir Nich.
Woolston
v. Aston,
Hardr. 511.

Floyer v.
Levington,
1 P. Wms. 268.

quiet enjoyment, and the *purchaser* had afterwards made a marriage settlement upon it. The question was, Whether it was redeemable after sixty years? And it was decreed, by Lord *Cooper*, that it was not. His Lordship observed, it was material that at the time of making the mortgage, interest was at 8 per cent., the rent-charge, therefore, was much less than the interest of the money; consequently, the payment of the rent-charge could not be taken as the payment of the interest; that several circumstances occurred in this case, which, though each of them singly might not be of force to bar the redemption, yet, joined together, were strong enough to prevail over it; that *the mortgagee seemed to have allowed a consideration* for purchasing the equity of redemption after the death of the mortgagor; first, by taking the rent of 48*l.* per annum; secondly, by agreeing to have his money by instalments; thirdly, by leaving it only at the election of the mortgagor, whether he would redeem or not; that there could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased; that length of time, where so great as in the present case, was a good bar of redemption of a rent-charge, as well as of land; and that the mortgagor was not bound to pay the money by any covenant.

The reporter observes upon the last case, that it was thought length of time was the principal objection to the redemption; but in the case of *Mellor v. Lees*, which came on before Lord Chancellor *Hardwicke*, upon an appeal from the Rolls, the doctrine that such limited agreements for redemption, or rather repurchase, were legal, was confirmed. In this case a mortgage was made of an estate by the plaintiff's grandfather, *Thomas Mellor*, in 1689, to *John* and *James Whitehead*; the *Whiteheads* afterwards, on the 5th of *June* 1689, mortgaged the same estate to *Cartwright* and *Haywood*, and their heirs, for securing 200*l.*, to which *Thomas* and his son, *John Mellor*, were parties; and *Cartwright* and *Haywood*, in order to secure themselves the interest, made a lease to the plaintiff's father, and to his assigns, dated the 12th of *June* 1689, for five thousand years, at the rate of 12*l.* a year for the three first years, and 10*l.* a year for the remainder of the term; and if, in the space of three years, the 200*l.* was paid with interest, then the premises were to be reconveyed. Receipts had been given sometimes for interest, and sometimes for a rent-charge; the last receipt was in 1730. The 200*l.* lent was money left under one *Sutton's* will in 1687, and directed to be laid out in the purchase of lands in fee, in *Lancashire* or *Cheshire*; the rents to be applied towards clothing twenty-four aged and needy housekeepers. The estate, at the time of the mortgage, was worth 500*l.* only, but was now valued at 900*l.* The plaintiff, on the 20th of *January* 1738, had given notice that he would pay in the money; but the defendant, a new trustee of the charity, had refused to take it, insisting that it was an absolute purchase. And it was so decreed by *Fortescue*, Master of the Rolls, which decree was upon appeal to the Chancellor confirmed, his Lordship saying, that the bill was properly dismissed at the

2 Atk. 494.

Rolls, not so much upon general rules, as upon the particular circumstances of the case, and the similitude of it to the case of *Floyer v. Levington*.

Tasburgh v.
Echlin *et al.*
4 Brown's
Parl. Ca. 142.
|| See Verner
v. Winstanley,
2 Scho. & Lef.
393. Gifford

v. Hort, 1 Scho. & Lef. 107. Butler, Co. Lit. 205. a. note s. 2. Sugden's V. & P. 223. (5th ed.) Mr. Coote, p. 30. thinks the principal case was determined on circumstances too special to be considered an authority for the general rule deduced from it in the text: *sed vide* Powell, 153. a. (6th ed.)||

It seems, from the determination in the case of *Tasburgh* and *McNamara v. Sir Robert Echlin et al.* that such a contract respecting lands, limiting the payment of the money advanced and interest thereupon to a particular period, would be considered in the nature of a conditional purchase, and no redemption allowed thereof after the time stipulated.

This case came before the House of Lords upon an appeal from a decree made by the Lord Chancellor of *Ireland*, in the year 1732, on the following circumstances; *viz.* King *James I.* by his letters-patent under the great seal, dated the 17th of *June* 1608, granted divers lands to *John King* and *John Bingley*, and their assigns, for 116 years, to commence from the 18th of *May* then last past, at a certain yearly rent. The residue of this term, by deed dated the 26th of *May* 1677, became vested in *John Tasburgh*, father of *Henry Tasburgh*, the appellant in the cause. King *Charles I.* by his letters-patent, dated the 25th of *March* 1647, granted the same premises to *Sir Maurice Eustace* and his heirs at a like rent, but without reciting or taking any notice of the term of 116 years. *Sir Maurice*, by his will dated the 20th of *June* 1665, devised the premises, *inter alia*, to his nephew *Sir John Eustace* in fee; who by virtue thereof, or as heir at law of the testator, became entitled to the reversion and inheritance of the premises, expectant on the determination of the term of 116 years. The premises being only of the clear yearly value of 200*l.* *Sir John*, in consideration of 200*l.*, paid him by the said *John Tasburgh*, did by lease and release, dated the 30th and 31st of *May* 1681, grant and convey the same to *Charles Tasburgh* and his heirs, in trust for *John Tasburgh*; in which indenture of release there was a proviso to the following effect, *viz.* that if *Sir John Eustace*, his heirs, executors, or administrators, should pay to *Charles Tasburgh*, his executors, administrators, or assigns, at the end of five years, to be accounted from the date of the release, the sum of 200*l.* with full interest for the same, at the rate of 10*l.* per cent. per annum, according to the custom of the kingdom of *Ireland*, that then it should be lawful for him and his heirs into the premises to re-enter, and the same to repossess and enjoy as in his and their former right. But if *Sir John*, his heirs, executors, or administrators, should fail in payment of the money with interest at the time limited, that then the estate of the said *Charles Tasburgh* should be absolute and indefeazable, as well in equity as in law; and that *Sir John*, his heirs and assigns, should, on failure of payment as aforesaid, be for ever debarred from all right and relief in equity, against the tenor of the said release. And *Sir John* did thereby, for himself and his heirs, release unto *Charles Tasburgh*,

Tasburgh, his heirs and assigns for ever, all his right in equity to redeem the premises, in case of failure of payment as aforesaid : and there was no covenant in the deed, on the part of the grantor, to repay the 200*l.*, or the interest thereof, as is usual in mortgages. The five years mentioned in the proviso being elapsed, and no part of the 200*l.*, or the interest thereof, having been paid, *John Tasburgh* (having no remedy at law to compel the payment, the estate being only a reversion expectant upon the determination of a term of which there were then forty-three years unexpired,) exhibited a bill, in *April* 1687, in the name of *Charles Tasburgh*, against *Sir John Eustace*, setting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional estate of *Charles Tasburgh* in the premises (in case it should be adjudged to be a defeazable or redeemable estate) should be made absolute to him and his heirs ; and that in that case *Sir John Eustace* might be foreclosed of all right or equity of redemption of the premises, and might make farther absolute conveyances and assurances to the said *Charles Tasburgh*, according to the tenor and true meaning of the indentures of lease and release. *Sir John*, being served with a *subpœna* to answer this bill, stood out all process of contempt to a sequestration, and, in *May* 1688, appeared by his six clerk, and prayed a commission for taking his answer in *England*, which was granted by consent. But it was ordered, that, unless the same was returned by the 22*d* of *June* following, the cause should be set down to be heard, and the bill taken *pro confesso*. *Sir John* having neglected to answer at the time limited, farther time was given him ; but he still neglecting to answer, a decree was made the 11*th* *December* 1688, that he should be foreclosed, unless the principal, interest, and costs were paid before the 11*th* *December* 1689. Afterwards *Sir John Eustace* returned to *Ireland*, and lived until the year 1706, when he died without issue ; but he never took any one step to impeach these proceedings or decree ; nor did he ever attempt to seek a redemption of the premises, but acquiesced under the decree for eighteen years. *Henry Tasburgh*, the appellant, succeeded to his estate on the death of his father, in 1691, and entered thereupon. And not imagining that, after an acquiescence of thirty-four years under the decree, any person would set up a claim thereto under *Sir John Eustace*, he by indenture, dated the 24*th* of *April* 1722, in consideration of a fine of 300*l.*, demised the same to the appellant *George M'Namara* for the term of thirty-one years, at the clear yearly rent of 250*l.* But the value of lands in *Ireland* rising considerably, a bill was exhibited in the Court of Chancery there, in *September* 1723, by several persons in right of their wives (nieces and coheiresses of *Sir John Eustace*), alleging, that the decree of foreclosure was obtained by surprise, fraud, and imposition ; and praying it might be reversed. Afterwards, in *April* 1729, the appellant *Henry* put in a plea and answer to this bill, (which having abated, they claimed a right to revive,) insisting on the title as before set forth ; and farther pleading the lease and release executed in 1681 by *Sir John Eustace*, the de-

claration of trust executed by *Charles Tasburgh*, the decree of foreclosure, and the proceedings had in that cause, and the great length of time and acquiescence under that decree. And *George M'Namara* denied notice of the respondents' title, and insisted that he was a purchaser, for a valuable consideration, of his said term without any notice. But it was decreed, that upon the respondents paying the appellant *Henry* the principal, interest, and costs due to him, he should reconvey the same; and as to *M'Namara*, an issue was directed to be tried, whether he, at any time, and when, had notice that the coheiresses of *Sir John Eustace* had or claimed any and what right to the lands in question, after the lease to *King* and *Bingley* should expire? From this decree an appeal was brought, when it was ordered and adjudged, that the proceedings, orders, and decrees complained of by the appellant should be reversed, and the respondents' bill dismissed.]

Preced.
Chan. 160.
Jory v. Cox.

|| CONDITIONS FOR ABATING AND RAISING INTEREST.||— But though these and such like restrictions are relieved against, to make them answer the primary intention of the parties, yet, if *A.* on a mortgage lends money at 5*l.* per cent., but agrees in the deed, that, if the money be paid within three months after it become due, he will accept of 4*l.* per cent., and the mortgagor neglects to pay the interest within the time, equity will not relieve him, but he must pay 5*l.* per cent.; for though the court relieves against unreasonable penalties, yet this is not so, for the mortgagee might have refused to lend his money under 5*l.* per cent.

Stanhope v.
Manners,
2 Eden, R.
197. See
Leveridge v.
Forty,
1 Maul. & S.
706.
Powell,
901.a. note M.

|| But although the condition on which the interest is to be abated must be strictly performed on the part of the mortgagor, yet the agreement for abatement is not considered so strictly in the light of a condition as to be utterly defeated by a single breach. *Sir William Stanhope* borrowed 10,000*l.* of *Lord William Manners*, on redeemable mortgage, with interest at 5*l.* per cent. The mortgage contained a proviso, that so often as the interest should be paid, half-yearly, or within three calendar months after each half-yearly day, 3*l.* 15*s.* per cent. should be accepted by *Lord W. M.* in lieu of 5*l.* per cent. And, by a separate agreement of the same date, it was agreed that *Lord W. M.* should not call for the money unless the interest should be in arrear. The first half-year's payment was not tendered till after the expiration of three months from the half-yearly day; on which *Lord W. M.* wrote a letter, stating the omission, and insisting on the failure, and soon afterwards gave notice to be paid off the principal. Within the three months from the second half-yearly day, *Sir W. S.* tendered one half-year's interest at 5 per cent., and another half-year's interest at 3½ per cent., which was refused; and the present bill was filed for specific performance of the agreement to take 3½ per cent. *Lord Northington C.* held, 1st, That the mortgagee was bound to accept 3½ per cent. for the second half-year, notwithstanding the first default; and, 2d, That he was at liberty to call in his money.||

Chan. Rep. 52.

So, if the mortgagee devises, that the mortgagor should be re-
mitted

mitted part of his mortgage-money, provided he pays the principal and interest within three days after his decease; if the condition be not performed, the remittance is lost: because this being a voluntary bounty, and not *ex debito justitiæ*, the party must take it as it is limited, for *cujus est dare, ejus est disponere*; and the court cannot relieve in this case after the day.

But where in a mortgage there was a proviso, that, if the interest was behind six months, then the interest should be accounted principal, and carry interest; this, by my Lord Cowper, was decreed to be a vain clause, and of no use; and he said, that no precedent had ever carried the advance of interest so far; and that an agreement, made at the time of the mortgage, will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal.

S. P. *Per Lord Eldon C.* But such an agreement is not usurious at law. *Legrange v. Hamilton*, 4 Term R. 613. 2 H. Bl. 144.; and see 1 Ball & B. 450.||

[But where, on a bill to foreclose a mortgage, the interest, by the deed, was to be 5 per cent. per ann., payable half-yearly, and if not paid by the space of two months after the time of payment, then to be raised to 5l. 10s. per cent. per ann. for increase of interest; the interest being run greatly in arrear, the question was, After what rate it should be computed on redemption of the mortgage? And it was decreed to be computed at the rate of 5 per cent. per ann. *only*: for where the interest was to be increased, if not paid at the day, that was but in the nature of a penalty, and relievable in equity.]

But it seems, that if there be a covenant for payment of the additional 1 per cent., the court will not relieve against it. Thus, where money was lent on mortgage at 5 per cent., and the mortgagor covenanted to pay 6 per cent. if he made default in payment of interest for the space of sixty days, after the time of payment; the court decreed, that, from default made, the mortgagor should pay 6 per cent.; for that this covenant was the agreement of the parties, and not to be relieved against as a penalty.

And, if an indulgence be given by the mortgagee, such agreement will be good to raise the interest, upon the ground of forbearance; such additional interest not being considered, in that case, as a penalty, but as a liquidated satisfaction fixed and agreed upon by the parties. So, where a mortgage was given, in *Ireland*, to trustees, by way of securing debts to creditors, and no money actually passed, but the sum nominally lent was to be paid by instalments; an agreement that the interest of those sums should rise, on nonpayment at the time appointed, or within three weeks after, from 5 to 8 per cent., was held good, upon an appeal to the House of Lords.

And, in a similar case, where a long arrear of interest had accrued, and the mortgagee had sent an account thereof to the mortgagor, who returned an answer, admitting the account, *desiring forbearance*, and promising to make satisfaction for the same;

2 Salk. 449.
pl. 1. Lord
Ossulston v.
Lord Yar-
mouth,
2 Atk. 331.
Thornhill v.
Evans, S. P.
||Chambers v.
Goldwin,
9 Vesey, 271.

Strode v.
Parker,
2 Vern. 316.
Holles v.
Wyse,
2 Vern. 289.
Nichols v.
Maynard,
3 Atk. 520.
||Seton v.
Slade,
7 Ves. 273.||

Marquis of
Halifax v.
Higgins,
2 Vern. 134.
||But this case
seems to be
overruled.
See 2 Eden, R.
199. note.||
Prec. Chan.
161.

Burton
v. Slattery,
3 Brown's
Parl. Ca. 68.

Brown v.
Barkham,
1 P. Wms.
652.

[[In 2 Eden, R. 199. note, this case is said to be overruled, *sed qu.*?
Vide, as to interest, *post*, *Mortgage* (F).]]

Lord Chancellor *Parker* allowed the additional 1 per cent. reserved, as a satisfaction; saying, that though the proviso, obliging the party to pay 6 per cent., was generally looked upon as a penalty, and *in terrorem*, and therefore to be relieved against, if only a very short lapse had happened; yet it might not be relievable against, in case of a long arrear of interest; and that if no reservation of 6 per cent. had been made, and a great arrear of interest had incurred, the court, on such a promise in writing, to make a satisfaction for forbearance, would have given the mortgagee some allowance in that respect.]

(C) Of the Nature of a Mortgage, as to the distinct Interests of the Mortgagor and Mortgagee.

(a) The mortgagor being considered in the nature of a tenant at will, it follows, that if he makes a lease subsequent to the mortgage, the mortgagee may treat the lessee as a wrongdoer, or not, at his election: *Cro. Ja.* 660. *Cro. Car.* 305. If the mortgagee permits the lessee to enjoy his lease, the mortgagor may thenceforth be considered as a receiver of the rent, or, in some sort, a trustee for the mortgagee, who may at any time countermand the implied authority, by giving notice to the tenant not to pay the rent to the mortgagor any longer. 1 *Atk.* 606. But if the mortgagee elects the other alternative, the lessee may be turned out by an ejectment, he being in under a person who had no power to under-let, but subject to eviction by the mortgagee. *Keech v. Hall*, Dougl. 21. But if there is tenant from year to year, and the landlord mortgages pending the year, the tenant is entitled to six months' notice from the mortgagee. *Birch v. Wright*, 1 *Term R.* 378. Though the tenant be in possession under a lease prior to the mortgage, yet the mortgagee, after giving notice, is entitled to the rent in arrear at the time of the notice, as well as to what shall accrue afterwards, and he may distrain for it after such notice. *Moss v. Gallimore*, Dougl. 279.] [Pope v. Biggs, 9 *Barn. & C.* 245. which seems to overrule *Alchorne v. Gomme*, 2 *Bing.* 54.] (b) It is said, that a tenant in tail of an equity of redemption may devise it for payment of debts. *Vern.* 41. *Turner v. Gwinn*. But this doctrine was overruled by *Kirkham v. Smith*, *Ambl.* 518., where Lord Hardwicke decided, that an equitable remainder on an estate tail was not barred by a settlement and will; and it is now established that an equitable entail and remainders are only barrable, like legal entail and remainders, by fine or recovery. See *Legatt v. Sewell*, 2 *Vern.* 552. The recovery may be suffered without the concurrence of the mortgagee. *Nouaille v. Greenwood*, 1 *Turner, R.* 26. [A. being seised of the lands in question in fee, mortgaged the same for two several terms of 1000 years each, and afterwards made his will, by which he devised those lands to L. L., his heir at law, and to the heirs male of his body, remainder to B. for life, with contingent remainders to his first and other sons in tail, remainder to G. D. for life, with remainder to his first and other sons in tail, remainder to his own right heirs, and died: Afterwards L. L. being seised of the lands in question under the will, and also of other lands in fee of a very considerable yearly value, made his will, by which he bequeathed to his mother the sum of 2000*l.*, and then directed and appointed that his executor should pay off and discharge all mortgages and incumbrances laid and charged upon his estate in Sussex, being the lands in question, and particularly mentioned the two aforesaid mortgages for years, and then directed and appointed that the said several mortgage leases should be kept on foot; and upon payment of the several sums of money due upon the same should be assigned by the mortgagees to his mother, dame M. S., for her sole use and benefit, during the remainder of the several terms, in the said several mortgages contained; and farther devised a yearly rent-charge of 100*l.* to his mother for life, to be issuing out of all his manors, &c. in the several counties of Hertford and Bedford. Then the will went on:—“and as for and concerning all and every my manors, messuages, lands, tenements, and here-titaments, which I the said L. L. am now seised of in law or equity, or which I have a power to give or charge, I do give and dispose the same in manner following;”—and then he appointed, that if his wife proved with child, and such child should be a son, that his son should

should have all his aforesaid manors, &c., in tail, remainder to his cousin *W. L.*, the defendant in the original cause, and to his heirs: And if the said after-born child should prove a daughter, he appointed that 5000*l.* should be raised out of the profits of his said estate for such daughter; and if his wife were not with child at the time of his death, then he devised all his said manors, &c. to his said cousin *W. L.*, and his heirs for ever. The testator died, his wife not having been with child. *S. B.* and *G. D.* both died without issue. Then the plaintiff, as representative to dame *M. S.*, brought a bill, praying an assignment of those terms; and the defendant brought a cross bill, praying to be let in to redeem as devisee of the reversion by the will of *L. L.* And the question was, Whether the equity of redemption, which the testator had, incident to the reversion in fee, as heir at law of the mortgagor, was severed from the reversion by the devise, and given to dame *M. S.*; and so those terms vested in her irredeemable by the devisee of the reversion? or, whether those terms were devised to her only as securities for the original mortgage-money, and so subject to be redeemed by him that should have the inheritance? And it was decreed by the Lord Chancellor *King*, assisted by Lord Chief Justice *Raymond*, and Mr. Justice *Denton*, that the devisee of the reversion under the will of *L. L.* should be let into redeem; for that the testator did not otherwise intend these mortgages for his mother, than as securities for so much money. *Amburst v. Litton*, Fitz. 99.] [See *Rex v. Abbott*, 5 Price, 195.; 10 Mod. 425.; and note, *Powell*, p. 260. (6th ed.)]

Therefore, if a man mortgages his land, and, as is usual, still continues in possession, and levies a fine, and five years pass, yet the mortgagee is not barred; for though the mortgagee be, in reality, out of possession, yet when that is done by the consent of both parties, and the nature of the contract requires it should be so while the interest is paid, it is against the original design of the contract, that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security, and is no less than a fraud, which the law will not countenance.

And as the mortgagor, being considered only as tenant at will (a) to the mortgagee, cannot, by his act, defeat the interest of the mortgagee, otherwise than by payment of the mortgage-money; so neither can the mortgagee defeat the mortgagor of his equity of redemption: therefore, if a mortgagee in fee suffers a recovery, this, even at law, shall not bind the mortgagor's right of entry, upon performance of the condition. But if the mortgagor had been a party to the recovery, then his right had been bound, not only on account of the recompense in value, but because he is estopped by the recovery to claim the land against the recoverer, or his heirs, when he was called in before the judgment given to defeat his title, and could not do it.

So, if a mortgagee be disseised, and the disseisor levy a fine, and five years pass after the proclamation, though the mortgagee is hereby barred, yet if the mortgagor pay, or tender his money, he has five years to prosecute his right, by the second saving in the statute of 4 H. 7. c. 24., because his title did not accrue till payment of the money.

¶ **PRESENTING TO BENEFICES.** — And as the mortgagor, till the equity of the redemption be foreclosed, is considered as owner of the land, it was ruled, where a bill for a redemption was brought against a mortgagee in possession, and a decree accordingly, that a mortgagee, before the account taken, having presented to a church that became void, should revoke his presentation (b) and present such a person as the mortgagor, or his vendee (he having contracted to sell), should appoint.

Ca. temp. Tab. 144. *Robinson v. Jago*, Bunb. 150. (b) *Qu.* How is the presentation to be revoked?

Sid. 460.
Vent. 82.
Lev. 274.
Carth. 101.
414.

Palm. 135.
Cro. Jac. 593.
[(a) See note,
p. 615. *ante.*]

Plow. 373. a.

Preced.
Chan. 71.
[That the
mortgagor
shall present,
see *Gally v.*
Selby,
1 *Stra.* 403.
Kensley v.
Langham,

Gardiner v.
Griffith,
2 P. Wms.
404.

Mackenzie v.
Robinson,
3 Atk. 560.

Gardiner v.
Griffith,
2 Will. 405.
3 Atk. 458.
|| *Vide post*,
tit. *Simony*,
as to a sale
while church
is void.||

Lady Whet-
stone v.
Sainsbury,
Prec. Chan.
591. See
Willis v.
Fineux,
Id. 108.

Hungerford
v. Clay,
9 Mod. 1.
2 Eq. Ca. 610.

[In the case of *Gardiner v. Griffith*, the mortgage was of a long term in a naked advowson, and therefore a distinction was attempted; because the mortgagee could have no other satisfaction than by providing for a child, relation, or friend, on the advowson becoming void; and the rather, for that it was expressly so agreed in the mortgage-deed; but the court gave no opinion thereupon. And in the case of *Mackenzie v. Robinson*, which was the case of a mortgage of a naked advowson, Lord *Hardwicke* doubted the legality of such a covenant, *that the mortgagee should present*, it being a stipulation for something more than principal and interest; and the mortgagee, not being able to find any precedent in his favour, gave up the point of presenting; in consequence whereof, an order was made that the mortgagor should have liberty to present, and the mortgagee was obliged to accept of his nominee.

But, if the mortgagee present to an advowson, a bill by the mortgagor, to compel the incumbent to resign and to deprive him of his living, will be dismissed, unless brought within six months after the death of the last incumbent. In such case the mortgagee, instead of bringing a foreclosure, should pray a sale of the advowson.

A mortgagee takes the estate mortgaged in the same plight that it is in, in the hands of the mortgagor. If the mortgagor, therefore, has done any act that amounts to a forfeiture, the mortgagee will lose his security. Thus, tenant for life, with remainder to his wife for life, remainder to his sons in strict settlement, remainder over, having occasion for money, together with his wife, mortgaged the estate settled by way of lease and release and fine, *come ceo*, &c. which mortgage was afterwards assigned to the plaintiff, and another lease and release and fine levied and executed by the husband and wife for making good the assignment. The husband died, and a bill was brought against the widow and eldest son to compel them to redeem or to foreclose them, and to be relieved against the forfeiture. The defendant, the son, pleaded the marriage-settlement of his father and mother, who were but tenants for life, and insisted on the forfeiture; and the court allowed the plea; the Lord Chancellor saying, that this was a contrivance to destroy the settlement and disinherit the son; and his Lordship said, he had so decided in many cases, particularly in the case of Sir *Harry Peachy* and the Duke of *Somerset*.

A mortgagee, before foreclosure, cannot exercise any act of ownership over the property which may incumber the mortgagor. He can make no lease of the lands for years to an under-tenant. Thus, in the case of *Hungerford v. Clay*, the bill was for redemption on payment of principal and interest. The substance of the answer was, that the defendant, the mortgagee, had made a lease of the house for five years at a rent reserved, with a covenant that the lessee should have the option of a farther lease for four years after the expiration of the said term; that the term for five years was now expired, and the lessee desired to take the premises for

for four years longer; that, if the plaintiff would grant such lease, the defendant would reconvey on payment of principal and interest. On hearing this case at the Rolls, the defendant had a decree; but, on appeal to the Chancellor, his Lordship was of opinion, that the mortgagee, before foreclosure of the equity of redemption, could not lease the premises for years to bind the mortgagor, unless, to avoid an apparent loss, and merely in necessity: and the decree at the Rolls was reversed.

¶ **WASTE BY MORTGAGEE.** ¶ — And as a mortgagee cannot, before foreclosure, exercise any act of ownership that will attach on the estate, but ought to reconvey the premises free from all incumbrances; so neither can he justify, in equity, the commission of any act which may injure the estate; therefore, though at law a mortgagee in fee may commit waste, yet he will be restrained in equity. Thus, on a bill to redeem a mortgage, wherein an account was decreed, and 250*l.* reported as due, and exceptions taken to the report; it being, on motion and reading affidavits, shewn, that the defendant had burnt some wainscot and committed waste, the defendant was ordered to deliver up possession to the plaintiff, who was a pauper, he giving security to abide by the event of the account.

Hanson v.
Derby,
2 Vern. 392.

So, where the mortgagee of an estate in fee had cut down trees, on application to the court it was decreed, that an account should be taken of what was cut down, and the produce applied in the first place to the payment of the interest, and then to the sinking of the mortgage; and an injunction was granted to stay felling any more.

But a distinction is made where the security is defective; for, in that case, the court will not restrain a just creditor from his legal privileges; but then the timber, when cut down, must be applied to ease the estate, and not to the mortgagee's benefit.

Withrington
v. Banks,
Sel. Ca. Ch.
31.

However, although the mortgagee cannot, to better his security, do any act to incumber the estate mortgaged, which will be valid against the mortgagor after redemption, nor will be justified in committing waste, yet he will be entitled to such expenses as he shall incur in necessary repairs, or other acts for the preservation of the estate mortgaged, and may, certainly, add this to the principal of his debt, and it will carry interest.

3 Atk. 518.
¶ See Trimles-
ton v. Hamil,
1 Ball & B.
377. and *en*
post, (F). ¶

Thus, if a leasehold estate be mortgaged, and there is no covenant on the part of the mortgagor, that he should procure the lives to be filled up, the mortgagee cannot compel him to do it; but must pay the expense of renewing, and reimburse himself by adding it to the principal of the mortgage, and it shall carry interest. So it was determined in the case of *Manlove v. Ball* and *Bruton*, which was a mortgage of a church lease for three lives, two of which died during the time the estate was in mortgage, and were renewed on fines paid by the mortgagee.

3 Atk. 4.
Lucam v.
Mertins,
1 Wils. 54.
Manlove v.
Ball *et al.*,
2 Vern. 84.
suprà.
¶ 1 Ball & B.
202. ¶

A term assigned in trust to attend the inheritance will, in equity, follow all the estates created thereout, and all the incumbrances subsisting upon such inheritance, and is so connected with it, that equity will not suffer it to be severed to the detri-

Vide 3 Atk.
476, 477.
Charlton *et al.*
v. Low *et al.*,
5 P. Wms. 528.

ment

¶ See as to the assignment of attendant terms, Sugden, V. & P. 585. (6th ed.)
Butler, Co. Lit. 290. b. n. (1) § 13. and Powell, 477. a. note (6th ed.)]]

ment of a *bona fide* purchaser. Therefore, a mortgagee shall have the benefit of all the interests which the mortgagor had at the time the mortgage was made, unless against an intermediate purchaser without notice; and, consequently, if there be a term in a mortgaged estate held in trust for the mortgagor, when the mortgage of the inheritance is made, the concealment of it will be a fraud upon the mortgagee, and the trustees of such a term assigned to attend the inheritance will, in equity, become trustees for the mortgagee of the inheritance.

If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his representatives, with a good title; the mortgagee will be entitled, in equity, to the benefit of it; for it will be considered there as a graft upon the old stock, and as arising in consideration of the former title.

Seabourne v. Seabourne, 2 Vern. 11.

As, where houses and lands were demised for a long term, and an assignee of the lease, believing he had a good title, mortgaged it for 100*l.*, afterwards the title turned out to be bad, the estate belonging to another person. Then the real owner of the estate, out of compassion to the assignee, who had built upon it, leased the premises for a long term to trustees for his wife, he being run away. And on a bill filed, the trustees were decreed to make a new mortgage to the mortgagees; the Master of the Rolls saying, that this was a graft on the old stock, all the benefit of it, except the rent reserved, arising in consideration of the former title.

Rakestraw v. Brewer, Sel. Ca. in. Ch. 35.
Lee v. Lord Vernon, 7 Bro. Par. Ca. 432.

If a mortgagee procures a grant of a new term after the old one be actually expired, yet this will be a trust for the mortgagor, and redeemed with the principal; for it is supposed to have proceeded from having had the original term: and, although there be nothing in fact in having a tenant-right, yet, as such regard is had to it, in the estimation of the world, it will be looked on as the occasion of the lease.]

¶ QUALIFICATION TO VOTE, AND TO SIT IN PARLIAMENT. ¶ — By the 7 W. & M. c. 25. it is enacted, “That no person or persons shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate, but that the mortgagor, or *cestui que* trust in possession, shall and may vote for the same, notwithstanding such mortgage or trust.”

And by the 9 Ann. c. 5., which requires that knights of the shire should have 600*l.* per annum; and every other member 300*l.* per annum, it is enacted, “That no person shall be qualified to sit in the House of Commons, within the meaning of the act, by virtue of any mortgage, whereof the equity of redemption is in any other person, unless the mortgagee shall have been in possession of the mortgaged premises for seven years before the time of his election.”

Eaton v.

¶ LIABILITY TO COVENANTS. ¶ — [On the assignment of a term by

by way of mortgage, the mortgagee, before actual possession, is not liable to the arrears of rent, and other covenants in the original demise.

Jaques,
Doug. 455.
Walker v.
Reeves, *Id.*

461. note. ¶ But the case of *Eaton v. Jaques* has been expressly overruled; and it is now settled, that the assignee of a lease by way of mortgage is liable on the covenant for payment of rent, though he has never taken actual possession, since the assignment vests in him the whole legal interest. *Williams v. Bosanquet*, 1 Brod. & B. 238. 3 Moo. 100. A mortgagee, therefore, for safety should only take an underlease of the premises for a term wanting a day or week of the original term; but he should have an express covenant to indemnify against the rent, as he would be liable to a distress. See *Powell*, 185. a. (6th ed.)]

But, if the mortgagee enters into possession, he becomes liable to all covenants that run with the land, for he takes it *cum onere*, and, enjoying the profits, he must submit to the losses.

Traherne v. Saddleir, 1 Bro. Parl. Ca. 105.

And if a mortgagor, by a mortgage of a term vested in him, divests himself of all interest therein, in the consideration of a court of law, he retains only the equity of redemption, which he must pursue in a court of equity; and therefore, if he join with his mortgagee in a lease, in which the lessee is made to covenant with the mortgagor for rent, repairs, &c. such covenants will be merely collateral to the mortgagee's interest in the land, and the assignee of the mortgagee cannot maintain an action for the breach of them on the statute of 32 H. 8. c. 34.

Webb v. Russell, 3 Term R. 595.

These covenants, therefore, must be considered as *covenants in gross*, upon which, of course, the mortgagor may maintain an action. And so it was determined on the same instruments, and between some of the same parties, in the case of *Stokes against Russell*, in the Court of King's Bench.

Stokes v. Russell, 3 Term R. 678.

¶ The devisee of the equity of redemption (the legal fee being in a mortgagee) is not liable in covenant as assignee of all the estate, right, title, and interest of the original covenantor.¶

The Mayor, &c. of Carlisle v. Blamire, 8 East, 487.

¶ WASTE BY MORTGAGOR.¶ — If a mortgagor commit waste, whether it be a mortgage in fee or for a term of years, the court, on a bill by the mortgagee to stay waste, will grant an injunction; for they will not suffer a mortgagor to prejudice the incumbrance.

Farrant v. Lovel, 3 Atk. 723.

¶ Where the mortgage was of land, wood, and underwood, (a) the Lord Chancellor decided, that it was not waste in the mortgagor to cut the underwood at seasonable times, it being the ordinary fruit of the land, but the mortgagor having become bankrupt, an injunction was granted against cutting the underwood, on the ground that the mortgagee was entitled to have the estate in the plight in which it was at the date of the bankruptcy, and to prove the rest of his debt.

Hampton v. Hodges, 8 Ves. 105.
(a) As to what is underwood, see *Rex v. Ferrybridge*, 1 Barn. & C. 375.

But the mortgagee is entitled to an injunction to restrain the mortgagor from cutting timber, if the land without it is a scanty security.¶

Humphreys v. Harrison, 1 Jac. & W. 581.

A mortgagor is never permitted to dispute the title of his mortgagee; because no man is permitted to dispute his own solemn deed.

Cowp. 601.

A mortgagor *in possession* gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, the mortgage being only a pledge to him for security of his money, and the original ownership of the land still residing in the mortgagor,

Doug. 610.

subject

subject only to the legal title of the mortgagee, so far as such title is requisite to the end of his security.

But, if the mortgagee evict the mortgagor and take possession, the mortgagor, though afterwards occupying permissively for a particular purpose, will not thereby gain a settlement.]

¶MORTGAGOR NOT TO ACCOUNT TO MORTGAGEE. — Although the mortgagee may assume the possession by ejectment at his pleasure, and, according to the case of *Moss v. Gallimore*, Doug. 279., may give notice to the tenants to pay him the rent due at the time of the notice, yet if he suffers the mortgagor to remain in possession, or in the receipt of the rents, it is a privilege belonging to his estate that he cannot be called upon to account for the rents and profits to the mortgagee; even although the security be insufficient.

So, where a mortgage was made for 1000*l.*, the property being in lease, the mortgagor became bankrupt, and the mortgagee gave notice to the tenant to pay the rent to him, notwithstanding which the assignees received the rent. On a petition by the mortgagee that the assignees should pay him the rent received, Lord Chancellor *Eldon* said, that admitting the case of *Moss v. Gallimore* to be sound law, he had often been surprised by the statement, that the mortgagor was receiving the rents *for the mortgagee*; a mortgagee never could in that court make the mortgagor account for the rent for the time past. The consequence was that the mortgagor did not receive the rents for the mortgagee.

So, also, where a trust term was mortgaged by the trustees, and under certain collateral proceedings, *distinct* from the mortgage, a receiver had been appointed, and the surplus rents paid into court, and a portion of the money remained due on the mortgage when the term expired by effluxion of time. The mortgagees applied to the court for an account of the rents and profits which had come to the hands of the receiver from his appointment to the expiration of the term, but the motion was refused; and the Lord Chancellor said, he thought that the mortgagee of a term, if he chose not to lay his hands on the rents during the term, must be in the situation of a mortgagee in fee who had suffered the rents to be applied for purposes other than the security.

LEASE AND LOAN. — As equity looks strictly to the real relation between the mortgagee and mortgagor, that of lender and borrower, notwithstanding the legal ownership is in the mortgagee, courts of equity protect the mortgagor from any oppressive advantage which the mortgagee may seek to derive from the possession of the absolute legal estate. Therefore it has been decided by Lord *Redesdale*, Chancellor of *Ireland*, that the mortgagee cannot accept a lease of the premises from the mortgagor even at a fair rent. The facts of the case were, that *Webb*, having mortgaged to *Rorke*, afterwards executed a lease of part of the land to *Rorke* for 999 years at a yearly rent. A bill was filed by the heirs of *Webb* against the heirs and personal representatives

Rex v.
Catherington,
3 Term
R. 771.

Colman v.
Duke of St.
Alban's, 3 Ves.
jun. 25. and
vide 2 Atkins.
107.

Ex parte
Wilson,
2 Ves. &
B. 252.

Gresley v.
Adderley.
Gresley v.
Heathcote,
1 Swanst.
R. 573.

Webb v.
Rorke,
2 Scho. &
Lefroy, 661.; et
vide Gubbins
v. Creed,
2 Scho. &
Lefroy, 214.
Long acquies-

sentatives of *Rorke*, charging that the lease was made at a gross undervalue, and in consequence of threats of foreclosure, and that the rent had never been paid, and praying a re-assignment of the lease to the plaintiff, and that the same might be declared void, and that defendant might account for the real value of the lands from the date. The answer insisted that the lands were let at a fair value, and without threat. Two issues were directed: 1st, Whether the lease was voluntarily granted; 2d, Whether the rent reserved was a fair rent; both which issues were found in the affirmative. On the hearing in equity, Lord *Redesdale* considered he was mistaken in directing the issues, and decreed the lease to be set aside as contrary to public policy, and the spirit of the laws for preventing usurious contracts.

But it has been decided, that a lease granted as a security for an advance, and at a fair rent, to be applied in discharge of the debt, is a valid security by way of *mortgage*; the Lord Chancellor of *Ireland* (*Manners*) distinguishing this from the cases of *absolute* leases by the mortgagor to the mortgagee, which are held void. In the same case, however, a further lease granted thirteen years after the original lease for a term of twenty years at the *same rent*, in consideration of a further advance, was set aside as fraudulent.||

cence, however, will render such transactions unimpeachable. *Hickes v. Cooke*, 4 Dow. 4 P. C. 16.

Morony v. Odea, 1 Ball & B. 117.

(D) Of the Legal Performance of the Condition.

THE condition must at law be strictly performed, otherwise the mortgagor loses all benefit of redemption; but if upon a mortgage a tender be made of the money at the place at any time of the day specified in the condition, and the mortgagee refuse, the condition is saved for ever.

And upon such refusal the land is discharged, because upon the tender the demise is void; and if it be upon a feoffment, the condition is performed, and the feoffor may re-enter. But the money lent doth yet remain a debt or duty, because it was a debt by the original lending of the money, whether it had been so secured or not; and though the security fails, according to the words of the agreement, yet there is the same natural justice that the money should continue: but, if a feoffment were made, on condition of payment of a sum gratuitously, to re-enter, if it were refused, there is no remedy.

The legal tender, or payment, must be made to the parties mentioned in the condition; because, to make such a tender as will be a legal performance, it must be made according to what the parties have expressly agreed on in the condition.

Therefore, if a man bargains and sells lands, with proviso, that if the vendor, before such a day, pay so much money to the vendee, his heirs or assigns, that the sale shall be void; the vendee before the day makes his executors, and dies, and the vendor tenders the money to the executors, this is not good, because the word *assigns* must be understood to be assigns of the land, in its primary and original signification; and where there is

7 E. 4. 5.
9 H. 6. 12.
22 H. 6. 37.
47 E. 3. 26.
Plow. 175.
5 Co. 114.
Co. Lit. 209.
Co. Lit. 209.

Dyer, 180,
181.
Co. Lit. 210.

an express provision to whom the tender and payment is to be made, the executor is excluded; for *expressum facit cessare tacitum*.

Co. Lit. 210.
5 Co. 96.

But, if a man make a feoffment in fee, upon condition that the feoffee shall pay 20*l.* to the feoffor, his heirs or assigns; here, the primary signification of the word *assigns* fails, because there can be no assignment of the land of which he hath enfeoffed another; and since the original sense of the word fails, lest it should be wholly insignificant, the secondary sense of the word is to be taken, *viz.* the assignees in law, which the executors are *quoad* the personal estate; and therefore the payment is good either to the executor or to the heir.

Co. Lit. 210.

If the condition be to pay the money to the feoffee, in mortgage, his heirs or assigns, and he make a feoffment over, it is in the election of the feoffor to pay the money to the first or second feoffee, because by the words he may pay it either to him or the assignee. So, if the first feoffee die, in this case he may pay it to his heir or the assignee, for the same reason; nor is he obliged to take notice of the validity of the second feoffment, to which he is a stranger.

Lit. § 359.
Co. Lit. 209.
5 Co. 96.

But if the condition was, that the feoffor should pay it to the feoffee at such a day, and the feoffee die before the day, it shall be paid to the executor, and not to the heir, though the land descend to the heir; for during the suspension of the condition, which is till the whole time is elapsed, the land is wholly taken to be a pledge for the money, and the money to be a personal duty to the feoffee, and, consequently, is to be paid to such person as represents him; but then this payment must be to the executor of the whole sum; for a partial and fraudulent payment, though accepted by the executor, is really no performance of the condition, and therefore the interest remains in the heir at law.

Lit. § 357.

If the condition were, that the feoffor should pay so much money to the feoffee, without limitation of time, the feoffor hath time during life to pay the money to the feoffee during his life; but if either die before the time which is set by the parties for the performance of the condition is elapsed, the feoffment is absolute; but if the payment were to be made to the feoffee, his heirs or executors, then the feoffor hath time during life.

5 Co. 96.

If a man make a feoffment in fee, upon condition that the feoffor, within a year after the death of the feoffee, pay to his heirs, executors, or administrators, 100*l.* that then the feoffor should re-enter; the feoffee make a feoffment over, and die; the feoffor pay the 100*l.* within the year, and the heir pay back 30*l.*, this is a partial and fraudulent payment, and no good performance of the condition, to defeat the estate of the feoffee: but if the whole money had been paid, it had been good, because the payment is to be made to the persons mentioned in the condition, and not to the assignee of the land, who is not named therein.

(E) Of the Equity of Redemption and Foreclosure :
And herein,1. *Who may redeem, and by whom the Mortgage Money shall be paid.*

ALTHOUGH, after breach of the condition, an absolute fee-simple is vested at common law in the mortgagee, yet a right of redemption being still inherent in the land till the equity of redemption be foreclosed, the same right shall descend to and is vested in such persons as have a right to the land, in case there had been no mortgage or incumbrance whatsoever: and as an equitable performance as effectually defeats the interest of the mortgagee as the legal performance doth at common law, the condition still hanging over the estate, till the equity is totally foreclosed; on this foundation it hath been held, that a (a) person who comes in under a voluntary conveyance may redeem a mortgage; and though such right of redemption be inherent in the land (b), yet the party claiming the benefit of it must not only set forth such right, but also shew that he is the person entitled to it.

Hard. 465.

(a) Vern. 195.

(b) Vern. 182. Chan. Ca. 74.

As the heir at law is regularly entitled to the benefit of redemption, he is also entitled to the assistance of the personal estate of the mortgagor for that purpose; according to the doctrine established in the courts of equity, that the personal estate, in the hands of the executor, shall be employed in ease of the heir, by whatever means the heir becomes indebted as heir; for the personal estate having received the benefit by contracting the debt, and the real being considered only as a pledge for it, it is but reasonable that satisfaction should be made out of it; according to the common rule, *Qui sentit commodum sentire debet et onus*.

2 Chan. Ca. 5. *Vide tit. Heir and Ancestor, and tit. Executor.*

And on this foundation it hath been frequently held, that if a man mortgage lands, and covenant to pay the money, and die, the personal estate of the mortgagor shall, in favour of the heir, be applied in exoneration of the mortgage.

2 Salk. 449. pl. 3. [So, Pockley v. Pockley, 1 Vern. 56.]

King v. King, 3 P. Wms. 560. Galton v. Hancock, 2 Atk. 456. Robinson v. Gee, 1 Ves. 251. Earl of Belvedere v. Rochfort, 6 Bro. P. C. 520. Philips v. Philips, 2 Bro. Ch. Rep. 275.]

Also it is held by some opinions, that this benefit shall not only extend to the heir at law, or *hæres natus*, but also to an (c) *hæres factus*, from a presumption, that it is the intention of the testator, that he should have all the privileges of the *hæres natus*: And (d) some even hold, that an ordinary devisee shall have this benefit: but as to this last point it hath been (e) held otherwise; and that if a man mortgages his land, and then devises it to *J. S.* or to *A.* for life, the remainder in fee to *B.*, that there the charge doth pass with the estate, there appearing no intention of the testator that he should have it discharged. (g)

(c) 2 Chan. Ca. 84. (d) Vern. 56. (e) Chan. Ca. 271.

[(g) In a later case a contrary determination was given. There, the defendant's testator having

made a mortgage of his lands for a considerable sum of money, by his will appointed them to be sold for payment of his mortgage-money, and afterwards devised the lands so in mortgage, as to one moiety thereof, to the plaintiff, &c. and made the defendant executor, and devised the personal

personal

personal estate to his executor *for the payment of his debts*: The single question was, Whether the personal estate should be applied to discharge the mortgage for the benefit of the devisee? And it was decided at the Rolls, that the personal estate should be so applied for the advantage of the devisee, and that decree was confirmed by the Lords Commissioners. *Johnson v. Milkrop*, 2 Vern. 112. — In the case of *Pockley and Pockley*, 1 Vern. 36. it was determined, that such debt on mortgage would lessen the widow's customary moiety in the province of York; for the custom cannot take place until after the debts paid. So, a mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part of the custom of London. *Bail v. Bail*, cited 1 P. Wms. 335. — And where lands are subject to or devised for payment of debts, such lands shall be liable to discharge mortgaged lands either descended or devised. *Bartholomew v. May*, 1 Atk. 487. *Marchioness of Tweedale v. Coventry*, 1 Br. Ch. Rep. 240. Even though the mortgaged lands be devised expressly *subject to the incumbrance*. *Serle v. St. Eloy*, 2 P. Wms. 366. So, lands descended shall exonerate mortgaged lands devised. *Galton v. Hancock*, 2 Atk. 424. So, *unincumbered* lands and *mortgaged* lands, both being specifically devised, (but expressly "*after payment of all debts*,") shall contribute in discharge of such mortgage. *Carter v. Barnardiston*, 2 P. Wms. 505. 2 Bro. P. C. 1. In all these cases, the debt being considered as the *personal* debt of the *testator* himself, the charge on the real estate is merely collateral.]

[So, also, where the testator exempts his personal estate, and devises his mortgaged estate *subject to incumbrances*, and permits another estate to descend, the descended estate shall exonerate the mortgaged estate devised. *Barnewall v. Cawdor*, 3 Madd. 453.; and see *Watson v. Brickwood*, 9 Ves. 447. But an estate *expressly* devised for payment of debts shall be resorted to before a descended estate. *Powis v. Corbet*, 3 Atk. 556. But not an estate specifically devised *charged* with payment of debts; for estates *particularly* devised are never applied till all other funds are exhausted. *Davies v. Topp*, 1 Bro. C. C. 524. *Wride v. Clarke*, cited 2 Bro. C. C. 261.; and whether the descended estate is purchased before or after making the will, appears to make no difference as to its being applied before or after a devised estate. *Donne v. Lewis*, 2 Bro. C. C. 257. *Manning v. Spooner*, 3 Ves. jun. 114. *Milnes v. Slater*, 8 Ves. 295. The general order of payment, therefore, as laid down in *Davies v. Topp*, and confirmed by the other cases, is, 1st, out of the personal estate unless specially exempted; 2d, estates particularly devised for payment of debts; 3d, estates descended whether purchased before or after will; 4th, estates specifically devised, though generally charged with payment of debts.]

2 Salk. 450.
Vern. 37.

So, if the mortgagor conveys away the equity of redemption, the purchaser shall not have the benefit of the personal estate, but must take it *cum onere*.

2 Salk. 449.
Vern. 436.
Preced.
Chan. 61.
This guard e
statement
is no longer

It has likewise been held by some opinions, that the heir of the mortgagor shall have the benefit of the personal estate to pay off the mortgage, though there be no covenant in the mortgage-deed for the payment thereof; because the mortgage-money is a debt, whether there be any express covenant for the payment of it or not.

necessary: the law is now clearly settled as here laid down. For, by Lord *Talbot*, in *King v. King*, 3 P. Wms. 358. every mortgage implies a loan, and every loan implies a debt; and though there be no covenant or bond, yet the personal estate of the borrower of course remains liable to pay off the mortgage. Hence, a decree of Lord *Harcourt* in the case of the mortgage of a ship, where the ship was taken at sea, and there was no covenant for payment of the money; and though the ship could not properly be said to be in nature of a pawn or *depositum*, since the mortgagor had sailed with the same to sea; nevertheless the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. So it is in the case of Welsh mortgages (*Howell v. Price*, *infra*), where no day is appointed for the payment, but the matter is left at large. And see *Balsh v. Hyham*, 2 P. Wms. 455. S. P.]

[*Howell v. Price*, Pr. Ch. 425.
Gilb. Eq. Rep. 106.
S. C. totidem verbis.
2 Vern. 701.
S. C. It

But where a mortgage in fee was made, redeemable at *Mich.* 1702, or any other *Mich.* day following, on six months' notice; and there was no covenant for payment of the mortgage-money; it was held by my Lord Chancellor *Cowper*, that the mortgagor having devised his personal estate to his wife and daughter, and having during his life paid the interest of the mortgage, the personal estate should not be applied in ease and exoneration of the real

real estate, for the benefit of the heir at law; for, as he said, there being no covenant for payment of the money, there was no contract at all between them, neither express nor implied; nor would any action lie against the mortgagor to subject his person, or compel him to pay this money; but this was in the nature of a conditional purchase, subject to be defeated on payment by the mortgagor, or his heirs, of the sum stipulated between them, at any *Mich.* day, at the election of the mortgagor, or his heirs; so that here was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages; and therefore there could be no equity of redemption, or any occasion for the assistance of the court; but the plaintiffs might even at law defeat the conveyance, by performing the terms and conditions of it; which were not limited to any particular time, but might be performed on any *Mich.* day, to the end of the world; and since here was no covenant or contract, either express or implied, to charge the personal estate of the mortgagor, he thought there was no reason to lay the load of this debt upon that which was given to other persons.

in 1717, upon the equity reserved after the trial of an issue that had been directed by the court. Upon that occasion Lord Chancellor seemed to be strongly of opinion, that the personal estate should be applied in ease of the real, the testator having said in his will, that his executors should, by his personal estate, pay and levy his debts; and this mortgage-money being a debt, his Lordship decreed accordingly. 1 P. Wms. 291. 1 Eq. Ca. Abr. tit. Heir and Ancestor, (E), pl. 7.]

Also, if the grandfather mortgages, and covenants to pay the mortgage-money, and the land descend to his son, and his son dies, having a personal estate and a son; the son's personal estate shall not go in aid of this mortgage.

¶ For it is an established rule, that the debt must be the *debt of the party* whose personal estate is to be charged in relief of the realty. A person, seised of an estate subject to a mortgage created by himself, devised all his real and personal estate to his wife absolutely, and appointed her executrix. The residuary personalty was sufficient to discharge the mortgage, which was not, however, discharged by the widow, who died intestate, leaving her brother her heir at law. The defendants were administrators of the effects of the husband, and also of the effects of the wife; and the brother filed his bill against them to be indemnified against the mortgage out of the personal estate of the husband. The Vice-Chancellor refused the claim, on the ground that though the residuary personalty of the husband had become the property of the wife, yet the debt of the husband not having become *her debt*, *her* heir at law had no claim to be indemnified out of *her* personal estate against the debt of another.¶

So, if an heir has lands descended to him, incumbered with a mortgage, and he, before any application made by him to have aid of the personal estate, disposes of them, he cannot afterwards come upon the personal estate; for the equity, which an heir has, is, that the lands may descend clear to the family.

[Where the real estate is originally, or afterwards becomes

Vol. V,

T t

primarily

appears from the report in Pr. in Ch. & Gillb that there was no decree upon the argument of this case in 1715, to which period of time these histories refer, but that precedents were ordered to be searched. The same case is reported by Peere Williams, but in a later stage of the cause, viz.

2 Salk. 450.

Scott v. Beecher, 5 Madd. 96.

Abr. Eq. 270. Wood v. Fenwick.

primarily liable, the real estate shall be first applied, though a *covenant* is added, or a *bond* given; for such covenant or bond is only intended as a collateral security to the land, and cannot alter the fund. In *Bagot v. Oughton*, 1 P. Wms. 347. land descended to the wife subject to a mortgage made by her father; on an assignment of the mortgage, the husband covenanted for the payment of the money to the assignee: it was decreed, that the husband's personal estate was not liable to exonerate the mortgaged premises, for the debt was *originally* the father's, and *continuing* to be so, the covenant was an *additional* security for the satisfaction only of the lender, and not intended to alter the *nature* of the debt.

Evelyn v. Evelyn, 2 P. Wms. 659. Fitzg. 151. S. C. Sel. Ca. Ch. 80. ||Edward Evelyn and his son were plaintiffs in this bill, and defendants in another suit heard at the same time, and included in the Report in P. Wms.||

||Vide also Lechmere v. Charlton, 15 Ves. 193.||

George Evelyn, the father, and grandfather to the two plaintiffs, had three sons, *John*, *George*, and the plaintiff, *Edward Evelyn*; *George*, the father (being tenant for life, remainder to his eldest son *John*, in tail male of part of the premises), together with his eldest son *John*, on the 20th October 1698, by deed and recovery, settled certain estates in strict settlement, with a power to *George*, the father, by deed or will, to charge by lease, mortgage, or otherwise, the premises limited to himself for life, with raising or paying any sum not exceeding 6000*l*. *George*, the father, in pursuance of the power, mortgaged part of the said land for 1000*l*. for the term of 1000 years. This mortgage afterwards, by mesne assignments, became vested in Sir *Thomas Pope Blunt*, with a covenant, from *George Evelyn*, the son, for payment of the mortgage-money; and, on the same assignment, Sir *Thomas*, the mortgagee, covenanted to re-assign to *George Evelyn*, the son. Afterwards *George Evelyn*, the father, died; then *John Evelyn*, the eldest son, died without issue, upon which *George*, the second son, entered upon the premises comprised in the settlement, and died intestate, leaving the defendant, *Mary*, his widow, and three daughters. Then *Edward Evelyn* and his son (the next remainder-man in tail) instituted a suit against Mrs. *Evelyn*, the mother (afterwards married to Governor *Bohun*) being the administratrix of her former husband, *George Evelyn*, praying, that the personal estate of her late husband should be applied towards paying off the mortgage of 1500*l*. and in exoneration of the real estate. But it was held by the Lord Chancellor, assisted by the Lord Chief Justice *Raymond*, and the Master of the Rolls, that the personal estate of the son should not be applied to pay off this mortgage, made by the father; because the charge was made by the father in pursuance of the power contained in the settlement; and as he had such power, the plaintiff *Edward* must be contented to take such land *cum onere*; and notwithstanding that the son did afterwards, on the assignment to Sir *Thomas Blunt*, covenant to pay the mortgage-money, yet, since the land was the original debtor, this covenant from the son would be considered *only* as a security for the land.

Earl and Countess of Coventry, 2 P. Will. 222.

Gilbert, the late Earl of *Coventry*, on his marriage with the daughter of Sir *Strensham Masters*, (the Earl being but tenant for life, with a power of making a jointure of lands, not exceeding 500*l*. per annum, on any wife he should marry,) covenanted,

in

in consideration of the intended marriage, that he, or his heirs, would, after the marriage, according to the power given him by his father's will or otherwise, settle 500*l.* per annum on his wife for her jointure; and it being in proof, that the late Earl directed his steward to look over the rent-rolls, for a fit part of the estate to make good the jointure, and that afterwards the jointure-deed was engrossed, but not executed; though this depended only on a covenant, yet the jointure of *land* being the *chief thing* in view, the decree was, that the *land* should be settled, and the covenant not made good out of the *personal estate*. Strange, 596.
S. C.

And so in the case of *Edwards* and *Freeman*, though the wife's jointure and the daughter's portion were secured by articles, which were never completed by a settlement, yet those articles being to settle lands, and the covenantor leaving lands sufficient to answer them, it was decreed, that the daughter's portion should be raised out of the lands, and that the personal estate of Mr. *Freeman*, the covenantor, should not be applied in exoneration thereof. But it is to be observed, that in the latter case particular lands were agreed to be settled, and, consequently, that the covenant was a lien upon those lands. Freeman v.
Edwards,
2 Will. 455.

The son, tenant in fee, on an assignment of the ancestor's mortgage, covenanted with the assignee for payment: yet it was determined, that the personal security was only *auxiliary*, and both principal and interest were charged *primarily* on the land; for although the interest had accrued during the possession of the son, the interest must follow the principal, and be charged on the same fund. Leman v.
Newnham,
1 Ves. 51.
So, Lacam v.
Mertins, Id.
312. Robin-
son v. Gee,
Id. 251.

A. purchased an estate for 90*l.* which was at that time mortgaged for 86*l.*, and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor; the court admitted the rule of law above mentioned, but, in this particular case, thought that, although the covenant was with the vendor only, and the vendee's personal estate not liable in that respect to the mortgagee, yet the words were sufficiently strong to shew an intention in the vendee to make it his personal debt. Parsons v.
Freeman, be-
fore Lord
Hardwicke,
25th Oct.
1751. Vide
2 P. Wms.
664. note 1.

N. was, before her marriage, indebted to sundry persons, and entitled to the inheritance of lands, charged with the payment of sundry sums; and before her marriage entered into articles, whereby the estates were to be settled to the husband for life, *sans* waste, remainder in like manner to wife, remainder to the issue of the marriage, remainder to the wife in fee; the marriage took effect, and the husband being pressed for payment of the wife's debts, and having also occasion for a farther sum of money, they borrowed 1300*l.* of the wife's sister (the original plaintiff in the cause), and secured it by mortgage of the wife's estate, and the husband covenanted for payment of the whole money, and also executed a bond conditioned for payment of the money, according to the provisos in the mortgage. Subject to this mortgage, the lands were settled on the husband for life, remainder to the issue of the marriage, remainder to the wife's sister (the mortgagee) in fee. *N.* died without issue; and the plaintiff was the devisee of the sister, who brought his bill Lewis v.
Nangle, be-
fore Lord
Hardwicke,
7th Nov.
1752. Vide
2 P. Wms.
664. note 1.
|| 1 Cox, 240.
Ambl. 150.
and Pitt v.
Pitt, 1 Turner's
R. 180.||

against *N.*'s husband for the payment of the mortgage-money. But the Lord Chancellor held, that although part of the money was raised for the husband's use, yet the mortgage being a single transaction, he must suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt; and his Lordship dismissed the bill, so far as it sought to compel the husband to exonerate the land, but directed him to keep down the interest during his life.

Forrester v.
Leigh, 23d,
25th June
1775. *Vide*
2 P. Wms.
664. note 1.

L. had purchased several estates, subject to mortgages, with regard to one of which he entered into a covenant to pay the mortgage-money, for the purpose of indemnifying a trustee; and as to another, which was only part of an estate subject to a mortgage, upon splitting the incumbrance, both parties covenanted to pay their respective shares, and indemnify each other; Lord *Hardwicke* thought that these covenants would not have the effect of making the mortgages personal debts of the vendee, they having been entered into for particular purposes, and declared his opinion accordingly in the decree.

Perkins v.
Baynton,
2 P. Wms.
664. note 1.

Sir *W. O.*, by his will of the 5th *February* 1739, taking notice that his daughter *C.* was deaf and dumb, and that *B.* had taken care of her, devised certain real and personal estate to *J. B.*, her heirs, executors, and administrators, in trust, by sale, or selling timber to pay all his debts, and directed that *J. B.* should receive the rents and produce of his real and personal estate without account, during his daughter's life, she maintaining his daughter; and after the death of his daughter, he gave all his real and personal estate whatsoever to *J. B.* in fee, and appointed her sole executrix; Sir *W. O.* died, *March* 1740, and *J. B.* proved the will; Sir *W. O.*, in his lifetime, mortgaged part of his estate, for securing 1500*l.* and interest, which remained a charge at his death. *J. B.* paid off 500*l.*, part of this 1500*l.*, and afterwards borrowed a farther sum of 2500*l.* on mortgage of the estates, which money was, in the mortgage-deed, expressly recited to have been borrowed to enable her to discharge Sir *W. O.*'s debts. *J. B.* afterwards died, and on the disposition made by her, and those claiming under her, of the property of Sir *W. O.*, this cause was instituted. The cause was first heard before Lord *Bathurst*, on the 19th *February* 1777, when the court declared, that the sum of 1500*l.*, part of the 3500*l.* was not to be considered as a debt of the said *J. B.*, but was to remain a charge on the real estate, and directed an account of her personal estate. By an order made on rehearing, on the 13th of *August* 1781, that part of the decree was reversed, and, instead thereof, it was declared, that the said sum of 1500*l.* appearing to have been a charge made on the estate of the said Sir *W. O.* in his lifetime, and remaining such at his death, was to be considered as a continued lien thereon; and that the subsequent charge made on the estate by the said *J. B.*, being expressed in the mortgage-deed to have been made for the purpose aforesaid, the same together, with the 1500*l.*, amounting in the whole to the sum of 3500*l.*, was to be considered as remaining a charge on the said estates.

G. D.

G. D., mortgaged lands to *W. G.*, to secure payment of 5000*l.* with interest, at 5 per cent.; and by will, of 22d of *May* 1723, devised the lands to his nephew *G.*, in tail-male, remainder to the plaintiff in tail-male, remainder over, and died in the same month. In 1725, *G. S.* suffered a recovery to himself in fee. The mortgagee calling for his money, *W. G.* agreed to advance 5000*l.* at 4 per cent. on assignment of the mortgage, which accordingly, by indenture of 4th of *June* 1725, was assigned to him, with proviso for redemption on payment of the principal and interest at 4 per cent.; and *G. S.*, for himself, his heirs, executors, and administrators, covenanted with *W. G.*, that he, his heirs, &c., or some or one of them, would pay to *W. G.* the said principal and interest, in manner therein mentioned. In 1779, *G. S.* agreed to raise the interest to 5 per cent., and by deed covenanted with the mortgagees, that the estate should remain a security for the 5000*l.*, with interest at 5 per cent., and that he, his executors, &c. would pay such interest for the same. In *January* 1782, *G. S.* died, the interest on the mortgage being in arrear for about ten months; and the bill was brought (amongst other things) to have the 5000*l.* and interest paid out of the personal estate of *G.*, or at least the arrear of interest due at his death, and the additional 1 per cent. charged by the deed of 1779; but the Lord Chancellor was clearly of opinion, that the personal estate ought not to discharge the mortgage, the land being the primary fund. His Lordship also thought that the interest must follow the principal, and that the contract for the additional interest, turning upon the same subject, must be in the nature of a real charge.

A real estate charged with a sum of 200*l.* as a bounty was holden to be *primarily* liable, though the personal estate was also subjected by the covenant of the donor.

1785. 2 Cox's P. Wms. 664. note. ||1

A leasehold estate had been mortgaged by the testator's father to *N.*, for 6500*l.*, and had, subject to that mortgage, devolved upon him on the death of his father; afterwards the mortgage was assigned by the desire of the testator to *H.*, who advanced him a farther sum of 100*l.* upon it, and the testator conveyed other estates as an additional security to the mortgagee. The testator then made his will, and thereby devised as follows:—"I give and devise to *A.* and *B.*, their executors, administrators, and assigns, all those my manors, lands, &c. in *L.*, to have and to hold to them, from the time of my decease, for the term of 99 years, upon the trusts hereinafter mentioned." He then gave the real estate subject to the term, and, in default of issue of his own body, to the plaintiff for life, remainder to his first and other sons, in strict settlement, with remainders over, and afterwards declared as follows:—"I do hereby declare, that the term and estate, so as aforesaid limited to them the said *A.* and *B.*, &c., is upon the special trust and confidence, and to the intents and purposes following; that is to say, upon trust, that they the said *A.* and *B.*, &c. shall, out of the rents and

T t 3

" profits,

Shafto v. Shafto, before Lord *Thurlow*, Feb. 1786.

2 P. Wms. 664. note 1. ||1 Cox, R. 207.||

So, Earl of Tankerville v. Fawcett, 2 Br. Ch. R. 57.

Wilson v. Earl of Darlington, at the Rolls, Feb. Cox, R. 174.||

Duke of Ancaster v. Mayor, 1 Br. Ch. Rep. 454. ||and see 1 Mer. 225.||

and certain legacies, and amongst others a legacy to his sister *Elizabeth Rozier*; and he also took all his father's personalty, and was appointed his sole executor. *Johannes Worsfold*, by his will, dated 13th *February* 1761, devised an estate called *A.*, part of the estate of which he was seised in fee under his father's will, to his said sister for life, with remainder to her sons and their heirs, and appointed his sister and *E. H.* executors. On the 15th of *May* 1761, he executed a mortgage of the estate of *A.* for securing the legacy to his sister, and covenanted in the deed for payment of the money. By a codicil of the 5th *August* 1761, he, amongst other things, gave his estate in *D.* to his executors and their heirs, upon trust to sell for payment of all his debts, of what nature and kind soever, and legacies and funeral expenses, expressing his apprehension that his personal estate would not be sufficient. *Elizabeth Rozier* survived *Johannes Worsfold*, and filed her bill to have the estate of *A.*, which she took as devisee of her brother, exonerated by his personal estate from her legacy under the father's will. But the Lord Chancellor decided that the legacy never became the personal debt of *J. Worsfold*, and dismissed the bill with costs.||

Basset v.
Percival,
21st July 1786.
Note (a)
2 P. Wms. 665.
|| 1 Cox, R.
268.||

[*M. D.*, by will of 15th of *January* 1746, devised estates to trustees for a term of 500 years, to raise money for payment of his debts and legacies, in aid of his personal estate; and, subject to the term, he devised the estate in strict settlement with the ultimate limitation to his own right heirs, and he gave the residue of his personal estate to his executrix *C. P.* The executrix applied the personal estate in payment of some of his debts, and all the legacies, except a legacy to herself of 1000*l.*, and then died; whilst the limitations in strict settlement subsisted, and after the death of *C. P.*, her representative filed a bill to have a debt due to *C. P.*, and her legacy, raised; and the only person then entitled under the limitation in strict settlement dying pending the suit, by which event the ultimate limitation to the testator's right heirs took place, a supplemental bill was filed against *M. D.* and *M. D. P.*, the co-heirs of the testator. To stop this suit, the co-heirs liquidated the demands of the representative of *C. P.* at 2070*l.*, and gave their joint and several bond for that sum; this demand was afterwards assigned to *A. B.*, who also bought in debts to the amount of 3270*l.* remaining due from the testator *M. D.*, and the co-heirs gave another joint and several bond to *A. B.*, for this sum also; so that *A. B.* became the sole creditor on the estate. *M. D.* being dead, and a bill being filed by *A. B.* for payment of these sums of money, the question was, Whether a moiety thereof should be raised in the first place out of the personal estate of *M. D.*, or out of the real? and his Honour was of opinion, that the real estate was the original debtor, and ought to bear the burden.]

Bamfield v.
Windham,
Prec. Ch. 101.
Stapleton v.

|| Where the debt is admitted to be the debt of the party, the general rule is that the personal estate is the primary fund for its discharge. The burden may, however, be thrown on the real estate by a clear manifestation of such intention in a testator's will.

will. The cases on this subject are very numerous: and it has been observed by Lord Eldon in a late case (*Bootle v. Blundell*, 1 Meriv. 219.), "that, on a comparison of the cases, it is scarcely "possible to find any two in which the court altogether agrees "with itself." It was formerly held, that if the loan were clearly the debt of the party, nothing short of an *express declaration* of intention would exonerate the personal estate from being the primary fund for its discharge; and Lord Eldon and Sir William Grant have both regretted that this rule was ever departed from. It is now, however, decided, that the intention may be evinced not only by express declaration, but also by *plain implication*, sufficient to satisfy the mind of the judge deciding upon the case. The intention is to be collected from the whole will taken together, and evidence *dehors* the will, though admitted in some earlier cases, is now held to be inadmissible. The intention manifested must be not merely to *charge the real estate*, whether by a trust for sale or otherwise, but also to *exempt the personal estate*. As the inference of intention is to be drawn from the facts of each particular case, it is impossible to lay down any general rules as to the expressions which will or will not be sufficient to express the intention one way or the other. Certain dispositions have, however, been held unfavourable to the claim of exemption; such as the same persons being appointed trustees of the real estate and executors; a gift of the personalty to an executor as a legacy, and his appointment of executor in the same sentence; and still more the circumstance of the personalty falling to the executor *virtute officii*; a bequest of the *residue* of the personal estate, except where preceded by previous bequests of the personal estate; and the circumstance of the real estate being limited in strict settlement and accruing to the same person as the personalty. So, on the other hand, the circumstance of the trustees not being executors, and of a gift of the *whole personalty*, have been held favourable to the inference of an intention to exempt the personal estate from payment of debts. The presumption, however, arising from all or any of these circumstances, is open to be rebutted by opposite presumptions arising from the general contents of the whole will.]]

Philips, 6 Ves. 567. Howe v. Lord Dartmouth, 7 Ves. 149. Watson v. Brickwood, 9 Ves. 447. Hancock v. Abbey, 11 Ves. 179. Tower v. Lord Rous, 18 Ves. 152. Aldridge v. Lord Wallscourt, 1 Ball & B. 512. Bootle v. Blundell, 1 Meriv. 193. 19 Ves. 494. McClellan v. Shaw, 2 Scho. & Lef. 538. Gittins v. Steele, 1 Swanst. 28. Greene v. Greene, 4 Madd. 148.; *et vide ante*, tit. *Executors and Administrators*.

If one devise lands which are in mortgage to *A.* for life, remainder to *B.* in fee; *A.* shall contribute one third towards the discharge of the mortgage, and *B.* the other two thirds.

Walley, 1 Ch. Rep. 221. Ballet v. Spranger, Prec. Ch. 62. Verney v. Verney,

|| But this doctrine is now altered, and the rule now is, that the tenant for life shall only be compelled to keep down the interest during his life; for the whole charge is upon the whole inheritance, and the natural division is, that he who has the *corpus* shall take the burden, and he who has only the fruit shall pay to the extent of the fruit of that debt.]]

Colville, For. 202. Incliquin v. French, 1 Cox, 1. Ambl. 53. 1 Wilson, 83. Andrews v. Emmet, 2 Bro. C. C. 503. Dolman v. Smith, Prec. Ch. 456. French v. Chichester, 2 Vern. 568. Haslewood v. Pope, 5 P. Wms. 525. Fereyes v. Robinson, Bunb. 502. Walker v. Jackson, 2 Atk. 625. Bridgeman v. Dove, 5 Atk. 202. Samwell v. Wake, 1 Bro. C. C. 149. Gray v. Minnethorpe, 5 Ves. jun. 106. Burton v. Knowlton, *id.* 107. Brummel v. Prothero, *id.* 111. Tait v. Lord Northwick, 4 Ves. jun. 816. Hartley v. Hurle, 5 Ves. 540. Brydges v.

[Cornish v. Mew, 1 Ch. Ca. 271. Rowel v. 1 Ves. 428.]

White v. White, 9 Ves. 560. *Vide* Lord Penrhyn v. Hughes, 5 Ves. 99.

[And

and certain legacies, and amongst others a legacy to his sister *Elizabeth Rozier*; and he also took all his father's personalty, and was appointed his sole executor. *Johannes Worsfold*, by his will, dated 13th February 1761, devised an estate called *A.*, part of the estate of which he was seised in fee under his father's will, to his said sister for life, with remainder to her sons and their heirs, and appointed his sister and *E. H.* executors. On the 15th of May 1761, he executed a mortgage of the estate of *A.* for securing the legacy to his sister, and covenanted in the deed for payment of the money. By a codicil of the 5th August 1761, he, amongst other things, gave his estate in *D.* to his executors and their heirs, upon trust to sell for payment of all his debts, of what nature and kind soever, and legacies and funeral expenses, expressing his apprehension that his personal estate would not be sufficient. *Elizabeth Rozier* survived *Johannes Worsfold*, and filed her bill to have the estate of *A.*, which she took as devisee of her brother, exonerated by his personal estate from her legacy under the father's will. But the Lord Chancellor decided that the legacy never became the personal debt of *J. Worsfold*, and dismissed the bill with costs.||

Basset v.
Percival,
21st July 1786.
Note (a)
2 P. Wms. 665.
||1 Cox, R.
268.||

[*M. D.*, by will of 15th of January 1746, devised estates to trustees for a term of 500 years, to raise money for payment of his debts and legacies, in aid of his personal estate; and, subject to the term, he devised the estate in strict settlement with the ultimate limitation to his own right heirs, and he gave the residue of his personal estate to his executrix *C. P.* The executrix applied the personal estate in payment of some of his debts, and all the legacies, except a legacy to herself of 1000*l.*, and then died; whilst the limitations in strict settlement subsisted, and after the death of *C. P.*, her representative filed a bill to have a debt due to *C. P.*, and her legacy, raised; and the only person then entitled under the limitation in strict settlement dying pending the suit, by which event the ultimate limitation to the testator's right heirs took place, a supplemental bill was filed against *M. D.* and *M. D. P.*, the co-heirs of the testator. To stop this suit, the co-heirs liquidated the demands of the representative of *C. P.* at 2070*l.*, and gave their joint and several bond for that sum; this demand was afterwards assigned to *A. B.*, who also bought in debts to the amount of 3270*l.* remaining due from the testator *M. D.*, and the co-heirs gave another joint and several bond to *A. B.*, for this sum also; so that *A. B.* became the sole creditor on the estate. *M. D.* being dead, and a bill being filed by *A. B.* for payment of these sums of money, the question was, Whether a moiety thereof should be raised in the first place out of the personal estate of *M. D.*, or out of the real? and his Honour was of opinion, that the real estate was the original debtor, and ought to bear the burden.]

Bamfield v.
Windham,
Prec. Ch. 101.
Stapleton v.

|| Where the debt is admitted to be the debt of the party, the general rule is that the personal estate is the primary fund for its discharge. The burden may, however, be thrown on the real estate by a clear manifestation of such intention in a testator's will.

will. The cases on this subject are very numerous; and it has been observed by Lord *Eldon* in a late case (*Bootle v. Blundell*, 1 Meriv. 219.), "that, on a comparison of the cases, it is scarcely possible to find any two in which the court altogether agrees "with itself." It was formerly held, that if the loan were clearly the debt of the party, nothing short of an *express declaration* of intention would exonerate the personal estate from being the primary fund for its discharge; and Lord *Eldon* and Sir *William Grant* have both regretted that this rule was ever departed from. It is now, however, decided, that the intention may be evinced not only by express declaration, but also by *plain implication*, sufficient to satisfy the mind of the judge deciding upon the case. The intention is to be collected from the whole will taken together, and evidence *dehors* the will, though admitted in some earlier cases, is now held to be inadmissible. The intention manifested must be not merely to *charge the real estate*, whether by a trust for sale or otherwise, but also to *exempt the personal estate*. As the inference of intention is to be drawn from the facts of each particular case, it is impossible to lay down any general rules as to the expressions which will or will not be sufficient to express the intention one way or the other. Certain dispositions have, however, been held unfavourable to the claim of exemption; such as the same persons being appointed trustees of the real estate and executors; a gift of the personalty to an executor as a legacy, and his appointment of executor in the same sentence; and still more the circumstance of the personalty falling to the executor *virtute officii*; a bequest of the *residue* of the personal estate, except where preceded by previous bequests of the personal estate; and the circumstance of the real estate being limited in strict settlement and accruing to the same person as the personalty. So, on the other hand, the circumstance of the trustees not being executors, and of a gift of the *whole personalty*, have been held favourable to the inference of an intention to exempt the personal estate from payment of debts. The presumption, however, arising from all or any of these circumstances, is open to be rebutted by opposite presumptions arising from the general contents of the whole will. ||

Philips, 6 Ves. 567. Howe v. Lord Dartmouth, 7 Ves. 149. Watson v. Brickwood, 9 Ves. 447. Hancock v. Abbey, 11 Ves. 179. Tower v. Lord Rous, 18 Ves. 132. Aldridge v. Lord Wallscourt, 1 Ball & B. 312. Bootle v. Blundell, 1 Meriv. 193. 19 Ves. 494. McClellan v. Shaw, 2 Scho. & Lef. 538. Gittins v. Steele, 1 Swanst. 28. Greene v. Greene, 4 Madd. 148.; *et vide ante*, tit. *Executors and Administrators*.

If one devise lands which are in mortgage to *A.* for life, remainder to *B.* in fee; *A.* shall contribute one third towards the discharge of the mortgage, and *B.* the other two thirds.

Walley, 1 Ch. Rep. 221. Ballet v. Spranger, Prec. Ch. 62. Verney v. Verney,

|| But this doctrine is now altered, and the rule now is, that the tenant for life shall only be compelled to keep down the interest during his life; for the whole charge is upon the whole inheritance, and the natural division is, that he who has the *corpus* shall take the burden, and he who has only the fruit shall pay to the extent of the fruit of that debt. ||

Colville, For. 202. Inchiquin v. French, 1 Cox, 1. Ambl. 35. 1 Wilson, 83. Andrews v. Emmet, 2 Bro. C. C. 303. Dolman v. Smith, Prec. Ch. 456. French v. Chichester, 2 Vern. 568. Haslewood v. Pope, 5 P. Wms. 525. Fereyes v. Robinson, Bunb. 302. Walker v. Jackson, 2 Atk. 625. Bridgeman v. Dove, 3 Atk. 202. Samwell v. Wake, 1 Bro. C. C. 149. Gray v. Minnethorpe, 5 Ves. jun. 106. Burton v. Knowlton, *id.* 107. Brummel v. Prothero, *id.* 111. Tait v. Lord Northwick, 4 Ves. jun. 816. Hartley v. Hurle, 5 Ves. 540. Brydges v. [Cornish v. Mew, 1 Ch. Ca. 271. Rowel v. 1 Ves. 428.] White v. White, 9 Ves. 560. *Vide* Lord Penrhyn v. Hughes, 5 Ves. 99.

[And

Hayes v.
Hayes,
1 Ch. Ca. 223.

[And if the mortgage-money is payable on a contingency not arrived, he in remainder or reversion may exhibit his bill *quia timet*, against the tenant for life, and the tenant for life shall be decreed to contribute.]

Newling v.
Abbot, East,
1 Geo. 2 Eq.
Ca. Abr. 596.
11. [refers to
Vin. Abr., but
the editor
finds no case
of this name in
that book.]

And if the tenant for life of the equity of redemption pays off the mortgage, and has the term assigned over in trust for himself, and makes improvements, and dies; and afterwards the remainder-man or reversioner comes to redeem; the representatives of tenant for life shall have the allowance of two thirds of the lasting improvements, but nothing for the other third, because he received the benefit thereof during his life; and no interest shall be allowed during the life of tenant for life for the money he paid, for he is bound to keep down the interest during his estate.

James v.
Hailes, Prec.
Ch. 44.; ||*sed*
vide 9 Ves. 560.
5 Ves. 99.||

In the case of *James* and *Hailes*, it is laid down that, if an estate in mortgage be settled on *A.* for life, and then on *B.* in tail or in fee, the tenant for life shall bear two fifths of the principal and interest, and the remainder-man three fifths.

Kirkham v.
Smith,
1 Ves. 258.

But where he who is possessed of the equity of redemption hath such an interest in the estate, as he can *secure* the money laid out by him to redeem upon, the remainder-man shall pay him, or his representatives, *all* he hath advanced. As, where a *tenant in tail* of a mortgaged estate, under the will of his father, upon the death of his two brothers, paid off a death originally on the estate by mortgage term for years, but neglected to have an assignment of the term to himself, and afterwards devised the same lands; and the plaintiffs, the remainder-men under the will, claimed the estate, as not barred, discharged of the incumbrance: the Lord Chancellor held, that there being a term for years in the mortgagee, which stood in point of law as it did before, no assignment in law being made thereof, none of the parties before the court had the legal estate, for a conveyance of which the plaintiffs came; and therefore *that* conveyance must be upon equitable grounds. That, so far as it appeared, tenant in tail paid it off with his own money; that he might have taken an assignment of the term, either in trust, to attend the inheritance, which would have ended this question, or in trust for himself, his executors, or administrators, which would, notwithstanding the remainder over, have kept this incumbrance on foot for the benefit of his personal estate and those entitled thereto; or, that he might have called for an assignment of it in his life, if he had found out this limitation in remainder, that it might have been made for the benefit of his executors, *not* of the remainder; but his not doing any of these, clearly proved that he took himself to have had the absolute ownership and disposal of it. And the court could not decree, to persons claiming this, in contradiction to his apprehension and intent, a conveyance of the inheritance, and likewise of this term, without making a satisfaction to the personal estate of the tenant in tail; as that would be contrary to the maxim, *that he who would have equity, must do equity*; and the plaintiffs were decreed to have the estate, subject to the money paid by the tenant in tail in discharge of the mortgage.]

But, if lands in mortgage are devised to *A.* for life, remainder to *B.* in fee, and *A.* takes an assignment of this mortgage in a trustee's name; though *B.* might have compelled *A.* to contribute one third towards payment of the mortgage, in respect of his estate for life, yet if *A.* be dead, and the bill be brought against his executor, he shall be obliged to contribute only in proportion to the time that *A.* his testator enjoyed it.

Vern. 404.
Clyat v.
Battison.

A. mortgaged his lands upon condition, that if he or his heirs repaid 100*l.* at such a day, he should re-enter; before the day he dies, leaving issue a daughter, his wife *ensient* with a son; the daughter pays the money at the day, and then the son is born; the daughter shall keep the lands, and the son shall not recover against her; for the daughter is in nature of a purchaser, where she hath regained the land by her own vigilance, which otherwise had lapsed at law to the mortgagee.

Cro. Car. 87.
Co. 99.

[If one purchase an estate subject to a mortgage, his personal estate will not be liable to exonerate the real estate from payment of the mortgage-debt, although he covenant with the vendor to pay the mortgage, and indemnify him from all costs and charges in respect of it. Thus, *A.* agreed to purchase an estate of *B.*, which was then subject to a mortgage of 2000*l.* to *D.*; and accordingly, by indenture of lease and release between *A.* of the one part, and *B.* of the other part, reciting the mortgage, and that *B.* had contracted with *A.* for the purchase of the inheritance of the said estate, and had agreed to pay the sum of 3500*l.* for the same in manner therein mentioned; that was to say, to the mortgagee all such sums as should be due to him upon the said mortgage on the first of *May* next ensuing, as also to pay such sum of money as should remain after deducting the money due to the mortgage of *D.*; it was witnessed that the said *A.*, in consideration thereof, did grant, &c. to the said *B.*, his heirs and assigns for ever, all the said premises, &c.; and in the covenant against incumbrances, the mortgages and securities were excepted. And the said *B.* did covenant, that he, &c. would well and truly pay, or cause to be paid, to the said *D.*, the said sum due in manner aforesaid, and would indemnify the said *A.*, his heirs, &c., and his goods and chattels, land and tenements, from all costs and charges, &c. in respect of the said mortgage. *A.*, after completing the purchase of *B.*, made his will and died, and then a question arose between his personal representatives and the devisees of this estate under the will, Whether, from the nature of the contract, the personal estate of *A.* (respecting which he had made no disposition in his will) was liable to be applied in discharge of the mortgage? *Et per curiam*, it is a clear rule that the personal estate is never charged in equity where it is not a law; and if not chargeable at law, there is no principle or case in this court to warrant its being chargeable in equity, contrary to the order of the law. Where it is a debt payable by executors at law, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims. In respect of the rule of marshalling assets, it is that it must be a debt affecting both the

Tweddel v.
Tweddel,
2 Br. Ch. Rep.
101.
||Butler v.
Butler,
5 Ves. 534. ||

real

real and personal estate; so in case the personal fund proves deficient, to enable the court to marshal the assets, you must prove that the executors are accountable at law, and not in equity. In this case, the personal estate never was liable, either by action against the party himself, or against his executors.]

Woods v.
Huntingford,
3 Ves. jun. 128.

¶ Although in general a mere covenant by the purchaser with the vendor to pay the mortgage debt is not sufficient to indicate an intention to make the debt his own, so as to throw the burden on the personal estate, yet that, joined with other special circumstances, has been held to have that effect. *Richard Huntingford* and *Alice* his wife being tenants for life, with remainder to their eldest son *John*, in fee of certain lands, they all joined in mortgaging them for securing money raised for the benefit of *John* alone. The father and son covenanted for payment of the money; a further sum was afterwards advanced, for payment of which they also covenanted, and thus both became liable to an action at law for the money. The interest being greatly in arrear, and *John* being desirous of being discharged from the debt, conveyed his remainder in fee to *Richard*, in consideration of *Richard* taking upon himself the debt, and covenanting to indemnify *John* therefrom. *Richard* afterwards borrowed a further sum, and made a fresh mortgage of the estate for the whole sum. The Master of the Rolls thought this case distinguished from *Tweddell v. Tweddell*, and relying principally on the circumstance of the father's being liable at law jointly with the son, and on the new mortgage by the father for the whole debt, decided that *Richard H.* had made the debt his own, and consequently that his personal estate was the primary fund for the discharge of it.

Waring v.
Ward, 5 Ves.
671. 7 Ves.
332.

So, also, if a purchaser borrow a sum of money to enable him to complete his contract, and the estate is on the purchase limited to the lender by way of mortgage, the debt is the proper debt of the purchaser, and his personal estate is primarily liable, though a part of the money borrowed be applied in discharge of an existing mortgage. An estate was sold by order of the Court of Chancery to Mr. *Waring* for 32,500*l.* The estate was in mortgage for 17,800*l.* The purchaser paid 12,500*l.* into court, and borrowed 20,000*l.* from Sir *R. Cunliffe*, which was also paid into court; and all parties concurred in a conveyance to Sir *R. Cunliffe* in fee, subject to redemption by *Waring*, on payment of 20,000*l.* and interest. It was contended that the land was the primary fund for payment of the money borrowed, or at least of so much of it as was applied to discharge the original mortgage. But the court decided that the whole debt was the debt of *Waring*, that the transaction was a personal contract between him and *Cunliffe*, and consequently that the money was to be paid out of the personal estate.

Earl of Oxford
v. Lady Rod-
ney, 14 Ves.
417.; vide also
2 Eden, R.
162.

So, in a case where one *Nicholl*, being possessed of the equity of redemption of a house, sold the equity of redemption to Lord *Oxford*, in consideration of 1360*l.*, subject to a mortgage of 2100*l.* to Mr. *Wilbraham*. *Wilbraham* was a party to the conveyance, and covenanted that if Lord *Oxford* paid the 2100*l.*, with interest, on certain days and in certain proportions, mentioned in the purchase-

purchase-deed, he would re-assign the premises; and Lord *Oxford* covenanted that he would pay the debt accordingly. It was held that Lord *Oxford*'s personal estate was the primary fund.||

[Sir *John Napier*'s estate was in mortgage, and he died, leaving Sir *Theophilus* his heir, who, upon his intermarriage with Lady *Effingham*, settled a jointure upon her, and covenanted to pay his father's debts, and then died, possessed of a considerable personal estate, which came to his wife, having disposed of a real estate, which was settled by an act of parliament, in trust to pay his father's debt: the heir at law brought his bill against the wife, to have the personal estate of the husband, upon his covenant, applied to discharge the father's mortgages, and it was so decreed. But the reason was, because the heir had disposed of the estate so settled in trust, and then it was but just and equitable that his personal estate should be applied to exonerate the mortgaged estate, descended to the heir at law, because he was answerable for the trust estate, settled for that purpose.]

If a man enter into a bond, in which he binds himself and his heirs, and dies, leaving a real estate to descend to his heir, subject to a mortgage for years, and the heir sells the equity of redemption, the obligee cannot redeem the mortgage, without first having a judgment at law against the heir.

A dowress may redeem a mortgage, paying her proportion of the mortgage-money; and as to the rest, she may hold over till she is satisfied.

||*Prec. Chan.* 137.; and see *Powell*, 681. note (F).||

So, if a jointure is made of lands which are mortgaged, the wife may redeem, and her executor shall hold over till repaid with interest; because such tenant for life ought to be reimbursed the money she paid to set her estate free, and in the condition she ought to have been in.

But if a jointress after marriage join with her husband in a fine, and mortgage the land, and the husband die; there, her land is charged, and she shall pay her part towards the disburdening of the land; and her executors shall not hold the land till satisfied thereof, because she herself concurred in laying on the charge, and therefore must join in the disburdening of it, according to the value of her interest.

If the wife joins in a mortgage, and levies a fine, with an intent to bar her dower; and in consideration thereof the husband agrees that she shall have the equity of redemption in lieu of her dower, and he afterwards mortgages the same estate twice more; though this agreement be fraudulent against the subsequent mortgagees, so far as to entitle the wife to the whole equity of redemption, yet she shall have her dower, if she survives her husband, and shall not be put to her writ of dower, because the estate may be so conveyed away by some of the mortgagees that possibly she may not know against whom to bring her writ of dower.

If a man marries a jointress of houses which are burnt down, and the husband and wife borrow 1500*l.* to build on the ground, and

Napier v.
Lady Effingham, Fitzg.
142. 144.
||*S. C.* 2 *P.*
Will. 401.
5 *Bro. P. C.*
221. *nom.*
Effingham v.
Napier.||

Abr. Eq. 315.
Bateman v.
Bateman.
||1 *Atk.* 421.||

Abr. Eq. 219.
Palmer v.
Danby.
681. note (F).||

Chan. Ca. 271.
2 *Vent.* 243.
2 *Chan. Ca.*
100. 161.

Chan. Ca. 271.
2 *Chan. Ca.*
99, 100.

Vern. 294.
Dolin v.
Coltman.

Vern. 215.
Brend v.
Brend.

||1 Eq. Ca. Ab. 62. Skin. 338 ||
[In this case, as reported by the name of Brond v. Brond, 2 Ch. Ca. 98. it is stated, that there was an agreement, that the wife should not be prejudiced, but should redeem, paying the interest of the money borrowed, and that the court resolved, that the wife having suffered the representatives of the husband to remain in possession, and pay off his debts, without exhibiting her claim for a long period of time, should not be allowed any profits received by the husband's representatives, but from the time of filing the bill, which was the first notice to them of such agreement.]

and levy a fine *sur concessit* for ninety-nine years, if the wife lives so long, and a deed is made between the conusee and the husband, wherein the husband covenants to repay the mortgage-money, with interest; and the equity of redemption is limited to the husband and his heirs, and the husband expends 3 or 4000*l.* in building on this ground, and dies; the wife shall redeem, and not the heir of the husband; for the wife was no party to the deed of re-demise, by which the redemption was limited to the husband; and the wife being a jointress, and having granted a term for years only, out of her estate for life, there rests a reversion in her, which naturally attracts the redemption.

2 Vern. 480.
Acton v.
Pierce.

A. on his marriage agreed to leave his wife 1000*l.* if she survived him; the drawing of the agreement was left to the parson of the parish, who made a bond from *A.* to his intended wife in 2000*l.* conditioned to leave her 1000*l.* if she survived him; the marriage was had, and *A.* died, leaving a freehold and copyhold estate in mortgage, and which were mortgaged together; and it was held, that the wife should redeem as well the freehold as copyhold, and hold over till she was satisfied.

2 Vern. 437.
The Earl v.
the Countess
of Hunting-
ton.
||Corbett v.
Barker, Anst.
138. 755.
Ruscomb v.
Hare, 6 Dow.
P. C. 1.||

A. joins with *B.* her husband in making a mortgage for years of her inheritance for 4500*l.* to supply the husband's occasions, and to pay for the place of captain of the band of pensioners; and subject to the mortgage, which was for a term of years, the estate was settled on *A.* for life, remainder to her son in tail: *B.* in the mortgage-deed covenants to pay the money, and the proviso was, that on the payment of the mortgage-money the term was to cease: the mortgage was several times assigned, and particularly in 1683, and the wife joined in it, and there the proviso was, that on payment of the money by them, or either of them, the mortgage-term was to be assigned as they, or either of them, should direct or appoint; a few days after the mortgage was made, *B.* by letter thanked his wife for having sealed it, and added, that the profits of the office should be religiously applied to pay off the incumbrance: but afterwards, when money came in, though he paid off the mortgage, yet he took an assignment thereof in trust for himself; and by will devised his personal estate, and the benefit of this mortgage, to his second wife. On a bill by the son of the first wife, to have this mortgage assigned him, it was declared by my Lord Keeper, that he could not decree for him, but upon the usual terms of redemption, on payment of principal, interest, and costs, discounting profits. But upon an appeal to the Lords, the son obtained a decree to have the mortgage assigned to him.

1 Br. P. C. 1.

||The general principle of equity is, that if money be borrowed by husband and wife, upon the security of the wife's estate, although the equity of redemption is by the mortgage-deed reserved

served to the husband and his heirs, yet there shall be a resulting trust for the benefit of the wife and her heirs, and the wife or her heir shall redeem, and not the heir of the husband. But if a clear intention appears on the face of the mortgage-deed, to give the equity to the husband and his heirs, in that case the husband or his heir shall redeem; and this intention may be collected from the *limitations*, and need not necessarily be expressed by *recitals* in the deed.

Mary Hare was devisee of her late husband's lands, subject to two mortgages for 800*l.* and 450*l.*, and also his executrix and residuary legatee. After his death she married *Bruford*, and joined with him in a conveyance, reciting those mortgages and payment of interest on them to that time by *Bruford*, and conveying the estates to the mortgagee, for better securing the mortgage-monies and interest, at 5*l.* per cent. (the interest before having been 4*l.* 10*s.* per cent.), discharged of the former proviso for redemption, and subject to a proviso, that in case *Bruford* should pay the mortgage-money and interest at five per cent., the mortgagee should reconvey to him, his heirs and assigns, for ever. The wife died in 1794, and the husband in 1799; and the son and heir of the wife filed a bill for redemption against a vendee under the husband and the mortgagee, and also against the devisees of the husband. The Lord Chancellor decreed a redemption by the heir accordingly; and on appeal to the House of Lords, the decree was affirmed, the Lord Chancellor expressing his opinion that the *intention* of the mortgage by the husband and wife was to secure the higher rate of interest, and not to reserve the equity of redemption to the husband.

Ruscombe
v. Hare,
6 Dow. P.C. 1.

By a marriage settlement, lands were settled to the use of the husband and wife successively, for life, remainder in strict settlement, remainder to the wife and her heirs, with a power of revocation and new appointment; and the wife joined with her husband in a mortgage for a term of years, subject to redemption on payment of the money and interest, on which the term was to be void. A fine was levied according to covenant, and by the deed, to lead the uses, the lands were limited after determination of the mortgage term to the husband and wife, and survivor for life, remainder in tail special; and for default of issue, remainder to the right heirs of the survivor of husband and wife. The wife having died without issue, leaving the husband surviving, it was decided by the House of Lords, on appeal, (reversing the decree of the Court of Chancery) that this was more than a mere mortgage transaction; that the mortgage term and the fee being kept distinct in the deed, there was on the face of the limitations an apparent intention, after the purposes of the security were satisfied, to limit the estate to fresh uses; and therefore that the heirs of the husband, and not the heirs of the wife, were entitled to redeem.||

Jackson v.
Innes and
others,
1 Bligh, R.
104. and
16 Ves. 35.;
and see
Powell, 678.
notá (6th ed.)

So, where *A.* and his wife mortgaged the wife's estate, and *A.* covenanted to pay the money, but the equity of redemption was reserved to them and their heirs; the husband dying, it was decreed,

2 Vern. 604.
Pocock v.
Lee.

creed, that the mortgage should be discharged out of the husband's estate.

Tate v.
Austin,
1 P.Wms. 264.
2 Vern. 689.
S. C.

[Again, a husband, seised in right of his wife, borrowed 500*l.* to supply *his* occasions; for securing which, he and his wife levied a fine of her inheritance, and raised a term of 500 years, which was limited to the person lending the money, with remainder to the wife in fee, to be void nevertheless upon payment of the money borrowed, with interest; and in the deed, the husband covenanted to pay it off. Afterwards, the husband made his will, by which he gave several charities out of his personal estate, and then died, without having discharged the mortgage, indebted by simple contract. The assets not being sufficient to pay the mortgage-money, and also the charities given by the will, the widow exhibited her bill to have the former discharged out of her husband's personal estate. And so it was decreed; for his personal estate would be liable to pay debts before legacies, though left to a charity, they being still but legacies.

Clinton v.
Hooper,
1 Ves. jun. 188.

|| But if the wife or her heir, after the husband's death, promise to relinquish her claim, the husband's estate shall be exonerated; and parol evidence is admissible of such agreement, though not admissible, as it should appear, to prove that the money was a *gift* to the husband, contrary to the express terms of the deed. The court said that where the money was intended as a *gift* to the husband, the estate might be vested by a fine in trustees upon trust, by sale or mortgage, to raise the money; in which case the debt could never be the debt of the husband, but a sum to which he would have an original right without any obligation to repay.||

Ran v.
Cartwright,
1 Ch. Ca. 59.
1 Vern. 193.
Nelson, 101.
Eq. Ca. Abr.
315. 1.
Barthrop
v. West,
2 Rep. Ch. 62.

Where a man made a voluntary deed, and afterwards mortgaged the same lands, and the *first deed*, on trial at law, was found fraudulent against the mortgagee; yet, on a bill exhibited by the person to whom the deed was made to redeem the mortgage, it was held, that, although the first deed was fraudulent, because voluntary, as to the mortgage, yet it was good as to the equity of redemption, and would pass that; for a voluntary deed would bind the party that made it, and his heirs.

1 Ch. Ca. 71.
||As to bankruptcy of
mortgagor, *vide* tit. *Bankrupt*.||

Assignees of a bankrupt may redeem, or assign an equity of redemption.

Dougl. Rep.
22. Keech
v. Hall.
||2 Crui. Dig.
110. (2d ed.)||

So, likewise, a tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it; ||and this although he be lessee of the mortgagor only, after the mortgage made.||

Howard v.
Harris, 1 Vern. 33.

The assignee, in equity, may redeem a mortgage.

||Nelson, 101.
1 Eq. Ca. Abr.
315.||

And an assignee of the equity of redemption, which has been deserted for a time, but not for that period which is a bar to a redemption, will, if there are circumstances which would induce the court to decree a redemption in favour of the mortgagor or his representative, be entitled to the benefit of it. Therefore,

Lord

Lord *Hardwicke*, in a case where a prowling assignee had bought an equity of redemption, which had been abandoned for fifteen years, for a very inconsiderable sum, imagining that, from some knowledge of the law, he might be able to unravel a great number of circumstances, and by that means entitle himself to a redemption, was of opinion, that he was entitled to a decree to redeem. But his Lordship held him entitled only upon these terms, *viz.* that the assignee, in taking the account before the Master, should be confined to surcharge, and falsify only, and the interest upon the mortgage be computed at five per cent., though at that period money bore a higher rate of interest.

A mortgage by a popish heir may be redeemed by the next protestant heir.

Anonymous,
3 Atk. 314.

Jones v.
Meredith
et al.,

Bunb. 546. Com. Rep. 561.

An equity of redemption will follow the custom as to the legal estate. In borough-english lands, if mortgaged, the equity of redemption will descend to the youngest son to whom the lands descend.

2 Ves. 304.

So, in mortgages of gavelkind, lands which descend to all the children equally, the equity of redemption descends to all likewise.

Ibid.

And it may be devised. Thus, where one, seised in fee-simple, mortgaged his lands, with a proviso for repayment by him, his heirs or assigns, and then devised the same premises, the court decreed, on a bill by the devisee to redeem, that the equity of redemption belonged to him and not to the heir.

Philips v.
Hele,
1 Ch. Rep.
190. *et vide*
2 Burr. 978.

But if a mortgagor, before the condition broken, devise, it will be void; for a condition is not devisable.

2 Chan. Ca. 8.

Every devisee of a mortgaged estate that brings a bill to redeem, need not make the heir at law party: if the devisee claims to have the will established, it is necessary; if only a title under the will, it is not.

2 Ves. 431.

A judgment-creditor may redeem against a mortgagee of a leasehold estate, who is likewise a bond creditor: but, before the bill is brought to redeem, a writ of execution must be sued out; for until that be done, the judgment-creditor hath no lien on the leasehold estate, and, for want of its being taken out, the bill in the principal case was dismissed.

Shirley v.
Watts,
5 Atk. Rep.
200.
Angel v.
Draper,
1 Vern. 599.
King v.

Marissal, cited in the principal case. ||As to whether the judgment must be docketed, see Powell, 281. a. note.||

Tenant by *elegit*, statute merchant, or staple, may redeem.

Bunb. 347.

2 Eq. Ca. Abr. 594. notes.

And the law is the same as to a judgment-creditor, though the judgment be with stay of execution. Thus, *H.* in 1693, confessed a judgment, with a defeasance, by which it was not to take effect until after the death of a woman, who lived until 1726. The estate, subject to this judgment, descended in the mean time from *H.* to his heir, who mortgaged it to *T.* The mortgagee had no notice of the judgment at the time: the heir afterwards, in 1721, about five years before the woman died, became bankrupt; and

Stonehewer v.
Thompson,
2 Atk. 440.

the mortgagee was appointed assignee. After her death, the representative of the judgment-creditor brought his bill against the assignee to redeem the mortgage, upon payment of principal, interest, and costs. The question was, Whether, as there was no actual *elegit* taken out by the judgment-creditor before the commission of bankruptcy issued, the assignee under the commission, *qua* such, or the judgment-creditor, should redeem? And it was contended on the side of the assignee, that the heir was chargeable *only* as *terre-tenant*; and therefore the person *who* claimed under the judgment was *not* a creditor of *the bankrupt*. *Sed per cur.*—The judgment-creditor is entitled to redeem the whole (for it must be entire) and to have the estate of *H.* exonerated out of that of his heir, if the heir's is sufficient. As to the point which had been laboured, in order to make this person come in as a creditor under the commission of bankruptcy, there was nothing in it. If it had been merely a bond-creditor from the ancestor, there might have been some colour to insist upon this under the statute of fraudulent devises; because that act made it a debt against the heir himself, as well as the ancestor. But it was entirely different here, as this was *a judgment* which was *a lien* upon the land, *à fortiori* a *lien* upon the lands in the hands of the assignee under the commission, who stood only in the place of the bankrupt.

Attorney
General v.
Crofts, 1 Bro.
P. C. 22. ||

The crown may redeem estates mortgaged, forfeited by the mortgagor by his being indicted and outlawed for high treason.

|| *Vide dictum* of M. R. in Burgess v. Wheate, 1 Eden, R. 211.||

Palmes v.
Danby,
Prec. Ch. 137.

If an estate descend to an infant, subject to incumbrances, the guardian may, without the direction of a court of equity, apply the profits to discharge the incumbrances, *viz.* to pay the interest of any real incumbrance, and the *principal* of a mortgage; because that is *a direct and immediate* charge upon the land; but *not* the principal of any other real incumbrance.]

2. To whom the Mortgage-Money shall be paid.

Chan. Ca. 88.
Smith v.
Smoult.

Mortgages, being part of the personal estate, belong to the executors or administrators; though it was formerly held, that if a feoffment in fee was made upon condition, that if the mortgagor paid the sum to the mortgagee, his heirs, executors, or administrators, that then the mortgagor should re-enter, and the day passed without payment, and the mortgagee died, whereby the lands descended to his heir; in such case, the heir being named in the condition, and no bond or covenant given to make it appear a personal matter, and no deficiency of assets to pay creditors, that the heir parting with the benefit descended to him, should have the money in the mortgage.

Chan. Ca. 283.
2 Chan. Ca.
50, 51. 220.
2 Vent. 543.
351.
Hard. 467.

But afterwards it was truly settled by the Lord Chancellor *Finch*, that the money should go to the executors or administrators, and not to the heir; and the reason was, because equity follows the law. And at common law, if conditions or defeasances of mortgages are so penned, as no mention is made either of heirs

or

or executors, in that case the money ought to be paid to the executors, because the money came out of the personal estate, and therefore ought to return thither again. But if the defeasance appoints the money to be paid to the heir or executor disjunctively, there, by the common law already mentioned, if the mortgagor pay the money precisely at the day, he may elect (a) to pay it either to the heir or to the executor. But where the precise day is past, and the mortgage forfeited, all election is gone in law, for in law there is no redemption. And when the case is reduced to an equity of redemption, it were perfectly against equity to revive the election of the mortgagor; because that would only tend to the delay of the payment of the money as long as he pleased, and end in compositions to pay the money into that hand which would use him best. And to say that the election should be in the court, would be to place an arbitrary power in it, which would tend to the inconvenience of the subject; since no man could safely pay the money in such cases, without a suit in equity. And, therefore, since there ought to be a certain rule, a better cannot be chosen, than to come as near as can be to the rule and reason of the common law. Now the law always gives the money to the executor where no person is named, and where the election to pay either to the heir or the executor is gone and forfeited in law, it is all one as if neither heir nor executor were named in the condition. And then, in natural justice and equity, the principal right of the mortgagee is to his money, and his right to the land is only as a deposit or pledge for his money; and therefore the money ought to be paid into the proper hand, that the mortgagee hath appointed receiver of his money, and that is his executor. And then the heir, who is only a trustee to keep the pledge, ought to deliver it back to the mortgagor; for though the heir has the use and benefit of the land till redeemed, yet he has it only as a pledge, and therefore is a trustee to restore it when the money is paid to the proper hand; and the heir himself, though he be proper to keep the pledge, being land, yet he is not proper to receive the money, it being purely personal. Nor is it hard that the heir should part with the land without having the money that comes in lieu of it; because we are to consider that the money was originally parted with from the personal estate, and had immediately come into the hands of the executor, had it not been placed out on this real security. Whether, therefore, the executor has assets or not, the mortgage-money should be paid to him. But the mortgagee, by any conveyance in his lifetime, or by his last will and testament, may dispose of it otherwise to whom he pleases.

If the heir of the mortgagee forecloses the mortgagor, the executor being no party, upon a bill by the executor against the heir of the mortgagee and the mortgagor, the land will be decreed the executor.

But if the executor of the mortgagee, after a foreclosure by the heir, brings a bill to have the benefit of the mortgage,

Vern. 170.
412.
Prec. Chan.
11.

[(a) If the mortgage be in fee, conditioned, that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns; and the mortgagee die before the mortgage forfeited, though the mortgagor has in this case his election to pay the money to either, yet it will belong to the executor.]
2 Ventr. 551.]

2 Vern. 66.

2 Vern. 67.

the heir, if he thinks fit, may take the benefit of the foreclosure to himself, paying the executor the mortgage-money and interest.

Ellis v. Gnavas,
2 Ch. Ca. 50.
|| If the mortgagee devise the land by will, not executed according to the

statute of frauds, *qu.* whether the devisee or executor or administrator shall have the land? it seems the devisee; for such devise appears to be out of the statute. See Powell, 428. (6th ed.)||

2 Vern. 567.
Tabor v. Grover.
|| 1 Eq. Ca. Ab. 328. 2 Freem. 227.||

2 Vern. 193.

If there be a mortgage in fee of a long standing, and there be two descents cast since the mortgage was made; though the mortgagor, by answer, says he will not redeem, yet the mortgage shall go to the executor, and not to the heir, the equity of redemption not being foreclosed or released.

[Although a mortgagor, the mortgage being forfeited, releases to the heir of the mortgagee in fee, yet the administrator shall have the benefit of that estate, even though there be no debts. And so it is in case a mortgage be foreclosed, or that the mortgage be of so ancient a date as in the ordinary course of the court it be not redeemable; *for, in case the mortgagee be not actually in possession, it will be looked upon to be personal estate.*

Turner v. Crane, 1 Vern. 170. || 2 Ch. Rep. 155.||

And, where there was husband and wife, and the wife, having a mortgage in fee of a copyhold, died leaving issue, which issue was admitted, and died, and then the husband, as administrator to his wife, claimed title to the copyhold, being a mortgage, and so part of his wife's personal estate: it was decreed to him against the heir at law, although the latter had been admitted.

1 Ch. Ca. 285.
1 Vern. 4.

So, a mortgage of an inheritance, to a citizen of *London*, hath been held to be part of his personal estate, and divided accordingly to the custom.

Garrett v. Evers, Mosel. 364. || See Powell, 423.a.||

But where a mortgage was devised as real estate, after a decree of foreclosure *nisi*, it was held to be personal estate for payment of debts, if assets fell short, though considered as real estate between devisor and devisee.]

Thompson v. Grant,
4 Madd. 438.

|| But as between devisor and devisee it was decided, that a mortgage did not pass under a devise of all lands in strict settlement; although a decree for an account on a bill of foreclosure had been obtained before the date of the will; for the mortgage was considered a chattel interest until the final order of foreclosure; and, as it then became the testator's fee-simple estate, it could not pass under his antecedent will.

Silberschidt v. Schiott, 5 Ves. & B. 49.

But if the devise is made after the final decree of foreclosure, the lands may pass, though treated as a mortgage, if the intention appear to be so.||

Martin v. Moulin,
2 Burr. 969.

[But a mortgage will not pass *as land* under a general description, applicable to it in point of locality, if there be other circumstances

cumstances sufficient to shew, that the owner considered it as personal property.

Where money secured by a mortgage (to which the executor was legally entitled) was articulated to be laid out in land, and settled on the issue of the marriage, it was by *Hale* Chief Justice, on a special verdict, adjudged to be bound by the articles.

Laurence v. Beverley, cited
3 P. Will. 217.
|| 1 Vern. 471.
2 Keb. 841. ||
2 Ves. 258.
|| 3 Ves. 651. ||

If two persons advance a sum of money on mortgage, and take the mortgage to themselves *jointly*, without inserting in the deed the words, *to be equally divided between them*, and one of them dies; when the money comes to be paid, the survivor shall not have the whole, but the representative of him that is dead shall have a proportion, because, from the nature of the transaction, the court presumes this to be the intention of the parties. Thus, *N.* and *S.* lent 2000*l.* to *G.* on mortgage, 1450*l.* whereof was the money of *S.*, and 550*l.* the residue, the money of *N.*, and it appeared, by a note under both their signatures, that the 1450*l.* was delivered by *S.* to *N.*, and that, if the mortgage was paid off, then the 1450*l.*, with interest thereon, was to be re-delivered into the hands of *S.*, for the uses of his will. Afterwards, and before the day of redemption, *S.* made his will, reciting the above memorandum, and disposed of his share thereby. The lands were redeemed on the day, and the whole money and interest paid to *N.*, *S.* being dead, and he claiming it by survivorship. But, on a bill exhibited by his executor, the court was clearly of opinion, that by equity there ought to be no survivorship in a case of this nature; and that the note, under the hands of both the parties, and the will of *S.*, shewed plainly that there was a trust between them, *that*, on repayment, each of them was to have his money, with interest.

Petty v. Styward,
1 Ch. Rep. 58.
|| 1 Eq. Ca. Abr. 290. ; and
see 2 Ves. 258. ||

|| As to husband's interest in the wife's mortgage, *vide tit. Baron and Feme.* ||

2 Ves. 258.

And if two persons, being mortgagees, foreclose the mortgagor, the mortgaged estate shall be divided *between* them, because their *intent* is *presumed* to have been, that it should be so divided.]

But if a mortgagee in fee enter for a forfeiture, and after seven years' enjoyment absolutely sell the land to *J. S.* and his heirs, the estate shall not be looked upon to be a mortgage in the hands of *J. S.* so as to make it part of his personal estate, but it shall be for the benefit of his heir.

Vern. 271.
Cotton v. Iles. || 1 Eq. Ca. Ab. 273. 528. Barn. Ch. Ca. 46. ||

A. being in possession of an estate that was a mortgage in fee, by will devises it to his daughters *B.* and *C.* and their heirs, and dies: *B.* marries, and dies: the question was, Whether the share of *B.* should be decreed real or personal estate, and, consequently, go to her heir, or to her husband as her administrator? It was decreed against the husband; and my Lord Keeper put this case: A man seised of lands in fee, which were only mortgaged to him, devises them to his son and heir, and his heirs; surely these lands shall descend as an inheritance; or, though the mortgage be paid off, shall not the money be considered as lands, and go to the heir and his heirs, as the lands would have done, and this purely by the intention of the testator? and did

Preced.
Chan. 265.
Noys v. Mor-dant. || Gilb. Ch. R. 2.
2 Vern. 581. ||

not the testator, who had a governing power, intend in the present case that the mortgaged lands should be considered as any other lands of inheritance, and be subject to, and be directed by, the same rules which other estates are?

3. *Of the Precedency and Right of Redemption, where there are several Mortgagees or Incumbrancers; and herein of their Remedies against each other, as well as against the Mortgagor.*

Abr. Eq. 320.

Herein we must observe, as a sure and established rule, that he who hath the first mortgage, having the legal estate, shall prevail before all other subsequent mortgagees and incumbrancers. But if a man mortgages land by a defective conveyance, and afterwards mortgages by an assurance which is good and effectual, without notice, the second shall prevail, because that carries the legal title; and equity will not interpose, when both are equally upon valuable consideration. But if a man mortgages by a defective conveyance, and there are subsequent debts that do not originally affect lands, there the defect of such a conveyance shall be supplied against a subsequent incumbrancer, who acquires a legal title afterwards; for since the subsequent incumbrancer did not originally take the lands for his security, nor had in his view an intention to affect them, when afterwards the lands are affected, and he comes under the very person that is obliged in conscience to make the security good, he stands in his place, and shall be postponed to such defective conveyance.

This rule and distinction being grounded on the following case, we shall here insert it at large.

Burgh v. Francis, 19 December 1670. 11 Eq. Ca. Ab. 323. Nels. Rep. 183. Finch's Rep. 28.; and see 2 P. Wms. 491. Mr. Powell, p. 528. (6th edit.) cites this case as an authority for a position not correct in itself, and clearly not borne out by the case; viz. that if a second mortgagee with the legal estate has notice of a prior defective mortgage, still the second mortgage will

Henry Francis, father of the defendant *Henry*, in consideration of 400*l.* money lent, by feoffment, 17th July 1665, mortgaged to the plaintiff's testator in fee a piece of ground called *Pursefield*, in the parish of *Gibs*, but no livery thereon, and covenanted for him and his heirs, that he was lawfully seised in fee of the premises, and for quiet enjoyment, free from incumbrances against him and his heirs, and all persons claiming under him, with covenant for farther assurance within seven years. *Henry Francis*, the father, Mich. 1669, borrowed of the testator 77*l.* on bond, and promised that the mortgaged premises should be security for it. *Henry Francis*, the father, in 1670, made his will, and thereof made *Henry Francis*, his son, executor. The testator, *Robert Burgh*, died, and the plaintiff *Eleanor* proved his will. The defendant, *Henry Francis*, confesses several judgments, on bonds, entered into by his father; (to wit) seven judgments, as heir, and one as executor to his father. One of these seven judgments was obtained by *Heyman*, a defendant, on an action brought the first or second day of *Hilary* term 1670, for 400*l.*, and all the other judgments were entered about the same time. This cause came to be heard by Sir *Heneage Finch*, Lord Keeper, assisted by Judge *Wyld*, who declared, that the court was fully satisfied that the plaintiff ought to be relieved, and that the said judgments ought not to incumber the premises, till the mortgage-money was fully paid; wherein the court did not ground its judgment upon the

the manner of obtaining the judgments all in a term, and most of them together, nor on the special way whereby the heir charged the lands, by pleading *riens per descent*, nor on the priority of the *teste* of the *subpœnas* before the *teste* of the original, on which the judgments were grounded; but upon the true nature of the case the court declared, that the debt due by the mortgage did originally charge the lands, which the bond did not, till they were reduced to judgments; and it ought not to be in the heir's power, by confessing judgments, to charge the lands in prejudice of that equity; and the rather, because of the covenant for further assurance. And though the mortgage was defective in law, for want of livery, yet equity, which supplied that defect, charged the lands: and though the creditors *had no notice*, yet they shall be bound in this case, because they are put in no worse condition than they ought to be, *viz.* to be postponed to the mortgage. Therefore it was decreed, that the defendant *Henry*, the heir, should convey to the plaintiff, or her assigns, in fee, in manner as a Master should direct, but redeemable on the payment of the said 400*l.* due on the former defective mortgage, and the premises to be held quietly against the plaintiffs, and all claiming under them, since the date of the mortgage; and he who has the equity of redemption may, in convenient time, bring a bill to redeem; and in default thereof, the now plaintiffs may bring one to foreclose. And a perpetual injunction was also awarded, to quiet the plaintiffs and their assigns in possession against all the defendants and the aforesaid incumbrances, and to stay all proceedings at law, but the plaintiffs to have no costs of this suit, unless some come to redeem; then, the now plaintiffs to have all the costs of this, and such suits, as is usual in the redemption of mortgages.

ment-creditor, without notice, will be postponed to a prior defective mortgagee. See Coote, 227. n. Fonbl. *ubi supra*. Powell, 528. note Y., *id.* 532. notes C, D. (6th ed.)

From this case, which hath been a governing case in the courts of equity, they have stated the difference before mentioned; for these bond-creditors did not originally pitch upon the land as a pledge and security for their money; and when they came afterwards, and reduced their securities into judgments, to affect the lands, yet, since they affect it in the hands of the heir, who was subject to this equity, and obliged in conscience to supply the defect in the execution of the deed, they can only stand in his place, and therefore must be subject to the defective security. But otherwise it had been, if there had been a subsequent mortgage duly executed, and without notice of the former; because the lands being then originally pledged for the money, and the mortgagee, having the legal title, the defective securities that could not prevail at law should not overturn in equity a security that was equally upon valuable consideration. But the bonds in the former case did not originally take hold of the land at all; and when they were reduced to a judgment, they only took hold of the land, together with other things; and therefore equity doth not look on them as such charges on the land as are to take hold so

be good, and he thinks *Oxwick v. Plumer, infra*, was decided on this ground; but in that case the second surrenderee had not notice of the prior surrender, and his security was held valid, expressly because he had equal equity, which could not have been if he had notice of the first defective surrender: and see Fonbl. Eq. vol. 1. p. 39. *Jennings v. Moore*, 2 Vern. 609.; and it is not clear that *Burgh v. Francis* can be considered as establishing a general rule that a subsequent judg-

immediately on it, that a prior defective security is not to be relieved and set up against them; especially, since such incumbrancers did not take the land as an original security, but came in afterwards, under the person who was obliged in conscience to supply that defect; for the difference between the two cases turns upon this, that in the case of a second valid mortgage we must, in all manner of justice, suppose, that the mortgagee would not have lent if the land had not been offered to secure his money; and therefore when he hath the title at law, it is no equity to overturn it, or to postpone him to a defective security; but in the case of the bonds, the obligees lent their money upon the personal security, and not on the credit of lands; and therefore, when they come to affect the lands, they must stand in the place of the person that had made himself liable, in a court of equity, to answer and make good the defective security.

2 Vern. 564.
2 Salk. 449.
pl. 2. Taylor
v. Wheeler.
|| *Vide* Mestaer
v. Gillespie,
11 Ves. 625.
Mitford v.
Mitford,
9 Ves. 100.||

Thus, it was also ruled by the Lord Cowper, where the case was, *A.* surrenders his copyhold by way of mortgage for money lent, and the surrender is not presented at the next court, according to the custom of the manor; *A.* becomes a bankrupt, and the assignees, &c. are admitted, and bring their ejectment, and the surrenderee of the copyhold brings his bill in equity to be relieved. And, in this case, the court decreed a perpetual injunction in behalf of the surrenderee. For though it was said, that the creditors of the bankrupt were equally valuable as the surrenderee, and having the title at law, they ought to be preferred; yet it was over-ruled, because the other creditors of the bankrupt did not lend on the credit of the land, as the mortgagee did; and therefore, when such creditors come under the bankrupt to charge the land, they ought to stand in his place, and come under the same obligation of conscience to make good the defective security.

Oxwick et al.
v. *Plumer*
et al., Pasch.
3d May, 1708.
|| 2 Vern. 636.
.C.||

The case of *Oxwick* and *Plumer* turns upon the reverse of this judgment, and was thus:—*Richard Wiseman*, esq. son and heir apparent of Sir *Richard Wiseman*, intermarried with *Winefred Barington*, entitled to a portion of 4000*l.*, and brings his bill against the trustees of his wife; whereupon a decree was had, to pay unto him the fortune of his wife, upon making a competent settlement; and upon failure thereof, the fortune to be invested in lands by the approbation of the master. But upon the master's report, that no competent settlement could be made by *Richard* the son, it was, by choice of parties, invested in lands of Sir *Richard* the father, of equal value, part of which lands happened to be eight acres of copyhold, which in the settlement were limited, and declared apart from the freehold, to be to the use of the issue of the marriage, in common form, and afterwards in fee to the son, with a covenant from Sir *Richard* to surrender the copyhold. The wife dies without issue, and the son mortgages both copyhold and freehold together, for a valuable consideration, to *Oxwick* and others, plaintiffs; but without any surrender: the son dies, and the lands descend to *Eliz.* his sister and heir at law: the mortgagees foreclose *Eliz.* by a decree of the court, and enter and

and take possession; to whom being in possession *Eliz.* releases, and confirms the estate in fee. Sir *Richard* the father, being then out of possession of the premises from the time of the settlement, which was made thirteen years past, surrenders the copyhold land to the defendant *Plumer*, for a valuable consideration. *Plumer* is admitted, and brings his ejectment; and the mortgagees bring their bills to be relieved. The Master of the Rolls, on solemn argument, dismissed their bill with costs; and held, that this court would not supply the defect of a surrender against a person that came in by title, upon surrender of the same premises. The case coming on to be reheard before my Lord *Cowper*, he was of the same opinion; and he took this difference, that when there are two persons that have equal equity, there, those that have the legal title shall prevail, because there is no equity to take from such persons the title that they have gained at law; as, where *A.*, *B.*, and *C.* are three mortgagees, and *C.* purchases in the mortgage of *A.* to secure his own money *bonâ fide* lent; equity will never take from him the legal interest he hath gained. But if the contending parties in equity have not equal equity, then those that have the greatest equity shall prevail against the legal title; as, if a creditor takes hold of the land by a feoffment in mortgage*, with livery, equity will supply the defective conveyance against a subsequent judgment-creditor; because the judgment-creditor not relying on the land for his security, he hath not equal equity to have it applied for the payment of his debt, as he that took it in mortgage. But in this case, where *Plumer* had equally lent money, and taken hold of the estate by a mortgage made with a legal surrender; so that the legal interest was in him; the covenant to surrender, though prior, cannot be set up against him who had no notice of it; but *Orwick* must pursue his remedy at law, for the breach of the covenant.

*||without.||

A precedent mortgagee discounts his mortgage-money by purchase of parcel of the land, and the subsequent mortgagee, having also a judgment, comes to be relieved; the precedent mortgagee pleads this purchase; and without notice it is good; for having a legal title by the first mortgage, kept on foot precedent to the second, this court will not destroy it; and the judgment on record is no notice, without express notice from the party in interest.

Churchill v.
Grove, 1 Ch.
Ca. 56.

If a man makes a voluntary deed, and mortgages the same lands, this deed, though fraudulent as to the mortgagee, is good to pass the equity of redemption, because the voluntary conveyance binds the party and his heirs.

Rand v. Cartwright, 1 Ch.
Ca. 59.

Tenant in tail demiseth the lands for ninety-nine years, by way of mortgage, under a condition of redemption; and on his marriage suffers a recovery, and in consideration of the portion settles a jointure; then the husband borrows more money of the mortgagee, and appoints the term as a security. The recovery enures to make good the term; and if the mortgagee had no notice of the jointure, he shall be allowed his whole money, for the entail is destroyed by the recovery; because every recovery places the fee in

Goddard v.
Complin,
1 Ch. Ca. 119.

in the recoverer ; and neither the husband nor wife, that comes in by title under him, can vacate this act precedent ; so that the subsequent recovery of tenant in tail makes good all precedent incumbrances.

|| But if the tenant in tail conveys *in fee*, a subsequent recovery will not be good without the concurrence of the first grantee, for want of a good tenant to the *præcipe*.

Beck v.
Welsh,
1 Wils. 276. ;
and see Coote,
217. Powell,
190. a. (6th
ed.)

Although the tenant in tail mortgagor, by suffering a recovery or levying a fine, lets in the mortgage, it has been decided, that if he become bankrupt after making a mortgage, the bargain and sale by the commissioners has not the same effect, notwithstanding the words of the statute 21 Jac. 1. c. 19. § 12. This decision has, however, been questioned by the Lord Chancellor in *Pie v. Daubuz*, 3 Bro. C. C. 595. ; but although some of the reasons on which the judges relied may not perhaps be satisfactory, yet the decision itself, it is apprehended, is supported by sound principle. The court in that case certainly appear to have treated the estate of the mortgagee as *absolutely void* on the death of the bankrupt mortgagor, since he could only affect the life-estate by the mortgage without recovery : whereas it would seem that the estate is only *voidable* by the entry of the issue in tail, and not void according to *Machell v. Clarke*, 2 Ld. Ray. 778. Admitting the estate, however, to be only voidable, there seems no sound reason why the assignees should not enter and avoid it after the death of the bankrupt ; for though the assignees stand in the place of the bankrupt for *some* purposes, they do not for *all* ; and are clothed with a trust for the creditors, which places them in a very different situation from the bankrupt.

Edwards v.
Applebee,
2 Bro. C. C.
652. *Pie v.*
Daubuz,
3 Bro. C. C. 595.

If, however, there is a covenant in the mortgage-deed for further assurance, as is usually the case, relief may be had on that covenant, and the assignees will be directed to convey to the mortgagee.||

Roscarrick v.
Barton, 1 Ch.
Ca. 217., &c.

A man makes a mortgage, and afterwards makes a marriage-settlement of the equity of redemption, wherein he limits it on the wife ; and then on the issue of his body, with remainder in tail to his brother ; the mortgagee exhibits his bill against the mortgagor, to have his money, or that he may stand foreclosed, without making the brother a party : and has a decree accordingly ; and afterwards the mortgagor dies without issue, and the lands remain to the brother by the marriage-settlement, who prefers his bill to redeem. The bill was dismissed ; for having made those parties to the bill of foreclosure, that were parties to the mortgage, the mortgagee did as much as was possible ; and since at law a fine, or other conveyance, extinguishes an equity of redemption, which is but a *chose in action*, though the modern course hath allowed it to be transferred, yet it ought not to be so allowed, that the mortgagee should not know from whom to seek a foreclosure, in order to keep him an eternal bailiff to the mortgagor ; therefore, after length of time, and in behalf of a mere volunteer, they

they would not open the account, after such decree to foreclose had against the person that was party to the mortgage; for possibly the mortgagee, since the foreclosure, had kept no account, since he was not bound to do it.

[*H.* being seised in fee, mortgaged for years, and afterwards, in 1734, made his will, and devised his estate to his son and his heirs, subject to an annuity to his wife for life, and to the incumbrances upon the estate; and in case his son should die without issue, to be divided amongst his three daughters, or such of them as should be living at the death of his son; and if his son and daughters should all die without issue, then to his wife for life, remainder to his own right heirs. A bill was brought by *P.*, as assignee of the original mortgagee, against the widow of the mortgagor, and her son, who was then an infant, to foreclose the equity of redemption; but the daughters were not made parties. In 1746, the cause was heard, and a decree made for an account and foreclosure, unless redeemed by the mother or son. The account was taken before the master, and the time for redemption being several times enlarged, and at last elapsed, the son, having attained twenty-one, released the equity of redemption; so that the foreclosure was not made absolute against him, but was made absolute against the wife. The son afterwards died without issue, and *R.* having bought the daughters' interest for a trifle, in 1765, filed a bill to redeem. But the Lord Chancellor was clear of opinion that *P.* was not entitled to redemption. That the first tenant in tail being a party to the foreclosure was sufficient. That he sustained the interest of every body, and those in remainder were considered as cyphers. That it would be very inconvenient if the remainder-men were necessarily to be parties. There might never be an absolute foreclosure. The account would be endless, and the foreclosure would be open to every contingent remainder-man. That nobody would lend money upon such terms. That the release in this case was equal to an absolute foreclosure by order. That the accounts were taken, and the time for redemption elapsed, and that this case was not so strong as that of *Roscarrick* and *Barton*.

Reynoldson v. Perkins, Amb. Rep. 564.
|| 1 Dow. P. C. 51.||

If a man mortgages lands, and then confesses several judgments, and some of the persons, who have judgments, give the mortgagee notice, and afterwards he obtains, against the mortgagor, a decree to foreclose; such persons, that give notice of their interest, shall, notwithstanding, redeem; because they are creditors for a valuable consideration, and the mortgagee had notice of them, that he might have made them parties to his bill; but the persons who gave no previous notice of their judgments are totally barred of all redemption, by the former decree. (*a*)

Greswold v. Marsham, 2 Ch. Ca. 170.
||(a) But this seems not settled, Godfrey v. Chadwell, 2 Vern. 601.; and see 1 Powell, 306. note (G), 551.
note (S), and 2 id. 988. a.||
2 Vern. 601.;
et vide Morret v. Westerne, *suprà*.

A second mortgagee may redeem the first, after a decree obtained by him to foreclose, although the first mortgagee had no notice of the second mortgage before the decree.

And a decree to foreclose, though made absolute, signed, and enrolled, is no plea to redeem, if surreptitiously procured.]

Lloyd v. Mansell, 2 P. Wms. 74.

If

1 Chan. Rep.
57, 58. Petty
v. Styward.

If a man mortgages his estate to two, who each of them lend several sums upon the estate, as appears by notes under their hands, and one of them dies, there shall be no survivorship: for it is considered as a sum of money still subsisting apart, for which the lands are only a pledge and security; so that the money being distinct sums, and the interest in it being distinct and separate, there can be no survivorship between them.

Pr. Ch. 30.
Bentham and
Haincourt.

If a mortgagee, after notice of a subsequent mortgage, joins with the mortgagor in a sale of the lands to a stranger, the money received by either for the purchase shall sink so much of the purchase-money: and in this case the mortgagor, being son-in-law to the mortgagee, and he having entered, and afterwards suffered the mortgagor to take the profits for several years, without requiring interest, it was held by the court, that the interest of the first mortgagee should not affect the lands, so as to keep out the second mortgagee longer than he would have been, had the interest been duly paid.

Ibbotson v.
Rhodes,
2 Vern. 554.
|| See Bro. C.C.
vol. i. 337. n. 5.;
sed vide
Powell, 446.
note (Q.) ||

If *A.*, being about to lend money to *B.* on a mortgage, sends *C.* to enquire of *D.*, who had a prior mortgage, whether he had any incumbrance on *B.*'s estate, and it is proved that *C.* went to him, and spoke to him accordingly, and *D.* denied having any; *D.*'s mortgage shall be postponed; || but *D.* must be informed of *A.*'s intention to lend money, in order to fix him with the fraud. ||

Berrysford v.
Millward,
Barnard.
Rep. 101.
2 Atk. 49. S.C.
Vide Shep.
Prac. Couns.
482. pl. 9. a
quæ. if such
cases do not
avoid prior
claim at law as
fraudulent.

[On a treaty of marriage between *A.* and *B.* his wife, *C.* the father of *A.*, and *D.* the father of *B.*, had a meeting together; at which meeting *M.*, who had a mortgage upon *C.*'s estate, was accidentally present; *C.* and *D.* discoursed together on the subject, and talked of making a settlement upon the estate on which the mortgage to *M.* was secured: *M.* never mentioned to the father of *B.* that he had such mortgage, but called out *C.* and reminded him thereof. *M.* then agreed with *C.* that he would take his personal security for the money, and they returned into the room together, when an agreement was entered into between *C.* and *D.*, in the presence of *M.*, to settle the estate in strict settlement. Afterwards, the marriage took effect, and *M.* brought an ejectment to recover the possession of this estate as mortgagee; whereupon *A.* and *B.* his wife brought a bill against *M.* and *C.*, in order to have a perpetual injunction: *M.* admitted all the facts, but pretended not to remember any thing of the agreement to accept *C.*'s personal security for the money lent. *C.* was examined as a witness in the cause for both parties, and swore to the fact of that agreement: and the Lord Chancellor was of opinion, that the plaintiffs were well entitled to a perpetual injunction, and ought to be relieved under the *head of fraud*; for that *M.*, having voluntarily concealed his mortgage at the time of the treaty of marriage, was not entitled to have any benefit from it against the plaintiff.

Draper *et al.*
v. Borlace *et al.*, 2 Vern.
370. || See
Powell, 439.
a. ||

D., *N.*, and *H.*, having lent *B.* 8000*l.* upon a mortgage in fee of the manor of *F.*, and on a statute in 1600*l.* penalty as a farther security; and *H.* being a counsellor, and afterwards consulted by *J.* as to a loan of 200*l.* to *B.* on a mortgage of the manor of *G.*,

G., encouraged him to lend his money, drew the mortgage-deed, and inserted therein a covenant that the estate was free from incumbrances, making no mention of the statute which was taken because F. was supposed to be deficient. The question was, Whether H. should be admitted to take advantage of the statute to lessen J.'s security upon the manor of G.? And it was held he should not; for if he, who only concealed his incumbrance, should be postponed, much more ought H., who was intrusted as counsel by the mortgagee, promoted the loan, and drew the conveyance with covenants that the estate was free from incumbrances.

And if a first mortgagee be a witness to a second mortgage-deed, and, knowing the contents thereof, do not acquaint such second mortgagee with his former mortgage, this will give the latter a preference. It is likewise said, that it will make no difference, although it be not in proof that the witness knew the contents of the second mortgage; for, since it does not appear but that he might have known them, the law will presume that every witness, who can write or read, is acquainted with the substance of a deed or instrument which he, having attested, undertakes to support by his evidence.

Mocatta et al. v. Murgatroyd, 1 Will. Rep. 593. [But Mr. Cox, the editor of Peere Williams's Reports, in a note added to the above observation, doubts the

truth of the proposition, and questions whether the bare attesting a subsequent incumbrance, without other circumstances of presumptive notice, will postpone a prior incumbrance, since, at that rate, a prior mortgagee or incumbrancer may, without any fraud, or ill intention on his side, be liable to be cheated of his security. — And so (he observes) he found it said by Lord King, in the author's (Peere Williams) report of an anonymous case, in Mich. Term, 1732. And Lord Hardwicke, before whom this point was agitated, in the case of Wilford and Beezly, 1 Ves. 6. said, "that he did not think that the bare attesting a deed as a witness would create such a presumption of his knowledge of the contents, as to affect him with any fraud therein; for a witness is only to authenticate it, and not to be privy to the contents." — And Lord Thurlow, in the case of Becket and Cordley, 1 Br. Ch. Rep. 557. seems to have been of a similar opinion with Lord Hardwicke upon this subject; for speaking therein of the case of Mocatta and Murgatroyd, his Lordship says, "the first mortgagee was a witness to the second mortgage, and was therefore postponed. I do not leave this as a case which I should determine in the same manner; for a witness in practice is not privy to the contents of the deed. The book refers to a case where Lord King denies the law to be so." || *Vide* Fonb. Eq. v. 1. 165. (5th ed.) Sug. Vend. and P. 654. (5th ed.) Reed v. Williams, 5 Taunt. 257. per Lord Eldon, 6 Ves. 190. Holmes v. Custance, 12 Ves. 279. Lord Ranelcliff v. Parkyns, 6 Dow. P. R. 224. ||

N.'s younger brother, having an annuity of 100*l.* per annum charged on lands by his father's will, contracted with H. for sale thereof; H. went to N. and informed him of his intended purchase, desiring to know of him if his younger brother had a good title to it, and whether his father was seised in fee at the time of making the will, and if it had ever been revoked. N. told him he believed his brother had a good title, and that he had paid him the annuity for twenty years; but at the same time informed him, that he heard there was a settlement made of his father's lands before the will, which was in the hands of T., but that he had never seen it, and therefore could not tell what were its contents; and encouraged the purchase, telling H. he had not only paid his brother the annuity to that time, but had also paid his sisters 3000*l.* under the same will. The purchase was completed, and afterwards N. got the settlement into his hands, and would

Hobbs v. Norton, 1 Vern. 136. *Vide* 2 Eq. Ca. Abr. 515. pl. 3. 9 Vin. Abr. 415. pl. 24. *Watts v. Creswell*. || See Powell, 412. note (N). ||

would have avoided the annuity, the lands being thereby entailed. *H.*'s bill was to have the annuity decreed on repayment of his purchase-money; and though, on the hearing, there was no proof that *N.* had any notice of the contents of this settlement at the time he promoted the purchase, yet the Lord Keeper decreed the payment of the annuity merely on the encouragement *N.* gave *H.* to proceed in completing the contract; for that it was a negligent thing in him not to have made himself acquainted with his own title, that he might have informed the purchaser of it, when he came to enquire of him.

And such constructive fraud not only binds the party himself personally, from whose negligence it arises, but also binds the lands, &c. charged. Thus, *B.*, the elder brother of *I. B.*, was under settlement entitled to a real estate, charged with 8000*l.* for one younger child of the marriage, but subject to a proviso, that, if the father should give to any of his daughters, or younger sons, any money or lands, for or in advancement in marriage or otherwise, the value thereof should be deducted from the portion, unless he should by writing declare to the contrary. The father devised to *I. B.* 4000*l.* after the death of his (the son's) mother, and the residue of his personal estate, and died. Then the elder son suffered a recovery, by which he obtained the fee-simple in the lands. Afterwards *I. B.* applied to *P.* to lend him 3000*l.* on the security of the 8000*l.* portion, for which he assigned 5000*l.* part of the 8000*l.* as a security, and also entered into a bond in a penalty for the same. *P.*, previous to lending the 3000*l.*, applied by his solicitor to *B.*, informing him of *I. B.*'s application, and desired to be informed by him, whether the 8000*l.* was a subsisting charge upon the estate, when *B.* declared that it was, and that *P.* might safely advance his money upon the security. *B.* also afterwards applied for and obtained a sum of money to pay off the 8000*l.* portion; and gave *P.*'s solicitor notice that he would pay off the 3000*l.* at the end of six months after the notice: *B.* dying soon after, the money was not paid, but from the death of his father, and down to his own death, he paid the interest of the 8000*l.* Upon his death the estate descended to his two daughters. *B.* had possession of the settlement, and knew of the advancements of the father to *I. B.*; but, supposing them not to affect the portion, did not reveal them to *P.* A bill was filed by the mortgagee against the daughters to have the 3000*l.* raised and paid out of the settled estate. They set up as a defence, that the bequest of the 4000*l.*, and of the residue, was a satisfaction for the portion under the proviso inserted in the settlement. And it being held that the bequest was a satisfaction, it then became a question, Whether *B.* had not bound himself and the land notwithstanding, by his declaration "that the portion was a subsisting charge?" It was agreed on behalf of the daughters, that if *B.* knowingly misrepresented the case to *P.*'s attorney, it certainly must bind him. All the cases were that the person misrepresenting was bound by his own misrepresentation; but this went something farther, namely, to bind the lands. If

a man

Pearson v. Morgan,
1 Bro. Ch. Rep. 65.
2 Bro. Ch. Rep. 388.
|| See Pasley v. Freeman,
3 Term R. 51.
Eyre v. Dunsford,
1 East, 318.
Haycroft v. Creasy, 2 id. 92.
Vernon v. Keys, 12 id. 652.
Tapp v. Lea, 3 Bos. & Pull. 567.
and Evans v. Bicknell, 6 Ves. 174.; and dictum of Sir William Grant, 10 Ves. 475.||

a man was guilty of a fraud, by which the land was affected, the misrepresentation would bind the land; but if there was no fraud, the land could not be affected. It was the duty of *P.*'s solicitor to make every enquiry; he ought to have made the trustees parties. It was great negligence on his part not to take a legal security. He ought to have enquired what *I. B.* took under the will. The principle the court went upon, was by acting upon the conscience of the defendant in such cases; if the defendant was acting against conscience, the court would apply a remedy, but there was in this case nothing against conscience. *B.* was ignorant of the legal effect of the legacies. If then there was no fraud, there was nothing for the court to relieve against, and the land could not be bound. But by *Buller J.* (who sat for the Chancellor), the only question is, Whether *P.* has a right to have 3000*l.* raised for payment of his debt, out of the estate of *James*? It is argued, that this is not to be done unless there is such a fraud as to affect land, and that here was no fraud, but *B.* acted innocently. It brings to my mind a case tried before me at *Guildhall*, by one merchant against another, for giving a false character of a third person, by which the plaintiff was induced to give him a credit, and lost his money; my direction to the jury was, that if one man tells another a falsehood, by which he is injured, the deceived person has his remedy by an action. Those who wish to maintain the daughters' case argue, that *B.* the father was a total stranger to the case, which argument admits the principle, that if he had been interested the declaration would bind. Here, the person of whom the question was asked certainly had no interest. Fraud is a question of law, and of fact. It is always considered as a constructive fraud where the party knows the truth and conceals it, and such constructive fraud always makes the party liable. I think that, here, *B.* knew of the proviso and advancements, and that in this court he was obliged to take notice of them. In fact he had express notice. It is not like the case of a latter deed referring to a former one. The enquiry was a very proper one on the part of *P.*, and completely repelled any imputation of negligence in his agent, and the enquiry was properly made of the party immediately interested. *B.*, at the time of the enquiry, had the equitable interest in the estate, and, upon the application, assured *P.*, that he might safely lend his money. The enquiry was the most material *P.* could make. If *B.* admitted the term to be in existence, he must be bound by his admission. He had full notice, and induced *P.* to lend his money, which was a fraud that would affect the daughter's estate. The term must, therefore, be held to be in force to secure the 3000*l.*, and the trustees must raise that sum.]

One *Goff*, being possessed of the *Thatched-House* at *St. James's*, on a building lease for sixty years, mortgages it to Dr. *Lancaster* and one *Habberfield*, for securing 600*l.*, which the defendant afterwards paid off, and advanced to *Goff* 600*l.* more, and took an assignment of this mortgage, but had not the original lease delivered to him till some days after the assignment.

Abr. Eq.
321, 322.
Peter v.
Russel.
||See Powell,
473. note (V).
(6th edit.)||

Goff

Goff afterwards, being in a declining way, proposed to borrow of the plaintiff 350*l.* on a mortgage of a vault and two rooms, part of the mortgaged premises; and on a treaty for that purpose, one *Remington*, who acted for the plaintiff, desired to see the original lease; *Goff* told him, that he had it not by him, but that his lawyer kept all his writings for him, as not thinking it safe to trust them in his own house, where all sorts of company resorted; upon which *Goff* goes to the defendant, who was an attorney in the city, tells him he was about agreeing with a person for the rebuilding part of the premises, at so much a foot square, which would better his security, and desired him to let him have the original lease, that he might see the dimensions of the house: the defendant would not trust him with the lease in his own power, but goes along with him to the *Thatched-House*; and after he had been there some time, *Goff* sends for the plaintiff and *Remington*, told them he had now the original lease, which they might see; and upon their coming to his own house, *Goff* goes into the room where the defendant was, and desires him to let him have the lease, to shew the person he had mentioned, for that he was now in the house; and accordingly the defendant lets him have the lease, which he carries to the plaintiff and *Remington*; and they being satisfied therewith lend him the money, and take a mortgage of the vault and two rooms, insisting at the same time to have the original lease delivered to them; but *Goff* urging that it concerned much more than the plaintiff had in mortgage, and that he could not part with it, the plaintiff permitted him to keep it; and he thereupon, in about an hour's time, delivered it again to the defendant, without acquainting him with what he had done; and the defendant swore expressly in his answer, that he had no notice of this transaction, or of the plaintiff's mortgage. Afterwards, the plaintiff lent *Goff* a further sum of money, and he prevailed on the defendant to let him have the original lease a second time; but there was no proof that the defendant knew the occasion of it, and he, by his answer, expressly denied his having notice of it. *Goff* afterwards failed, and thereupon the defendant brought his ejectment, and recovered; and this bill was brought to have the defendant's mortgage postponed, upon pretence that here was a manifest fraud on the plaintiff, and that the defendant was privy to it; and at the Rolls the plaintiff had a decree accordingly: but, on appeal, the decree was reversed. Lord Chancellor said, that if a man makes a mortgage, and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend his money, this fraud will, without doubt, in equity postpone his own mortgage: so, if such mortgagee stands by and sees another lending money on the same estate, without giving him notice of his first mortgage, this is such a misprision as shall forfeit his priority. But here is no manner of proof that the defendant knew any thing of the plaintiff's lending his money; nay, if there had, yet the plaintiff appears guilty of so much a grosser neglect, that he ought not to prevail;

prevail; for the defendant entrusted *Goff* with his original lease but for a very little while; the plaintiff takes his word, that he could not part with it, and leaves it wholly in his power to go on in defrauding whom else he had a mind to. Besides, it appears the defendant was imposed on by *Goff*, for he parted with the lease only to better his own security, and had the most specious pretence that could be for it; and therefore it cannot be, without manifest proof, objected to him, that he let *Goff* have the lease to shew the plaintiff, or with a design to draw in the plaintiff to lend his money. His Lordship dismissed the bill with costs, unless the plaintiff should, within such a time, redeem the defendant.

[*S.* made a mortgage of lands to *H.*, who, placing a great confidence in him, lent the money, taking his word that he would deliver him the title-deeds, the mortgage being executed in *London*, and *S.* pretending the title-deeds were in the country. Afterwards *S.* borrowed 2000*l.* of *E.* on a mortgage of the same lands, at the same time producing and delivering to him all his title-deeds, which were perused, and approved by his counsel. Then *H.* exhibited a bill to foreclose *E.* and to compel him to discover the title-deeds relating to the premises, and to have them delivered up to him, insisting upon them, as owner of the land. *E.* pleaded the mortgage made to him, and that he had no notice of the prior mortgage to *H.*, and insisted, that the court ought not to aid *H.* and take the title-deeds from him, without ordering him to be paid his mortgage-money; and so it was decreed by the Chancellor.

S. being seised in fee of certain estates, subject to an outstanding term of years in *R.* and *E.*, by indenture of lease and release, dated the 4th and 5th days of *June* 1732, conveyed them to *D.* and her heirs, for securing the payment of 1000*l.* and interest, and covenanted to produce the deeds respecting the terms for years. Afterwards, *R.* and *E.* assigned the term to other trustees, in trust for *S.*, his heirs and assigns; and then *S.* by indenture, dated the 19th of *December* 1732, conveyed the same estates to *N.* by way of mortgage, for securing to her 3000*l.* and interest, with a declaration that the trustees of the term should stand possessed of the term in trust for her, and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to *D.* Afterwards, *D.* brought an ejectment; *V.*, who claimed under *N.*, defended it, and set up the term with a declaration of the trust of it in favour of *N.*; upon this, *D.* brought her bill in equity. The question was, which should be preferred; *D.*, who had the first declaration of the trust of the term, or *V.*, who had the subsequent declaration of the trust, but had the custody of the deed? Lord *Northington* held, that a declaration of trust in favour of an incumbrancer was tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide*, and without notice, procured an assignment; and that the custody of the deeds, respecting the term, with a declaration of the trust of it, in favour of a second incumbrancer, was equivalent (a) to an actual assignment; and therefore

Head v.
Egerton,
3 P. Wms.
280.

Stanhope
v. Verney,
vide Co.
Lit. (last
edit.) 295. b.
in note.
[2 Eden, R. 81.
S. C. See
2 Ves. & Bea.
83.]

(a) That is
in equity.

gave him an advantage over the first incumbrancer, which equity would not take from him.

If the mortgage be of a reversion, there is no reason to postpone the mortgagee upon the mere abstract fact of his not having required or produced the title-deeds and writings; because, in such cases, the title-deeds and writings do not properly belong to the reversioner, nor has he, generally speaking, any means by which he can procure them, if refused by the tenant for life, or possessor of the particular estate.

Tourle v.
Rand,
2 Ch. Rep.
650.

This question was agitated in equity, before Lord *Thurlowe*, in the case of *Tourle* against *Rand*, which was as follows: *R.* being, as supposed, entitled under the will of his father to a remainder in fee (but in fact only to a remainder in tail) *expectant on the death of his mother*, in certain freehold estates, conveyed his reversion and remainder, expectant on the death of his mother, to *A.* in fee, by way of mortgage. At the time of making the mortgage, the deeds and writings were in the hands of a collateral relation, but *A.*'s attorney was informed by the mortgagor, that they were in the possession of the mother, who would not consent to part with them, she being then in possession of the estate as tenant for life, which she continued until the time of her death. Immediately after her decease, *A.*'s attorney applied to *R.* for the possession of the title-deeds, to which *R.*'s general answer was, that he would send them in a day or two, or to that effect. Shortly afterwards, *R.*, being then tenant in tail in possession, (but supposing himself tenant in fee of the above estate, and being also possessed of a leasehold estate,) mortgaged both estates to *T.* At the time when the latter mortgage was made, all the title-deeds relating to the estates were delivered to *T.*'s attorney, and continued in *T.*'s possession. Some time afterwards, *T.* filed his bill to foreclose the mortgaged premises, and, among other things, charged that *A.* ought not to have permitted the title-deeds and writings to have remained in the hands of *R.*, that he left them in his hands for the purpose of enabling him to raise more money on the security of the premises, and that the same was a fraud on *T.*, and that therefore *A.* ought to be compelled to redeem *T.*'s mortgage, or ought to be debarred of any interest which he might have in the premises till *T.*'s mortgage should be satisfied. It was contended on the part of *T.* that where a prior mortgagee leaves the title-deeds in the possession of the mortgagor, it is a fraud upon the second mortgagee, as he is induced by the title appearing on the deeds to lend his money; that the second mortgagee therefore, having the deeds, should be preferred. But Lord *Thurlowe* C. said, that he did not conceive that a first mortgagee not taking the deeds was *alone* sufficient to postpone him; if it were so, there could be no such thing as a mortgage of a reversion. *In that case*, the deed being in the hands of tenant for life, is not sufficient to turn him round. The first cases where the prior mortgage was postponed were cases of fraud, then the same was done in cases of gross negligence. (a) Here was no *laches*; the mortgagee could not compel the tenant for life to give up the deeds: though a dowress,

(a) "I find
"no case,"
"saith *Eyre*
C. B., "that
"goes the
"length of
"saying, that
"a failure of
"the utmost
"circumspec-
"tion shall
"have the
"same effect
"of postpon-
"ing a mort-
"gagee, as
"if he were
"guilty of
"fraud or

a dowress, upon a confirmation of her title, might be compelled, the tenant for life could not, although, after her decease, he might have filed a bill. But that was not sufficient to charge the mortgagee.

In the case of *Goodtitle* against *Morgan*, Mr. Justice *Buller* considers it “ as an established rule, in a court of equity (*a*), “ that a second mortgagee who has the title-deeds, without notice of any prior incumbrance, shall be preferred; because, if “ a mortgagee lends money upon mortgage, without taking the “ title-deeds, he enables the mortgagor to commit a fraud. If “ this has become a rule of property in a court of equity (says “ the learned Judge), it ought to be adopted in a course of law.” *Quære.*]

|| But it is now held, that the mere circumstance of the first incumbrancer not possessing the title-deeds is not alone sufficient to postpone his incumbrance, without other circumstances to make out a case of fraud.||

12 Ves. 153. *Harper v. Faulder*, 4 Madd. 129.; and see *Bailey v. Fermoer*, 9 Price, 276.

Although a deposit of title-deeds for the security of a debt amount to an equitable mortgage, yet if a creditor of the mortgagor, fearing his immediate insolvency, take a conveyance of the same estate, without notice (*b*) of the incumbrance, equity will not prevent him from availing himself of his legal estate.

structive. *Birch v. Ellames*, 2 Anstr. 427. || See *Hiern v. Mill*, 15 Ves. 114.||

By the 4 & 5 W. 3. c. 16., reciting that great frauds and deceits are often practised by necessitous and evil-disposed persons, in borrowing money, and giving judgments, statutes, and recognizances privately, for securing the repayment of the said money; and the same persons do afterwards borrow money, upon security of their lands, of other persons, and do not acquaint the later lender thereof with the same; whereby such late lender is very often in danger to lose his whole money, or forced to pay off the debts secured by the said judgments, statutes, and recognizances, before they can have any benefit of the said mortgages; and that divers persons do many times mortgage their lands more than once, without giving notice of their first mortgage; whereby lenders of money upon second or after-mortgages do often lose their money, and are put to great charges in suit and otherwise; for remedy whereof it is enacted, “ That if any person shall borrow any money, or, for any other valuable consideration, for the payment thereof, voluntarily give, acknowledge, permit, or suffer to be entered against him, or them, one or more judgment or judgments, statute or statutes, recognizance or recognizances, to any person or persons, creditor or creditors; and if the said borrower or borrowers, debtor or debtors, shall afterwards take up or borrow any other sum or sums of money of any other person or persons, or, for other valuable consideration, become indebted to such person or persons, and for securing the repayment and discharge thereof, shall mortgage his, her, or their lands or tenements,

“ wilful neglect.”
2 Anstr. 440.

(a) 1 Term Rep. 762.

Evans v. Bicknell,
6 Ves. jun.
185. *Barnett v. Weston*,
9 Price, 276.

Plumb v. Fluit, 2 Anstr. 452.

(b) *Secus*, where there is notice either actual or constructive.

|| By the Roman law, the making a second mortgage without giving notice of the first was punished as a crime called *Stellionatus*; but the crime was not committed if the land was equal in value to all the sums charged on it. Dig. 15. 7.; 56. 1.||

“ or any part thereof, to the said second or other lender or
 “ lenders of the said money, creditor or creditors, or to any
 “ other person or persons, in trust for or to the use of such se-
 “ cond or other lender or lenders, creditor or creditors, and shall
 “ not give notice to the said mortgagee or mortgagees of the
 “ said judgment or judgments, statute or statutes, recognizance
 “ or recognizances, in writing, under his, her, or their hand or
 “ hands, before the execution of the said mortgage or mort-
 “ gages; unless such mortgagor or mortgagors, his, her, or
 “ their heirs, upon notice to him, her, or them given by the
 “ mortgagee or mortgagees of the said lands and tenements, his,
 “ her, or their heirs, executors, administrators, or assigns, in
 “ writing, under his, her, or their hands and seals, attested
 “ by two or more sufficient witnesses, of any such former judg-
 “ ment or judgments, statute or statutes, recognizance or recog-
 “ nizances, shall within six months pay off and discharge the said
 “ judgment or judgments, statute or statutes, recognizance or re-
 “ cognizances, and all interest and charges due thereupon, and
 “ cause or procure the same to be vacated, or discharged, by re-
 “ cord; that then the mortgagor or mortgagors of the said lands
 “ and tenements, his, her, or their heirs, executors, administrators,
 “ or assigns, shall have no benefit or remedy against the said
 “ mortgagee or mortgagees, his, her, or their heirs, executors,
 “ administrators, or assigns, or any of them, in equity or else-
 “ where, for redemption of the said lands and tenements, or
 “ any part thereof; but the said mortgagee and mortgagees,
 “ his, her, or their heirs, executors, administrators, and assigns,
 “ shall and may hold and enjoy the said lands and tenements, for
 “ such estate and term therein as were or was granted and set-
 “ tled to the said mortgagee or mortgagees, against the said
 “ mortgagor or mortgagors, and all person and persons lawfully
 “ claiming from, by, or under him, her, or them, freed from
 “ equity of redemption, and as fully, to all intents and purposes
 “ whatsoever, as if the same had been purchased absolutely,
 “ and without any power or liberty of redemption.”

§ 3.

“ And it is further enacted, That if any person shall mort-
 “ gage any lands or tenements to any person or persons, for se-
 “ curity of money lent, or otherwise accrued or become due, or
 “ for other valuable considerations; and if the said mortgagor
 “ or mortgagors shall again mortgage the same lands or tene-
 “ ments, or any part thereof, to any other person or persons for
 “ valuable consideration (the said former mortgage being in
 “ force, and not discharged), and shall not discover to the said
 “ second or other mortgagee or mortgagees, or some or one of
 “ them, the former mortgage or mortgages, in writing, under
 “ his, her, or their hands, that then, and in these cases also, the
 “ said mortgagor or mortgagors, his, her, or their heirs, execu-
 “ tors, administrators, or assigns, shall have no relief, or equity
 “ of redemption, against the said second or after-mortgagee or
 “ mortgagees, his, her, or their heirs, executors, administrators,
 “ or assigns, upon the said after-mortgage or mortgages; but
 “ that such mortgagee or mortgagees, his, her, or their heirs,
 “ executors,

“ executors, administrators, and assigns, shall and may hold and
 “ enjoy such more than once mortgaged lands and tenements, for
 “ such estate and term therein as were or was granted and con-
 “ veyed by the said mortgagor or mortgagors, against him, her,
 “ or them, his, her, or their heirs, executors, or administrators
 “ respectively, freed from all equity of redemption, and as fully,
 “ to all intents and purposes, as if the same had been an absolute
 “ purchase, and without any power or liberty of redemption.

“ Provided always, and be it further enacted by the authority
 “ aforesaid, That nevertheless if it so happen that there be
 “ more than one mortgage at the same time made, by any per-
 “ son or persons, to any person or persons of the same lands
 “ and tenements, the several late or under mortgagees, his, her,
 “ or their heirs, executors, administrators, or assigns, shall have
 “ power to redeem any former mortgage or mortgages, upon
 “ payment of the principal debt, interest, and costs of suit to
 “ the prior mortgagee or mortgagees, his, her, or their heirs,
 “ executors, administrators, or assigns.

§ 4.

“ Provided always, That nothing in this act contained shall
 “ be construed, deemed, or extended to bar any widow of any
 “ mortgagor of lands or tenements from her dower and right in
 “ or to the said lands, who did not legally join with her husband
 “ in such mortgage, or otherwise lawfully bar or exclude herself
 “ from such dower or right.”

§ 5.

It hath been held, that if a man mortgages certain lands to
 one man, and mortgages those lands with some others to an-
 other; though this seems to be a case omitted out of the above
 statute against clandestine mortgages, yet if it appears to be a
 contrivance to evade it, as, if an acre or two of land were only
 added, this will not exempt it: also, a person, who will take ad-
 vantage of the statute, must be an honest mortgagee; and there-
 fore if a man has used any fraud or practice in obtaining a
 second mortgage, he shall not have the benefit of the statute.

Stafford v.
 Selby,
 2 Vern. 589.
 || 1 Eq. Ca. Ab.,
 320. pl. 5.||

4. *How far the purchasing of a precedent Mortgage or Incum-
 brance will protect such Purchaser, and entitle him to a Pre-
 cedency of Redemption: || And herein of Notice, Registration,
 and Tacking.||*

It hath been established as a rule in the courts of equity, that
 if a man mortgages lands to *A.*, and afterwards makes a subse-
 quent mortgage to *B.*, without notice at the time of his making
 the mortgage, and *B.* purchases in a precedent mortgage, which
 stands out at law, though nothing on it be due in equity, or a
 statute whereon money is due, which he extends, he shall hold
 the land till he is satisfied what is due upon both securities,
 though he had notice of *A.*'s mortgage before his second pur-
 chase of the prior security; because, having at first innocently
 lent the money, he may do what he can to secure that money
 from being lost; and when he hath purchased in the prior in-
 cumbrance, it is but just that equity should leave it in the same
 manner that it stood at law; for there is no room for equity to

Marsh v. Lee,
 2 Vent. 357,
 Chan. Ca. 36.
 149. 162. 166.
 Hard. 175.
 2 Chan. Ca.
 208.
 Vern. 187.
 2 Vern. 157.

interpose, to take away the security the law had given, where the person that has the security comes into the title without any corruption at all; and it were partiality, and not equity, to interpose where the security gives the fair lender a good and legal title. And it is all one, whether such third lender or purchaser takes in a mortgage, that is an interest vested, or a statute, that is only a charge; for both are real liens, and sufficient to overthrow the title of the mesne incumbrancer, whether money be due on the first security or not, since that does not alter the legal title.

Chan. Ca.
201. 3 Chan.
Rep. 67.
S. C. Sir
Ralph Bovey
v. Skipwith.

A man mortgages the manor and rectory of *D.* to *A.*, and afterwards mortgages the rectory to *B.*, without notice of the mortgage to *A.*, and then *B.* purchases in a precedent incumbrance on both the manor and rectory; and the question was, When *B.* had received all the money due on the first security, whether he should receive any more profits of the manor, or only keep the incumbrance on foot to protect the rectory? This was argued before Sir *Heneage Finch* Lord Keeper, in the presence of *Wild* and *Twisden*; and the two Judges held, that *B.* should not receive the profits of the manor after the first incumbrance was satisfied, because he had taken the rectory only for his security of that sum; and it would be unreasonable to give him a security beyond what he had in his original intention. But the Lord Keeper over-ruled it; for that when he had purchased the precedent incumbrances, which comprehended both the manor and the rectory, and were forfeited at law, it was but reasonable that the estate should not be taken away by the mesne incumbrancer here in a court of equity, which by no methods could be evicted at law, unless such person that seeks relief would do equity, and pay the whole money due on both securities.

Barnett v.
Weston,
12 Ves. 130.

||But the monies must be due to the mortgagee in the same right; for a mortgagee with the legal estate cannot, as against mesne incumbrancers, tack to his own mortgage another mortgage vested in him as executor. The following appears to be the only case in which this point has been discussed:—*Brooke* assigned to *S. Barnett* leasehold premises for securing 3000*l.*; and afterwards made a second mortgage to him for 500*l.* He then mortgaged the equity of redemption to *Hunt*, and then made a further charge to *S. Barnett*. He afterwards mortgaged the equity to *Sadler*, and ultimately to *W. Barnett*, the brother of *S. B.* *W. Barnett* died, and appointed *S. B.* his executor. *S. B.* died, and his executors filed a bill claiming to be paid all the advances made by *S. B.*, and to tack the mortgage made by *W. B.* in preference to the mortgage of *Hunt* and *Sadler*. The Master of the Rolls said, the law of the court gave a person who had obtained a mortgage of the equity of redemption the chance of getting in the legal estate if he could, and so gaining a priority over mesne mortgages; but *W. Barnett* never got the legal estate, nor did any executor of him ever get it, for *S. B.* did not get it as his executor, but had it in his own right before *W. B.*'s mortgage had any existence: it was just the same as if the estates

were

were in two different persons. The plaintiffs were only entitled to *S. B.*'s own mortgages.||

[Again, *R.* being seised in fee, acknowledged a statute of 1000*l.* to *I. S.* in 1663, and, on the 20th of *June* 1665, mortgaged the manor of *A.* to the plaintiffs *W.* and *K.* for 2000*l.*, and two days afterwards mortgaged part of the same to the defendant *B.*, and then died, leaving the defendant *H.* his heir; *B.*, the second mortgagee, agreed with *M.*, another defendant, executor of *I. S.*, to put the statute in execution at his costs, and to pay *M.* the debt due on the statute, after such time as the statute should be extended, and an assignment made thereof by *M.* to *B.* The statute was extended in *August* 1672. The plaintiffs' bill was, that on paying the debt on the statute, it might be set aside and assigned to them, and for a decree against *H.* to pay or be foreclosed of redemption. One question was, Whether the plaintiffs should be admitted to set aside the extent on payment of what was due on the statute, without paying off the 2000*l.* due on the second mortgage to *B.*, until the statute was satisfied, not according to the justice of the debt in equity, but according to the extended value? It was objected, that the defendant *B.* had not, in his mortgage made after the plaintiffs' mortgage, all the lands mortgaged before to the plaintiffs, but only part thereof, and that the statute covered the whole: and that, although the defendant *B.* might, by the purchase of the statute, defend himself against the plaintiff, as to what was in his mortgage, yet he could not as to such lands as were not therein. But the Chancellor was strongly against the plaintiffs on this point, and a question of fact arising, the case went off upon propositions.

And if a puisne incumbrancer or purchaser get in a satisfied judgment, or a prior statute, or judgment, or recognizance, although it be paid off, yet if he can make use of it at law, equity will not interfere to hinder him.

Wyndham
v. Lord
Richardson,
2 Cha. Ca.
212.

Edmunds v.
Povey,
1 Vern. 187.
2 Ch. Ca. 208.
Hard. 518.

Sed vide Hard. 172. *cont.*

So, where the plaintiff was a jointress, and the defendant a mortgagee subsequent, who had gotten an assignment of a statute that was precedent to the jointure, but was satisfied, and extended it on the lands mortgaged; the bill was to set aside the extent: but the Master of the Rolls decreed, that it should not be set aside, but upon payment of principal, interest, and costs.]

Sadler v.
Bush, 2 Vern.
30.

But if *B.*, the second mortgagee, had notice of the mortgage of *A.* at the time of his first lending the money, then he could not purchase in a prior incumbrance, so as to crowd out *A.*, because he lent it on the prospect that *A.* was first to be paid, and under that immediate expectation; and though the estate would bear more money at the time of the loan, yet if, by prior debts appearing, or any accident, it is likely to fall short, it seems he cannot crowd out *A.*, of whose interest he had notice, since he took the estate with his eyes open, under notice of *A.*'s interest; and therefore, on his original taking the security, ran all the hazards

Marsh v. Lea,
Chan. Ca. 166.
|| 2 Vent. 337.
S.C. Belchier
v. Butler,
1 Eden, R.
523. 5 Bro.
P. C. 292.
It seems of
no conse-
quence that
the first in-
cumbrancer,

when he conveyed to the third, knew of the second. Belchier v. Butler, *supra*. Robinson v. Davison, 1 Bro. C. C. 63.; *per* Lord Eldon, 15 Ves. 335.]]

2 Chan. Ca.
20.

A man mortgages lands (subject to an annuity) to *A.*, and then mortgages the same lands to *B.* The mortgagor and annuitant borrow more money of *A.*, for which the annuity is assigned, and the lands farther charged; *A.* shall be allowed the money if he had no notice of *B.*'s mortgage; if he had, then only what was paid to the annuitant.

Brace v.
Duchess of
Marlborough,
2 P. Wms.
491. Anon.
2 Ves. 662.;
sed vide
Wright v.
Pelling, Gilb.
Eq. Rep. 151.
and Prec. Ch.
494. || *Ex*
parte Knott,
11 Ves. 619.]]

[Where a judgment-creditor, or creditor by statute or recognition, buys in a first mortgage, he cannot tack or unite this to his judgment, so as to gain a preference thereby; because such creditor cannot be called a purchaser, nor hath he any right to the land; he hath neither *jus in re*, nor *jus ad rem*; and therefore, though he release all his right to the land, he may extend it afterwards. All that he hath by the judgment is a lien upon the land; but it is not certain whether he ever will make use thereof; for he may recover the debt out of the goods of the conusor by *scire facias*, or may take the body, and then, during the defendant's life, he can have no other execution. Besides, the judgment-creditor doth not lend his money upon the immediate view or contemplation of the conusor's real estate; for lands afterwards purchased may be extended upon the judgment; nor is he deceived or defrauded, although the conusor of the judgment hath before mortgaged his real estate, as in the case of a mortgagee, if the mortgagor hath before mortgaged his land to another.]

Breerton
v. Jones,
June 8. 1709.
Per Master
of the Rolls,
1 Eq. Ca.
Abr. 325. S.C.

A. mortgaged his estate to *B.*, and then assigned the equity of redemption to *C.*; afterwards *D.* obtained a judgment against *A.*; then *B.* the mortgagee assigns to *D.* his mortgage; and then *C.* tenders the money due on the mortgage to *D.*, who had notice of the assignment of the equity of redemption, upon his purchasing in of the mortgage. It was here objected, that *D.* having the legal estate in him by the assignment of the forfeited mortgage, and *C.* having only an equitable interest, and not supported by the legal estate, that if *C.* would have equity, he ought to do equity, by paying off both monies to *C.* But it was answered and resolved by the court, that *C.* should redeem, paying only the money due on the mortgage, and not what was due on the judgment; because the equity of redemption was never bound by the judgment; for the judgment was not confessed, so as to become a real lien upon the estate, at the time when the equity of redemption was conveyed away; but it only subsisted upon bond, which was a security *in personam*, not *in rem*, at the time when this equity was assigned; and therefore the judgment could never charge nor affect it; and, consequently, *C.* purchased an estate not bound by the judgment; and, by consequence, the judgment-creditor, by purchasing in the prior mortgage, could never defeat the interest of *C.* It was also declared, that if a person who has a first mortgage, purchase in a subsequent judgment, without the consent of the mortgagor, that a mesne mortgagee, or assignee of

of the equity of redemption, shall not be obliged to pay the money due on both securities, in order to redeem, because such transaction of the mortgagee is only to load the estate without the consent of the owner, and he has no prospect of bettering his own security, as in the case where a mortgagee at a third hand purchases in the first incumbrance.

Beeching made a mortgage of his estate, and became indebted to *Hayward* in 60*l.*, and then conveyed to *Streater*, another defendant, in trust to pay a debt to *Streater*, and then all his other debts of average; then *Streater* tendered the money to the mortgagee, which he refused, and afterwards assigned the mortgage to *Hayward*; and then *Hayward* obtained judgment against *Beeching*, on his bond of 60*l.*, and then *Streater* sold to the plaintiffs, who not having paid their purchase-money, preferred their bill against the mortgagees and *Hayward* to redeem. The Lord Keeper ordered, that the plaintiffs should redeem *Hayward's* mortgage, and deduct their costs out of the mortgage-money, and that the judgment should be paid but in proportion; for though *Hayward* had a title at law, and it was insisted, that his judgment would affect the resulting equity in *Beeching*, if there was more than sufficient to pay his debts; and none of the creditors of *Beeching* were made parties to the suit; yet the Lord Keeper thought, that the conveyance made for the payment of all *Beeching's* debts was a good consideration, and that being prior to the judgment, the subsequent judgment could not affect the estate; and though no creditors of *Beeching's* were made parties, yet they might be brought in before the Master.

[But where *A.*, the plaintiff, had lent money on several notes of different dates, each of them in words to this effect: "Received of *A.* —*l.*, to be secured on mortgage of my *Stokehall* estate;" and the drawer had, previously to his drawing these notes, made a mortgage of his estate to the defendant; and *A.*, to cover the sums lent on the notes, bought in a mortgage which was made prior to the defendant's: Lord *Hardwicke* was of opinion, that *A.* should thereby protect himself against the defendant's mortgage; and should be paid the money lent upon the notes, as well as what was due to him upon the assignment of the first mortgage.

which he cannot do; for this was a case of equitable mortgage. See *Powell*, 522. a. (6th ed.)

A prior mortgage purchased in will be no protection to a puisne mortgagee, unless it be forfeited; for, until then, the estate remains, as it was at common law, redeemable upon performance of the condition stipulated.

And a puisne mortgagee, who purchaseth in a prior security to protect his own, shall not only hold it until he be paid his debt, and reimbursed the money advanced by him to purchase it; but until he has received all the money, and arrears of interest, due on the security bought in, as well as upon his own.

And as a puisne mortgagee may tack a prior incumbrance, that brings with it the legal estate, to his own, and thereby protect

Stephenson v. Hayward, Feb. 9. 1710, per Lord Keeper *Harcourt*. Prec. Ch. 510.

Matthew v. Cartwright, 2 Atk. 347. || This case is distinguishable from the common case of a judgment-creditor purchasing a prior incumbrance to protect himself,

Hitchcock et al. v. Sedgwick et al., 2 Vern. 155.

Darcy v. Hale, 1 Vern. 49.

Goddard v. Camplin, 1 Ch. Ca. 119.

||(a) But not
a simple con-
tract debt.
Ex parte
Hooper,
1 Meriv. 7.||

Blackstone v.
Moreland,
2 Ch. Ca. 20.

tect himself against intervening charges thereon ; so, a mortgagee eigne, having the legal estate, may tack a subsequent sum advanced by him upon the former security (a) to his prior mortgage, and thereby protect himself against mesne incumbrances.

Thus, where *A.* had an annuity charged on the manor of *S.*, and *B.* an estate therein liable to the annuity, and *C.* an interest subsequent to both by mortgage ; *B.* having no notice of *C.*'s interest, treated with him in the reversion in fee, who desired to borrow money of him, and thereupon purchased *A.*'s interest, and for that, and by way of money lent to the reversioner, paid 900*l.*, but there was no more than 500*l.* due to *A.* ; *C.* exhibited his bill against *A.* and *B.*, to redeem them on payment of their debts ; the question was, Whether *C.* should pay *B.* any more than the mortgage-money he had originally lent, and the 500*l.* paid by him, which was due to *A.* ? And it was decreed, that he should pay the whole 900*l.* advanced.

Shepperd v.
Titely, 2 Atk.
552. 4th reso-
lution in
Brace v.
Duchess of
Marlborough.
2 P. Wms.
494. 2 Ves. 662.

So, if there be first and second mortgagee, and the first lend money after the last mortgage made, taking a *judgment* as security, he may tack this to his mortgage to protect himself against the second mortgagee, for he hath the legal estate and the judgment *which*, though it passeth no interest, presently, in the land, operates as a *lien*.

Cooper v.
Cooper, Nel-
son's Rep.
153.

But the farther sum advanced must be to one who has a right to charge the estate in question. Thus, *I. C.*, the grandfather of *C.*, made a mortgage of lands in fee to *H.*, and then having two sons, *A.* and *B.*, devised the equity of redemption to his youngest son *B.*, and his heirs, and died ; *B.* entered into the mortgaged lands, and enjoyed the same two years, and then died, leaving a son an infant. After *B.*'s death, his elder brother *A.* entered on these lands, and having occasion for money, joined with the mortgagee in an assignment of the mortgage to another person, of whom he borrowed a farther sum, which the assignee advanced, having no notice of the will of *John Cooper*. Then the heir of *B.* came of age, and exhibited a bill to be let into the equity of redemption upon the foot of the first mortgage. And on his part it was insisted, that the assignee could be in no better condition than the mortgagee, and that, if there had been twenty assignments for more money, if the mortgagor or he who legally represented him had not joined, he should not be barred, but ought to be relieved. On the other side it was contended, that the assignee was a purchaser for a valuable consideration without notice of this incumbrance by the will, and that he had a good title, having taken an assignment from the mortgagee, wherein the visible heir of the mortgagor was a party, and therefore, that if the heir would redeem, he ought to pay the whole principal sum and interest. But the court was of opinion, and decreed that the heir should be let into the equity of redemption upon the foot of the first mortgage.

And

And where *A.* had a prior judgment, and a mortgage likewise on the estate of *B.*; and a subsequent judgment-creditor, but prior in time to the mortgage, brought a bill in Chancery, praying a sale of the mortgagor's estate, who was likewise willing and desirous to sell; *per curiam*, here, *A.* is not a subsequent incumbrancer buying in a prior, but is the first of the incumbrancers who has advanced more money on a second incumbrance. Where the *first incumbrancer* by judgment has likewise a mortgage upon the estate, notwithstanding there is another judgment, prior in time to the mortgage, yet, if the mortgagee had no notice of such judgment, the creditor upon the second judgment shall not come into a court of equity, and pray a sale of the estate so mortgaged, without paying off the principal and interest, both of the first judgment and the mortgage; for it would be very hard if the defendant should be in a worse condition, with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be.]

Smithson v. Thompson,
1 Atk. 520.

If a man lends 600*l.* on a mortgage, and afterwards, discovering that the estate is pre-mortgaged to *J. S.*, he gets in an old, satisfied incumbrance, and brings his bill against *J. S.* to redeem or be foreclosed, he need not prove the actual payment of any money for such precedent incumbrance, the having the deed or acquittance being sufficient.

Holt v. Mill,
2 Vern. 279.

[The law is the same, although the incumbrance, set up as a protection, be obtained by fraudulent means; as, where one, being a purchaser, came into a man's study, and there laid hand on a statute that would have fallen on his estate, and put it in his pocket; in that case, he having obtained an advantage at law, the court would not take it from him, though procured so unfairly, and by so ill a practice: *sed quære?*

2 Vern. 159.
Siddon v. Charnell,
Bunb. 298.
Sherley v. Fag, case
cited, 1 Vern.
52, 53.
2 Vern. 58.

reported 1 Ch. Ca. 68.; *sed contra* Gilb. *lex pratoria*, 248.

But, where the prior incumbrance taken in is deficient in those requisites which are necessary to give it legal efficacy, no protection can be derived from it. As, if a recognizance, bought in, hath not been enrolled in proper time. And though the court may, on application, interpose, and, by their special order, supply the defect as to persons who come *subsequent* to such interposition, yet it will not over-reach an intermediate incumbrancer.

Fothergill v. Kendrick,
2 Vern. 354.
Bothomley v. Lord Fairfax,
1 P. Wms. 540.

So, if a judgment be not docketed within the time limited by the statute 4 & 5 W. & M. c. 20., it will not protect a puisne incumbrancer, although the eigne incumbrancer hath actually notice of it at the time of making the mortgage. Thus, where judgment was signed in *June* 1725, and a mortgage made to the plaintiff, who had notice of the judgment in 1728, but the judgment was not docketed, as appeared by an entry on the margin of the docket, until *January* 1730; the Master of the Rolls held, that the docket was not good, being made after the time limited by the statute, and that the mortgage had got the preference of the judgment by defect of the docket; and, as to the notice, it was not material, the statute being express, that judgments not docketed

Forshall v. Coles,
7 Vin. Abr. 54.
P. C. 6. S. C.
2 Eq. Ca. Abr.
592. 598.

||(a) But it has been decided by *Davis v. Strathmore*, 16 Ves. 419. that a purchaser is bound by notice of a judgment though not docketed. ||

Robinson v. Harrington, 1 Pow. Mortg. 415. But this exception, as to judgments not docketed, is confined to cases where they are set up against purchasers or mortgagees, or heirs, or executors, or administrators in the administration of the effects of those of whom they are representatives.]

Hawkins v. Taylor and Leigh, 2 Vern. 29. Farmer v. Richmond, *Id.* 81. S.P. If a prior mortgage or statute be bought in, pending a bill brought by *A.* against the mortgagor and *B.*, who buys in such precedent statute or mortgage, to foreclose; though this purchase be *pendente lite*, yet it will protect *B.*, he being at liberty to do what he can for his own security.

Wortley v. Birkhead, 2 Ves. 571. S. C. [The plaintiff (after a decree had been made in a cause in which he had been a party with other creditors, and the Master had been directed to enquire into the priority of their demands,) bought in a judgment given in 1694, and made claim before the Master to have it tacked to his mortgage, and thereby to be paid before the defendants; as to which the Master refused to make any report: whereupon the plaintiff filed his bill, and one question was, Whether he could tack the incumbrance bought in after the decree to his mortgage? Lord Chancellor *Hardwicke*, as to this part of the case, said, that there was no case wherein it had been determined that a puisne incumbrancer, a party in a cause, and a decree made in that cause, for satisfaction of incumbrancers, according to their respective priorities, having taken in a prior to tack to his puisne incumbrance, should be allowed to make use of it in any other shape than that in which the original incumbrancer might use it, had no such purchase been made. He thought it would be most mischievous and pernicious, if the court should allow the doctrine of tacking to be carried to that extent. First, taking it upon the terms of the decree; all those decrees, where there were several incumbrances before the court, a sale directed, and every thing necessary to clear the estate in order to that sale, proceeded on the foundation, *that the rights of the parties* were to be taken as they stood at the time of the decree; and therefore they directed an enquiry into the priorities. What, then, were those priorities? Why, such as they stood at the time of the decree: not that afterwards the priority should be varied. The sense, reason, and justice of the case required it should be so; for otherwise, if where an incumbrancer on an estate which was affected with several charges, brought a bill for satisfaction thereof, and there were all proper parties and a decree for it, as between himself and the owner of the equity of redemption, (some of the incumbrances being prior, others posterior to his,) one of those defendants, who happened to be prior to him, was allowed to convey to another defendant, who was puisne to him, it would shut out the plaintiff after the decree made, at which time the rights were considered. What would be the consequence? Nothing could lay a foundation for greater collusion and contrivance between the parties to exclude each other than such a liberty would, and that to the great deceit of the plaintiff;

plaintiff; for then a man would lose his costs by such a proceeding, although he had a right to his debt, principal, interest, and costs, according to the respective priorities; that was the direction of this decree; and there was a sufficient fund, according to the then right of the plaintiff, to pay all that was due; but if this were permitted, after a decree was made, two of these defendants might, by a collusion, give a third incumbrancer more than his debt, and it would be worth while to do so, in order to exclude another, who happened to be a second incumbrancer. It would be carrying securities to market in that manner, whereby the purchaser of them should not only stand in the place of the party selling, but would acquire a new equity, which it would be mischievous to allow; and therefore, his Lordship said, he never was clearer in opinion than upon this part of the case as to the general right.

So, where *S.*, a puisne incumbrancer, after the bill brought, and after the first decree made, and, in truth, after the report, got an assignment of an old judgment and mortgage, expecting thereby to gain a preference to his debt; the court held, that the assignment obtained by him being after the decree made, he should not profit by it or change the order of payment, but should come in according to the time of his own incumbrance, without regard to the old judgment and mortgage.

And the law is the same as to purchasers, incumbrancers who are not parties in the suit, *but who could come in under the decree*; for they must come in upon, and submit to, the terms of that decree, though no parties.

¶ In a case where a third mortgagee had obtained a transfer of a first mortgage, subsequently to a commission of bankrupt against the mortgagor, it was contended by the assignees, that *the commission* had the same effect as a decree to settle priorities, after which there can be no tacking. But the Lord Chancellor held that it was not so; that the commission was not a judgment for creditors, but only a conveyance for the security of creditors.

In this case another important question was raised, *viz.* What was the situation of the assignees of the bankrupt against the third mortgagee, claiming under one mortgage since the act of bankruptcy and a transfer of another subsequent to the commission? The mortgagee insisted that the assignees could not stand in a better situation than the bankrupt, and consequently could only redeem by paying all the money advanced on the faith of the land. The assignees, on the other hand, contended that the assignment was a conveyance for the benefit of creditors, and placed them in the same situation as if the debtor had not been bankrupt, but had made a conveyance for the benefit of his creditors. The point was not decided, an issue being directed as to the priority of the act of bankruptcy on the third mortgage.¶

A third mortgagee may purchase in a first mortgage, and defend himself thereby, notwithstanding a suit be depending between the respective mortgagees.

Thus,

Bristol
v. Hungerford,
2 Vern. 524,
525. || 1 Eq. Ca.
Ab. 142. ||

2 Ves. 575.
|| 11 Ves. 619. ||

Ex parte
Knott,
11 Ves.
618.

Robinson v.
Davison *et. al.*,
1 Br. Ch. R. 63.

Thus, where the second mortgagee filed his bill against the mortgagor, first and third mortgagees to be let in to pay off the first mortgage, and that then the estate should be sold, his own mortgage paid, and the third be satisfied out of the remainder; and pending the suit the third mortgagee bought in the first mortgage: it was determined by this he had gained a priority, and should be paid his whole money before the second mortgage.

Belchier v.
Butler, Ren-
forth v. Iron-
side, 1 Eden,
530.

|| In a case before Lord Keeper *Henley*, in which a similar point was determined, that judge thus explained the principles of the doctrine: — “ The rule of equity requires no more than “ that the third mortgagee should not have had notice of the “ second at the time of lending the money; for it is by the lend- “ ing the money without notice that he becomes an honest cre- “ ditor, and acquires the right to protect his debt. But he is “ not compelled to look for this protection till his debt is in “ danger of being prejudiced; and therefore when that danger “ is first discovered to him (whether it be by a suit in equity, or “ by any extra-judicial means), as the honesty of the debt is not “ affected by the discovery, so the right of protecting that debt, “ and the efficacy of such protection, are not prejudiced. Hence “ arose the rule which permitted the subsequent incumbran- “ cers to purchase *pendente lite*. ||

Vide Worsley
v. Earl of
Scarborough,
5 Atk. 392.

However, in many cases, a suit pending in equity against land is a bar to alienation; for *pendente lite nihil innovetur*; therefore the vendor of lands, pending a suit in equity against them, can give no title but what will be subject to its issue; but it is the pendency of the suit that creates the notice, for as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there; and to prevent a greater mischief that would arise by people's purchasing a right under litigation and then in contest. *J. F.* having only one daughter, and desiring to keep part of his estate in his name, by will made in 1684, devised a messuage to *F.* his near kinsman, in tail male, with remainder over, and gave his lands in *Sussex* to his daughter, who married *E.*; they, with *C.*, were supposed to have destroyed the will after the death of the testator. *F.* brought his bill against *E.* and his wife; and, in 1687, obtained a decree to hold and enjoy the lands according to the will against them, and all claiming under them. The estate devised to *F.* having been mortgaged by the testator, prior to his will to *B.*, for 100*l.*, *N.* pending the suit, bought in *B.*'s mortgage, and purchased the equity of redemption from *E.* and his wife. *N.* was served with the former decree, and appeared, and was examined, and set out his title under this mortgage, whereupon *F.* was put to bring his bill to redeem. *N.* by answer alleged, that although he had been informed before his purchase that it was pretended there had been such will made, yet, upon enquiry, he had been assured and satisfied that it was destroyed by the testator in his lifetime, and therefore he proceeded in his purchase, and insisted, that the former decree, to which he was no party, was unjust in decreeing the lands to be enjoyed according to the will; but, in regard

Finch v.
Newnham,
2 Vern. 217.;
et vide Fleming
v. Page,
Finch. 320.;
et vide Her-
bert's case,
3 P. Wms.
116. this
doctrine of
notice ex-
tended to a
criminal case.

regard he purchased *pendente lite*, and with notice that there was a will, the court would not admit him to examine the justice of the former decree, or to try at law whether such will was cancelled or destroyed by the testator, but declared he should be bound by the former proceedings, and decreed the redemption of the mortgage to the plaintiff.

|| On the same principle of the *lis pendens* being notice, a decree of foreclosure is held binding on all creditors, by mortgage or judgment, and assignees of the equity of redemption, subsequent to the filing the bill. In a case where it was decided that mortgagees of the equity of redemption, pending a suit for foreclosure, were bound by the decree, and that it was not necessary for the plaintiff to make them parties, the Master of the Rolls said, that the litigating parties were exempted from the necessity of taking any notice of a title acquired pending the suit. As to them it was as if no such title existed. The rule might sometimes operate with hardship upon those who purchased without actual notice, yet general convenience required its adoption; and a mortgage taken *pendente lite* could not be exempted from its operation. And the rule is the same although the suit abate after the making the mortgages *pendente lite*, and a bill of revivor be filed to which these mortgagees are not made parties.||

4 Dow. P. C. 428. Powell, 547. a. note

A. and *B.* were partners; *A.* died having made his will, and devised to his executors and their heirs "all his real and personal estate, not by his will otherwise disposed of, in trust that they should, by charging, leasing, or selling his estates, or any of them, raise money for the payment of all his debts; and what should remain, he directed to be divided into equal portions, share and share alike, between his five children, and left it to his executors to make proper allowances for their maintenance, until there should be a distribution made of his estates." *A.* amongst other things had a mortgage of 3500*l.* In a cause between the executor of *B.* and *A.*'s executors, the mortgage-deed was directed to be left in the hands of a Master of Chancery, till the partnership account should be finally adjusted. Afterwards *A.*'s executors conveyed the mortgage to Master *Bennet*, as security for one of the executors, on his appointment to be receiver of another person's estate. And one argument used by the children of *A.* in a suit against the holders of the mortgage, by way of security for the due discharge of the receivership, was, that there was a suit at the time of the assignment about the mortgage, who was entitled to it, and that therefore it was void, as being made *lite pendente*. But Lord *Hardwicke* said, that he did not see how this *lis pendens* could affect this assignment, unless it had been determined that this was the mortgage of *B.* the partner of *A.* and belonged to his creditors, who were the plaintiffs in that cause. But that, as it was therein determined to be *A.*'s estate, there was an end of that objection.

But, in case of a real purchaser for a valuable consideration, Sorrel v. *pendente*

Bishop of
Winchester v.
Paine, 11 Ves.
197.; *et vide*
Bishop of
Winchester
v. Beaver,
5 Ves. 315;
Metcalfe
v. Pulvertoft,
2 Ves. & B.
207.
Gaskell v.
Durdin,
2 Ball & B.
167.
Moore v.
McNamara,
2 Ball & B.
186.; and see
(R). (6th edit.)
Mead v.
Lord Orrery,
5 Atk. 256.
Id. 392. S. P.

Carpenter,
2 P. Wms.
482.

(a) There appears to have been an order to amend the bill in Trin. term, 1728 (the term of which the reporter makes the decision to have been); Reg. Lib. B. 1727. fol. 455.; and an order of dismissal in the Mich. term following. Reg. Lib. B. 1728, fol. 18.

In this case the Chancellor observed, that it was a difficult matter to search for bills in equity, or to get notice of them; many such being, after filing, kept in the six clerks' desk; and that though the court would oblige all persons to take notice of its decrees as much as of judgment at law, yet there did not seem to be the same reason for obliging people to take notice of the filing of a bill. *Vide* 5 Atk. 592.

Garth v.
Crawford,
Barnard. Ch.
Rep. 450.
2 Atk. 473.
S. C. by the name of Garth v. Ward.

And if a purchase or mortgage be made, pending a bill, to perpetuate the testimony of witnesses to a will of land, the proceedings may be read against a purchaser or mortgagee, during the suit, although he hath not notice either express or implied.

Barnard. Ch.
Rep. 454.
2 Eq. Ca. Abr.
687. 13.

But, in general, a bill that cannot be brought to a hearing, cannot properly create a *lis pendens*, so as to affect a purchaser, claiming under one of the parties, after filing the bill.

Searle v.
Lund, 2 Vern.
88. 1 Eq.
Abr. 552. 534.
2 Ch. Ca. 48.;
et vide
3 P. Wms. 401.;
et Ca. temp.
Talb. 217.
2 P. Wms. 622.
1 Ves. 496.

And it seems, that a decree in a court of equity, for money, does not bind a purchaser for a valuable consideration, without notice thereof, any more than a judgment at law; for a decree is not of superior force to a judgment; nay, its effect is inferior; and where it is said a decree is equal to a judgment, or to be paid equally therewith, this must be intended only out of the personal estate; for a decree for a debt does not bind the real estate, it acting only in *personam*, not in *rem*; and the remedy upon a decree to affect the land, is only for a contempt, whereupon the party proceeds to a sequestration, and that is but a personal process, as appears by its failing and abating by the death of the party.]

Hitchcock
v. Sedgwick,
2 Vern. 157.
160.

But, where *A.* made a mortgage to *B.*, and afterwards a commission of bankruptcy was taken out against him, and the commissioners made an assignment of his estate, and then *C.* lent the bankrupt 2000*l.* on a second mortgage, having no notice of the bankruptcy, though he afterwards got in the first mortgage; yet it was held by two lords commissioners against one, that this prior mortgage

mortgage should not protect the mortgage subsequent to the bankruptcy; for every one is bound to take notice of a commission of bankruptcy.

¶ But this decree was afterwards reversed in the House of Lords, and the money advanced *subsequent* to the commission was ordered to be paid to the mortgagee; which was deciding that a commission of bankruptcy is not of itself notice to a purchaser, and that advances made without notice subsequently to the commission may be tacked to the prior mortgage. However, notwithstanding this decision, it is perhaps not fully settled whether a *commission* is notice or not, so as to prevent tacking subsequent loans. It seems, however, that it is not.

It has even been doubted, whether an act of bankruptcy is not of itself notice; and it was stated by Lord *Redesdale* in *Latouche v. Dunsany*, (1 Schol. & Lefroy's R.) that it was the constant practice for the assignees to compel a redemption on payment only of what was advanced before the *bankruptcy*, meaning the *act* of bankruptcy: and Lord *Erskine* decided in a subsequent case, that the act of bankruptcy was notice so as to prevent a mortgagee tacking advances subsequent to it. This decision of Lord *Erskine*, it must be observed, directly overruled the case of *Collet v. De Gols*, decided by Lord *Talbot* (For. 70. Co. B. L. 1. 300.); and Lord *Erskine* considered that Lord *Redesdale* in the case above mentioned, and Lord *Eldon* in that of *Ex parte Knott*, 11 Ves. 609., had both expressed opinions against Lord *Talbot's* decision. But the report of Lord *Eldon's* judgment in *Ex parte Knott* is manifestly confused and inaccurate, and does not appear clearly contradictory of the doctrine in *Collet v. De Gols*; and it appears now to be the better opinion that that case remains established law, and that the *act* of bankruptcy is *not* notice so as to prevent tacking subsequent loans.¶

And though a purchaser or mortgagee may buy an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by taking a conveyance from a trustee after he had notice of the trust; for by taking such conveyance, he becomes the trustee himself.

[Even a fine levied by a purchaser for full consideration, *with notice of a trust*, to strengthen his estate, will not bind the *cestui que trust*, although there be five years non-claim; for he, having purchased with notice, is but a trustee, notwithstanding any consideration paid by him; and the estate not being displaced, the fine cannot bar; but a fine and non-claim will be a bar in equity, if a purchaser hath not notice.

And where the plaintiff's bill was to be relieved upon a trust, and charged the defendant with notice thereof, and that he had procured a conveyance of the lands upon which the trust was had, *and that at or before his taking the said conveyance*, he had notice of the said trust for the plaintiff; the defendant, by way of answer, denied that he had any notice of the trust *at the time of his purchase or contract*, and pleaded that he was a purchaser for a valuable consideration; it was insisted that the point of notice

2 Vernon, 161.
n.(1.) lastedit.)
Vide Coote
on Mortg.
430. Powell,
551. a. Sugden,
V. & P. 722.
(6th edit.)
Sowerby v.
Brooks,
4 Barn. & A.
525.

Ex parte
Herbert,
15 Ves. 183.
Vide 11 Ves.
609. Sugd.
V. & P.
720. (6th edit.)
Coote, 429.
Powell, 551. a.

Saunders v.
Dehew,
2 Vern. 271.;
¶ and see
Pearce v.
Newlyn,
3 Madd. 189.¶

Bovey
v. Smith,
1 Vern. 149.
2 Cha. Ca.
125.
2 Vern. 194.
1 Atk. 475.

More v.
Mayhow,
1 Ch. Ca. 34.
Attorney
General v.
Gower *et al.*,
2 Eq. Ca. Abr.
685. 11. *et*
Wigg v. Wigg,
1 Atk. 384.

was not well answered, in that the defendant denied notice *at the time of the purchase only*; for the word *purchase* might be understood to mean the time when the contract for the purchase was made, and it might be, he had no notice then, and might have notice after, before, or at the sealing of the conveyance; and if there was any notice before the conveyance to him was executed, that would charge the defendant; upon which objection the plea was over-ruled.

Elle v.
Osborne,
2 Vern. 754.
1 Eq. Ca.
Abr. 385. 3.

But if *cestui que trust*, tenant in tail, be the mortgagor, and join with the trustees in making the conveyance, it will be good and valid; they being considered as trustees purely for the tenant in tail to preserve his estate *only*, and not to stand in opposition to him, for the sake of those who are to come after him.

Willoughby
v. Willough-
by, in Chan.
June 19.
1756.

Previous to the case of *Willoughby* and *Willoughby*, a notion generally prevailed, that although a satisfied term resulting by operation of law might, if got in, be made use of to protect a purchaser, a term once assigned to attend the inheritance could not be so applied; for it could not enure to any other purpose than that prescribed, unless severed again by the owner of that inheritance; but in that case Lord *Hardwicke* explained this distinction, observing that its applicability to such purpose was an unavoidable consequence of the rule, that "*a purchaser for a valuable consideration, and without notice, shall not be hurt in equity.*" The facts of the case were as follow:—*George Willoughby*, being seised in fee of an estate in *W.* (subject to a mortgage-term for 500 years), by articles dated 12th *November* 1717, made upon his marriage, agrees to settle this estate to the use of himself for life, and afterwards to the intent that his wife should, out of the rents, &c. of part, take an annuity of 250*l.* by way of jointure; with remainder, as to the whole estate, to the use of the first and other sons of the marriage in tail male; with remainder to *George Willoughby* in fee, with a power for the said *George* to charge the estate, by will or deed, with the payment of 3000*l.* for the portions of his younger children. At this time the estate was subject to a mortgage for a term of years, as mentioned above, which being satisfied, the said term was by indenture, dated 17th *August* 1718, assigned to *Shelling* and *Popham*, and their executors, upon trust for *G. W.*, his heirs and assigns, to attend the inheritance. A settlement was made of the estate 14th *March* 1718, pursuant to the articles: 14th *March* 1750, *George Willoughby* made his will, and thereby executed the power reserved to him, by charging the estate with 3000*l.* for the portions of his younger children, and afterwards died, leaving *Jane* his widow, *Henry* his eldest son, three daughters, and a younger son *George*. *Henry*, having attained his age of twenty-one years, and being tenant in tail, suffered a recovery, and limited the estate to trustees in fee, to the use of such person and persons, and for such estate as he should by deed appoint. *Henry*, in pursuance of his power, by indenture dated in *June* 1751, for securing 870*l.* which he had borrowed of *Jane* his mother, declared the trustees should stand seised, and the estate be charged

Willoughby
v. Willough-
by, in Chan.
June 19. 1756.
||S. C. 1 Term
Rep. 763.
Powell, 465. a.
Mr. Butler,
arg. 2 Jac.
& Walk. 52.
termed this
case the
Magna
Charta of this
branch of the
law; and see
more as to at-
tendant terms,
and the as-
signment of
them, Butl.
Co. Lit. 290. b.
n. (1) § 13.
Sugden,
V. & P. Ch.
8. § 2. p. 372.
(6th edit.)
Powell, 477.
note (A)
(6th edit.)||

charged with the payment of this sum and interest. The term of 500 years was still standing out in *Shelling* and *Popham*. Afterwards *Henry* borrowed 800*l.* of the defendant *Cripps*; and for securing this with interest, by indenture of lease and release, dated 14th and 15th *June* 1752, he conveyed the estate in mortgage to *Cripps* and his heirs. The same day *Shelling*, the surviving trustee, assigns the term of 500 years to *Boot*, upon trust, in the first place, to protect the estate limited to *Cripps* and his heirs from mesne incumbrances, and, *subject thereto*, to attend the inheritance. It appeared upon the evidence, that *Cripps* had full notice of the articles and settlement, and that, notwithstanding, in the release above, he took a covenant from *Henry* that the estate was free from all incumbrances except the 500 years term and the several mesne assignments thereof; but it did not appear that he had notice of the mortgage to the mother. The bill was brought by *Jane* the mother, and the younger children, for payment (by sale of the estate) of the arrears of her jointure, the 3000*l.* to younger children, and the 870*l.* to the mother; and that then the rest of the incumbrances might be paid, according to their order and priority. The defendant *Cripps* insisted that, as the legal estate was in *Boot*, his trustee, and as he was a purchaser for a valuable consideration and without notice of the first mortgage, he was entitled to be preferred in payment of his mortgage upon this principle, that he had both *law* and *equity* on his side, and the mother *only* equity.

Lord *Hardwicke* was of opinion, that supposing *Cripps* to have no notice of the jointure, portions, or other incumbrances, he would *in equity* be entitled to the benefit of this term.

Jones, seised in fee of several estates, demised the same, in 1761, to *Aubrey*, for nine hundred and ninety-nine years, by way of mortgage. Afterwards, in 1768, this term was assigned to *Lockwood* in trust for *Jones*, as to part of the lands, and in the mean time to attend the inheritance; in 1767, *Jones* mortgaged to *Morgan*, and in *July* 1769, to *David*. Both these mortgages were in fee. In *December* 1769, *Jones* and *Lockwood* assigned the last-mentioned lands to *Moreland*, his executors, &c., for the remainder of the term of nine hundred and ninety-nine years, in trust for *Sprigg*, for securing 10,000*l.* lent by *Sprigg* to *Jones*. Afterwards, *Jones*, by indentures of lease and release, mortgaged the same estates in fee to *Sprigg*, for securing the 10,000*l.* On the mortgage to *Sprigg*, all proper searches were made on his part for incumbrances, and he had all the title-deeds that could be found delivered to him at the time he advanced his money, except the demise of the term for nine hundred and ninety-nine years, and the assignments of it, which were kept in the hands of *Lockwood*, on account only of containing other premises in mortgage to *Lockwood*, and which were not included in the mortgage to *Sprigg*, nor assigned to *Moreland*, his trustee, but counterparts of them were then delivered to *Sprigg*. On these facts the question on an ejectment was, Whether *Morgan* and *David*, or *Sprigg*, should be preferred?

Goodtitle
v. Morgan,
1 Term R.
755.
|| Overruled
Bailey v.
Fermor,
9 Price, 266. ||

On the part of *Morgan* and *David* it was contended, that this term must be considered as attendant on the inheritance; and, consequently, at the times of the respective mortgages to them, the trustee of the term became their trustee, and the term could not be separated from the inheritance but by their consent. That if, previous to the conveyance to *Sprigg*, in 1769, *Morgan* and *David* had brought ejectments upon their mortgages, neither *Jones* nor *Lockwood*, his trustee, could have set up his term as a bar to their ejectments; then if *Jones* himself could not set up the term, it was absurd to say that those who claimed under him might, for they could not claim a greater estate than he had. Then *Jones*, having parted with the inheritance, had no power afterwards to make any appointment of it differently. His power was gone, though it were collateral, by the conveyance of the land. *Sed per Ashhurst J.*, no man ought to be so absurd as to make a purchase without looking at the title-deeds; if he is, he must take the consequence of his own negligence. If the first mortgagee had an ordinary precaution, he must have known that this term was then outstanding. And if he did know of it, and neglected to take an assignment of it, it was enabling the mortgagor to commit a fraud, by mortgaging the same estate again. By this, therefore, he became *particeps criminis*, and he must suffer the consequences of the fraud; and *Sprigg*, who has got the legal estate, must be preferred.

Brothers v.
Bence, Fitz-
gib. Rep. 118.
2 Eq. Ca.
Abr. 615. 11.
||A purchaser
of copyhold is
affected with
notice of the
contents of the
Court-rolls as far
back as a search
is necessary for
the security of his
title. Pearce v.
Newlyn, 3 Madd.
R. 188.; *sed vide*
Sir E. Sugden's
objections to this
decision, Sugd. V.
& P. 729. (6th
edit.); and 18 Ves.
462.||

2 Ch. Ca.
246. Gilb.
Rep. Eq. 8.
1 Ch. Ca. 291.
Dunch v.
Kent, 1 Vern.
319.

Drapers'
Company v.
Yardly *et al.*,
2 Vern. 602.

Dunch v.
Kent, 1 Vern.
360. 319.

Where *A.*, copyholder in fee, mortgaged to *J. S.* who was admitted by *B.*, the steward of the manor: and afterwards *A.* made a second mortgage to *C.*, who was also admitted by *B.*, and then a mortgage to *B.*, who bought in *J. S.*'s security; it was decreed, that *B.* should not postpone *C.*; because it is presumed, from the mere act of admission, that a man of ordinary diligence and understanding, being steward of the manor when *C.* was admitted, must know or have notice of the mesne mortgage to *C.*

Where a purchaser cannot make out a title but by a deed, which leads him to a fact material to it; he will not be deemed a purchaser without notice of that fact, but will be presumed cognizant thereof; for it is deemed gross neglect, that he sought not after it.

Thus, where *B.* devised to *J.* in tail male, and if he died without issue male, to *Y.* in tail male, but subject to two legacies of 500*l.* and 1000*l.* to the Drapers' Company; and *Y.* afterwards levied a fine to the use of him and his heirs (on which was five years non-claim), and then granted a rent-charge of 100*l.* per annum to *S.*, and mortgaged the premises to *L.*: the court held the fine and non-claim was no bar to the legatees; for *Y.* having no title, but under the will, it was implied notice to all purchasers under him.

So, where an annuity was granted to *A.* by the crown, by patent issuable out of the excise upon special trust, that all such

of

of the creditors of *B.* as would come in *within a twelvemonth*, and accept a share of this annual sum proportionate to their debts, should have the same assigned to them; and *A.*, after the year, assigned part thereof by instruments which purported to be in consideration of debts due and owing from *B.*, but were in truth for *A.*'s own debts, and the assignees had afterwards assigned the same over to others, who claimed, as purchasers, without notice, for full and valuable consideration; it was held, that although all the creditors of *A.* did not come in within the year, yet this patent was in trust for them, and not convertible to other purposes; and that those who purchased of the assignees of *A.* came in under the letters-patent, in which the trust was mentioned, and ought to have taken notice of it at their peril.

And subsequent purchasers also are taken to have notice of the contents of a deed or will, if they must claim under it. As, if *A.* makes a conveyance to *B.*, with power of revocation by will, and afterwards limits other uses; if *B.* disposes thereof to a purchaser, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke; for no title can be made to a purchaser but by the conveyance which contains the power of revocation.

But, in the case of *Bovey v. Smith*, a will was not suffered to be set up, as presumptive notice to defeat a transaction, by a trust therein contained, that had lain dormant for many years, after a fine, and where there was *room to presume*, that other trusts were appointed. In that case *B.*, the mother of *A.*, being in *Holland*, and having a separate estate, about forty years previous to the time of filing the bill, made her will in *Dutch*, and thereby devised houses to *W.*, her husband's son by a former wife, and to other trustees, in trust *for her four daughters and their children, and such of their children as should be alive at the last*, and, afterwards, declared the trust of all her estate, thereby undisposed of, to be for her and her heirs. The trustees, apprehending that the devise carried the inheritance of the houses to the daughters, sold such inheritance in 1652, for a good consideration, and distributed the money arising from the sale equally amongst them. *A.* was privy to this conveyance, and made no claim, nor pretended any right to the houses; a fine was levied of them, and five years afterwards *W.* the trustee, for a full consideration, purchased them back to himself and his heirs. Then *A.* having taken advice on the will, and conceiving the daughters took only an estate for life, exhibited his bill against *S.*, who now stood in the place of *W.*, the trustee, to have an execution of the trust, and the lands decreed to him. Two decrees had been for the plaintiff. — One point argued was, that it was impossible any one should come at the land without having notice of the trust, for they must purchase under the will; and all their title was by the will by which the trust was created, and every man that had notice of the will must, at his peril, take notice of the operation and construction of the law upon it. But the Lord Keeper said, this was an application, after one-and-thirty years

Moore v. Bennett,
2 Ch. Ca.
246.; || and
see *Coppin v. Fernyhough*,
2 Bro. C. C.
291. *Pearson v. Morgan, Id.*
588.||

Bovey v. Smith,
1 Vern. 84.
144
2 Ch. Ca.
124. S. C.
|| 1 Atk. 475.
1 Eq. Ca. Ab.
257.||

possession, to affect an estate with a trust, notwithstanding a release and fine, and *that* upon a supposal that *B.* had made no other appointment (as she had power to do by the deed), and which, after so long a possession, it ought rather to be presumed she had done; and also upon a supposal, that this was a true copy of the will. This was only a translation; the original was lost; the difference in point of translation between the children and issue was nice, and the question was, Who should suffer? For the defendant was a purchaser, and had paid a full consideration, and was here to be affected with a notional notice only; the plaintiff stood by all the while and was silent, and, at best, passive in the breach of trust. That, therefore, though it was hard to dismiss the bill after two decrees for the plaintiff, yet his Lordship was not satisfied he could decree it for him, and the bill was dismissed.

1 Ves. 173.

So, likewise, this rule admits of an exception, in the case of an assignee of the estate of a testator, under an assignment made by the executor; for he will not, in favour of creditors or residuary legatees, be presumed to have notice of what is contained in the will of the deviser; because, whoever takes any thing from an executor, must always do it with notice of a will; and therefore, if this doctrine of the will being notice to the assignee was to prevail, no person would dare to purchase, or take an assignment from an executor. Besides, it would be unreasonable that a purchaser should take upon him to make out the account, as to the *quantum* of the debts or assets, when he is not entitled to have the vouchers for that purpose. Thus, *M.* having a mortgage of 3500*l.*, made his will in 1712, and devised all his real and personal estate, not by his will otherwise disposed of, to his executors in trust, in the first place by charging, leasing, or selling thereof, or of any part thereof, to raise money to pay his debts; and then to divide what should remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldest son *I. M.*, and another person, executors, and died, leaving his widow and five children; and after payment of all *M.*'s debts, a large surplus remained to be divided. *I. M.* having been appointed, in 1726, receiver of all the rents and profits of the real and personal estates of *E.*, procured a deed to be made, to which the other executors were parties, reciting, that there was due on the mortgage 9000*l.*, and that the same was the proper money of *I. M.*, and assigning the mortgage and all due thereon to *B.*, his heirs and assigns, with a proviso to be void, if *I. M.* faithfully accounted with *B.* for what he should receive from the estate of *E.* *I. M.* afterwards died intestate, without accounting with *B.*, and greatly indebted to the estate of *E.* A bill was then filed by the plaintiffs, two of the children of *M.*, against the defendants, the representatives of *E.*, to account for what they had received on the mortgage, and to deliver up the deeds and writings relative thereto; and one question was, Whether the plaintiffs, as residuary legatees of *M.*, were entitled to be relieved against the assignment of the mortgage,

Mead v. Ld.
Orrery, 3 Atk.
236. July 19.
1745.; *et vid.*
Ewer v.
Corbett,
2 P. Wms.
148. Burting
v. Stonard,
Id. 150.

mortgage, and to have an account; or, whether the representatives of *E.* were entitled to retain the assignment? And this turned upon the point, Whether the assignees of the mortgage were to be considered as having notice of the trust for the benefit of younger children? And the court held, the bare point of notice of the will, in this case, was not sufficient.

So, where an executor assigned over a mortgage term of his testator to *A.* as a satisfaction of a debt due to *A.* from himself; it was objected, in favour of the daughters of the testator, who were creditors under a marriage-settlement, that the assignees took this assignment with notice that it was the testamentary assets of the testator. But the court held the alienation to be good.

2 P. Wms. 150. ||See *Whale v. Booth*, 4 Term R. 625. note a., and Lord *Eldon's* observations, 14 Ves. 953.; and see 17 Ves. 163. *Powell*, 569. b. note (O).||

But where *H.*, being indebted to *C.* on bond, died possessed of a great personal estate, and made *W.* executor and devisee, who wasted the estate; *D.* having notice of *C.'s* debt, bought a leasehold estate of *W.* by discounting 200*l.* due from *H.*, 550*l.* due from *W.*, and by payment of 150*l.* in money; on a bill filed by *C.* to have satisfaction for his debt of the leasehold estate, being part of *H.'s* assets, the question was, Whether this was a good sale to bind a creditor? And it was held it was not, for *D.* was a party consenting to and contriving a *devastavit*.

ranted the application of it. *Vide* 2 Ves. 469.; ||sed vide *Powell*, 570. a. note (P).||

So, where the devisee of an estate, in trust for payment of debts, mortgaged the estates to one of the creditors, with notice; and the question was, Whether such creditor should retain it by way of security for his own debt, as well for the old debt, as for the money lately advanced? The Chancellor was of opinion, that, though the general rule was, that though a purchaser or a mortgagee need not see to the application of the money, where there was no schedule of the debts, yet this rule was never carried so far as to put it in the power of the devisee in trust, or of the heir at law, who in equity was considered as a trustee, to favour one creditor, which would be the consequence if this was allowed. Such creditor, as to his old debt, could not be put into a better condition by taking the mortgage, but must come in, *pari passu*, with the rest of the creditors; for the estate was a security in the hands of the trustee before, and such mortgage only operated to change the course, which the court would not suffer the trustee to do, considering the giving preference to one creditor as a fraud, which the court would not allow.

If a deed, by which a prior charge is made upon an estate be delivered, among other papers relating to the title thereof, to an intended purchaser, he will be taken to have notice of the prior incumbrance; it being necessarily presumed, that so material a circumstance could not escape his notice, or, if it did, it must be through gross neglect.

Thus, the plaintiff's father and mother sold an estate to *C.* and
Y y 4

Nugent v. Gifford, 1 Atk. 465. 1738. S. C. 2 Ves. 269. *Ewer v. Cobbett*, 2 P. Wms 149. *Burting v. Stonard*,

Crane v. Drake, 2 Vern. 616. Note: Lord *Hardwicke* admitted the principle of this case, but doubted whether the facts warranted the application of it. *Ithell v. Beane*, 1 Ves. 215. ||1 Dick. 152. S. C.||

Ferrers v.
and

Cherry,
2 Vern. 384.
[In *Senhouse*
v. Earl, Ambl.
289. Lord
Hardwicke
denied the
authority of
this case, but
he seems to
have acknow-
ledged it in
Mertins v.
Jolliffe, Ambl.
511.; and see
Hiern v. Mill,
13 Ves. 121.

and his heirs, which, pursuant to an agreement made on their marriage, had been settled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the first and other sons in tail male; and the conveyance was made by deed and fine. *C.*, upon his purchase, took in a mortgage-term, which was prior to the settlement, entered and afterwards sold the estate to *H.* and *I.* It appearing, by the proofs in the cause, that *C.*, the first purchaser, *had notice of the settlement*, and that the same, amongst other writings, were delivered to him, the court decreed, that *C.* should account for the consideration-money for which he sold the estate, with interest from the decease of the plaintiff's father and mother, discounting what was due on the mortgage made prior to the settlement.

Powell, 572. a. note (T).||

And if it do not appear upon the face of such settlement, whether it be voluntary, or on articles before marriage, and, in consequence, whether to be considered as binding against creditors or not, that will not alter the case; for the purchaser, having notice of the deed, must, at his peril, purchase, and be bound by the effect of it. But, in the last case, the bill was dismissed as to *H.* and *I.*, who were made defendants, they having pleaded that they were purchasers without notice, and the plaintiff not being able to prove any notice against them, there was no foundation to presume knowledge of the settlement, *C.* being able to make a good title without it.

Morrett v.
Paske,
2 Atk. 54.
Vide 1 Atk.
490, 491.

A creditor by judgment, in 1698, for 600*l.* came to an account with the consor in the year 1707, and settled the remainder due upon the judgment at 420*l.*, and took a mortgage in fee for that sum, as a collateral security to the judgment; and one *S.* an attorney, in 1716, took an assignment of this mortgage, in which there was a recital, *that 90*l.* of the consideration of the assignment was then the full worth of the estate.* *S.* was likewise in possession of another mortgage made in 1688, upon the same estate which was subject to the judgment in 1698, and the mortgage in 1707. It was resolved *S.* should not be allowed to tack the two mortgages together, so as to defeat intermediate incumbrances between the years 1688 and 1698; and yet the mortgage in 1707 should have relation back to the judgment in 1698, and by consolidating them together, should entitle *S.* to receive the sum due upon that judgment, prior to creditors after the year 1698; but, as to money reported due since the mortgage in 1707, it should be paid only in priority to creditors subsequent to 1707. One ground of which decision was, that the words in the recital of the assignment of the mortgage in 1716, *viz.* "that 90*l.*, the consideration-money, "was the full worth of the estate at that time," naturally implied, that there were intermediate incumbrances, and therefore, to give *S.* the advantage of tacking both mortgages, would be contrary to his own intention; for, at the time he took the assignment of this puisne incumbrance, he must know the estate was worth no more from the very words of the recital.

Again,

Again, *I. C.* being seised of several freehold estates, had settled the same to certain uses, and being possessed of a prebendal lease for twenty-one years, which was usually renewed every seven years, and which he held at the time of making his will, after charging the same, together with other freehold estates, with an annuity, devised it to the same uses, intents, and purposes as were declared in the settlement of the freehold estates first mentioned. Then the testator died. The leasehold estate was several times renewed by the several persons in possession, and in one of the renewals, the then lessee was stiled devisee of *I. C.* Afterwards there were several other renewals. Then the estate was mortgaged by one of the claimants under the settlement and will, as his own property. And the question was, Whether the mortgagee, who had no other notice of any defect in his title, except that the lease which was assigned to him recited, among the considerations, the surrender of the former lease, which recited the surrender of the other, in which the lessee for the time being was styled devisee of *I. C.*, had such notice thereby, as would render the estates in his hands liable to the trusts of the settlement? And it was held, that the mortgagee was affected with notice of the settlement, and that he must convey the estate according to the uses, &c. limited and declared therein.

|| It is an established principle, that whatever is sufficient to put a party upon enquiry is notice in equity. As, if a person is aware that the legal estate is in a third person he is bound to take notice what the trust is, and ought to make enquiry of the trustee. On the same principle it has been held, that a purchaser being told an estate was in possession of a tenant, and taking it for granted it was a tenancy from year to year, was bound by the lease under which the tenant held; but it must be observed, that if the lease be invalid, the point of notice cannot prevent an ejectment at law. So, if the tenant claim an interest beyond a tenancy, as under an agreement to purchase, a purchaser or mortgagee will be held to have notice of that fact if he had notice of the tenancy. And the same doctrine has been applied to a tenant's right to timber, although accruing under a title posterior to that on which his right to the possession was grounded. But if a lease be made of charity lands, which is set aside as improvident, it seems a *bonâ fide* purchaser of a sub-lease will not be supposed to have notice of that fact, which depends on a number of extraneous circumstances. Notice that title-deeds are in possession of a third person may, under particular circumstances, be sufficient to set a purchaser upon enquiry to ascertain what lien the party holding has on the estate.||

Where there were father, mother, and son, and the father settled an estate on himself for life, then to his wife for her jointure, and on her death, to the sons of the marriage; under which settlement, the wife and son insisted on being purchasers for a valuable consideration, without notice, and notice of a prior charge was proved against the father, by recitals on his own conveyances, and in part by his own admission; but, as to the wife

Coppin v. Fernyhough, 1 Bro. Ch. Rep. 291.; || and see Lord *Redsdale's* judgment in *Hamilton v. Royce*, 2 Scho. and Lef. 327. *Harvey v. Ashley*, cited in 2 Scho. & Lef. 328. *McQueen v. Farguhar*, 11 Ves. 467.||

Anon. 2 Freeman, 173. pl. 171.

Taylor v. Stibbert, 2 Ves. jun. 440. 13 Ves. 120. 14 Ves. 426. 4 East, 221.

Daniels v. Davison, 16 Ves. 249. 17 Ves. 435.

Allen v. Anthony, 1 Mer. 282.

Attorney General v. Backhouse, 17 Ves. 283.

Hiern v. Mill, 15 Ves. 114.

Whitfield v. Fausset, 1 Ves. 387. || *Collett v. Ward*, 7 Vin. Abr. 123.||

and

and son, there was no proof, but from these deeds being in the hands of the family; this was held not sufficient to affect them with notice; because such settlement might have been made by an apparent owner without the deeds having been looked into.

If a deed, or other paper which is deemed constructive notice of a prior incumbrance, be found in the custody of any one, it will be no objection to the charge of notice, that it does not appear when it came there; for if a person admits, or it be proved that a deed is in his custody, whether as representative of another or otherwise, it will be incumbent upon *him* to shew when it came there, for it is impossible for the other side to shew it.

Where tenant for life, remainder to his first son, mortgaged for 1500*l.*, and the deed of settlement was produced and seen by the purchaser, who lent the money notwithstanding, being advised that the tenant for life, not having then any son born, could destroy the contingent remainders, though, in truth, there was a son born five days before the lending of the money; yet the mortgagee having had no notice thereof, and having got the deed of settlement, the court would not relieve against him by compelling him to produce it.

Brampton v. Barker,
2 Vern. 159.
1 Eq. Ca. Abr.
333. 3.
||This case seems to be overruled, see Kelsal v. Bennett,
1 Atk. 522.
Powell, 581.

note B. (6th ed.) Sugden, V. & P. p. 739. (6th ed.)||

Merry v. Abney,
1 Ch. Ca. 38.
Notice to a man's scrivener, attorney, agent, or counsel, is sufficient notice to the party himself.

1 Ves. 69. 2 Ves. 477. 3 Ch. Ca. 110. Ashley v. Bailie, 2 Ves. 368. Hothwall v. Abney, Nelson, Rep. 59. ||Coote v. Mammon, 2 Bro. P. C. 596. 5 *Id.* 355. 2 Ball & B. 304. Toulmin v. Steere, 3 Mer. 210. Sheldon v. Cox, 2 Eden, 228. Ambl. 626. S. C.—The notice to the agent must be in the same transaction, and while the relation of principal and agent subsists. Fourth Res. in Worsley v. Scarborough, 3 Atk. 392. Hiern v. Mill, 13 Ves. 121. Hamilton v. Royse, 2 Scho. & Lef. 515. Mountford v. Scott, 3 Madd. 34. 1 Turner, 278. S. C.||

Maddox v. Maddox,
1 Ves. 61.

Thus, *M.* suffered a recovery of an estate in *A.*, and then settled all his lands in *A.* upon his family: afterwards a tenement in *A.*, of which he had the reversion after an estate for life, descending to him in tail by the death of the tenant for life, he suffered a recovery of it, and devised it to his younger son in fee. Then *M.* mortgaged it, together with 200*l.* that he had a power to charge on the settled estate, for securing 200*l.* which he borrowed, and then he died. The mortgagee applied to the elder son for the money, who at first disputed the payment, but afterwards submitted thereto, upon the mortgagee's assigning to him the tenement so charged, that he might stand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this assignment, he having heard of the younger son's title. The eldest son then mortgaged the tenement to *B.*, who had advanced the money to pay off the former mortgage. It was sworn, that *B.*'s agent was present at the execution of the assignment when the indemnity was insisted upon; and the agent deposed, that the deeds were laid before counsel, who made objections about the plaintiff's title. The assignment itself was strong evidence of notice, for it had not the face of an assignment to a person having the equity of redemption,

tion, but was made subject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other person had the equity of redemption, as the covenant to indemnify also supposed. One question was, Whether the last mortgagee had not notice of the youngest son's title? And the court held, here was such evidence of general notice, either to the party himself, or to his agent, to take care, as made it necessary for him to enquire into the title, which not having done, he must take the consequence. 2 Ves. 485.

Again, *E.* mortgaged his manor of *B.* to *M.* and his heirs, for securing 3000*l.*; afterwards *G.*, the father of the plaintiff *B.*, lent *E.* 2800*l.*, and, by deed, reciting *M.*'s mortgage, he declared, that after the 3000*l.* and interest paid, the estate should stand charged, and be a security for *G.*'s money. *M.* was no party to this deed. Afterwards *H.*, one of the defendants, lent *E.* 400*l.*, and obtained a deed from *E.* and *M.*, that after *M.* was paid, the estate should, in the next place, stand charged with the 400*l.*, and in like manner for *C.*, and several other defendants. All the securities were transacted at the shop of *W.* and *Y.* scriveners, who were witnesses, engrossed the writings, and were in the nature of agents to all the several lenders. The question was, Whether *B.* should be paid next after *M.*, or whether *H.* and the others should be preferred, because they had got a declaration both from *E.* and *M.*, who, by that means, became a trustee for them, after his own money paid? And it was decreed, that *B.* should be paid next to *M.*, and so on, as the mortgagees stood in order of time; for notice to the agent was good notice to the party, and consequently, those that lent last, must come last, having notice of what was before lent. Brotherton v. Hatt, 2 Vern. 574.

¶ And if the same solicitor is employed both for vendor and purchaser, it makes no difference as to the rule of notice, that the sale was made under the direction of the Court of Chancery, and that the purchasers were trustees on behalf of an infant. But the notice to the agent must be in the same transaction, even in the case of one solicitor being employed by both parties. Toulmin v. Steere, 5 Mer. 210.

Vide Sugd. V. & P. (6th ed.) 710. 735. as to notice generally. Mountford v. Scott, 5 Madd. 54.

And although a country attorney acts by an agent in causes in London, yet he will be considered as the solicitor for his clients, though he resides in the country, and what is known to him, will be constructive notice to them. 5 Atk. 37.

A. and *B.* were empowered by act of parliament to purchase estates in a certain district to enable them to build a square; *C.* (who was a barrister at law, and who appeared to have taken the management of the affair upon himself,) purchased a parcel of ground held on a church lease, and borrowed 3500*l.* of *D.*, and gave him a declaration of trust of the leasehold estates as a security, and delivered him the renewed leases: *C.* afterwards built several houses, some of which were erected upon the ground on which *D.* had his security, and then *C.* granted a lease of these houses to *H.*, reserving a ground rent; which was done for the purpose Sheldon v. Cox et al., Amb. Rep. 624. ||2 Eden, 224. S. C. ||; et vide Doe on dem. of Willis v. Martin, Mich. term, 31 G. 5. ||4 Term R. 59. 66. ||

purpose of establishing a rent; and *H.* declared himself in writing to be only a trustee for *C.* Afterwards *H.* assigned some of the houses in *D.*'s security to *M.*, for securing a sum of money by him lent, and then he assigned all the houses to *E.* likewise, for securing a farther loan. Neither *M.* nor *E.* had actual personal notice of the mortgage to *D.*, nor of each other's mortgage; but both *M.* and *E.* employed *C.* as their counsel and agent in these transactions, and nobody else. On a bill filed by *D.* for a sale of the estates, and to be paid his mortgage-money in the first place, one question was, Whether *M.* and *E.* were to be affected by the notice to *C.*, their agent, of *D.*'s security? *Et per curiam*, It is a fixed and settled point, that notice to the agent is notice to the principal. *C.*'s acting in different capacities makes no difference. It is the same as if they had been in different persons.

If one purchases in the name of another person, without any authority from him so to do, or his having notice of his intention, yet, if he afterwards *agrees to it*, he makes the former his agent *ab initio*.

Thus, *G.*, in 1699, lent *W.* 200*l.* upon a surrender of copyhold lands, but neglected to get the surrender presented at the next court-day as he ought to have done, for want of which the surrender was void, according to the custom of the manor. In 1703, *B.* agreed with *W.* to purchase the mortgaged premises for 400*l.*, and took a surrender in the name of *M.*, who afterwards consented to become the purchaser, and paid the money. It was proved that *B.*, whilst he was treating with *W.*, had notice of the former incumbrance, and therefore declined to purchase in his own name, and took the surrender in the name of *M.*, and procured him to become a purchaser, that *B.* might be paid a debt, which *W.* owed him, out of the consideration-money. On a bill filed by the executor of *G.*, *M.* pleaded himself to be a purchaser without notice of the plaintiff's demand; and that his surrender was presented, and he admitted tenant, without notice of *G.*'s surrender, which was kept in his pocket, and not presented till long after his purchase, surrender, admittance, and payment of his consideration-money. But it was adjudged at the Rolls, that notice to *B.* was sufficient to affect *M.*; for, though he did not employ *B.* to purchase for him, or knew any thing of it until after *B.* had agreed and taken the surrender in his name, yet he, by approving of it afterwards, had made *B.* his agent *ab initio*; and *M.* was decreed to pay the 400*l.* and interest, or to surrender to the executor of *G.*

But, examining a title in *one* transaction, in the ordinary course of business, which cannot be supposed to make any impression as to any future event, will not operate as constructive notice to an agent in general, or counsel or attorney, to affect his client on a *subsequent* transaction, and in another business at a distant period; for an agent or counsel cannot be supposed to remember every particular circumstance contained in deeds or papers that come under his perusal.

Jennings v.
Moore *et al.*,
2 Vern. 609.
S. C.
1 Brown's
Parl. Ca. 244.
||1 Eq. Ca.
Abr. 330.
2 Freem. 151.
Nels. 59. ||;
et vide Merry
v. Abney,
1 Ch. Ca. 38.

Case of Lord
Falconbridge,
cited
2 Ves. 369.
Fitzg. 211.
||5 Atk. 294. ||
S. C.
Worsley v.
Earl of Scar-
borough,
5 Atk. 392.; ||*sed vide* Aldridge v. Duke, Finch, 439. ||

And

And Lord *Hardwicke*, in the case of *Warwick and Warwick*, expressed his approbation of the rule laid down in the case of *Fitzgerald and Falconbridge* above mentioned, *that notice should be in the same transaction*; and his Lordship said, that it should be adhered to, otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions. And in the principal case, it was held that notice, arising from a case (stated by one who was an agent for both parties in a subsequent mortgage) stated in order to do something towards suffering a common recovery, a year and six months before the party was to be affected with this notice, was not sufficient to affect a purchaser. However, there were other circumstances in the case favourable to the purchaser.

So, where lands were settled by *F.* on his marriage in 1734, which he mortgaged among others, in 1736, to *W.*, who had no notice of the settlement, and *R.* was employed as agent in making both the settlement and the mortgage; one question was, Whether *W.* should be considered as having notice of the settlement, *R.* having acted as agent on both occasions? And the court held, that affecting a person with notice of the title of another, by reason of his agent's having notice of it, had not been carried so far as to affect the principal, unless where the agent had it at the time of his transaction with him; and that, as the notice which the attorney had of the settlement in this case was two years before the mortgage, the mortgagee could not be affected by it.

It hath not been settled, whether, where one employs an attorney or counsel, and, for want of despatch, takes the matter afterwards out of his hands, and gives it to another agent to finish, and the first agent acknowledges notice, but no proof of notice of a prior incumbrance can be had against the subsequent agent, notice to the first agent shall bind the party himself.

¶ But in the case of *Bury v. Bury*, Lord *Hardwicke* said, "where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice."¶

If one take a mortgage by assignment from a mortgagee, affected with notice of an outstanding title, he will take subject to that title; for his assignor cannot transfer to him a better right than he has himself. And if such original mortgagee, in a bill filed by the person setting up an eigne title against the mortgagee and his assignee, and praying to be let into possession, charging notice, confess by his answer, that he had notice before the lending of the money; that confession of notice will bind his assignee; for though the mortgagee's answer cannot be read against the assignee as evidence, yet he must stand in his assignor's place, and then his assignor's confession of notice will bind him.

T. having made mortgages of some parts of his estate, these mortgages afterwards by mesne assignment became vested in *W.*, and carried with them the legal estate. *T.* then became a bankrupt, but, before the assignment of *T.*'s effects to the assignees, *W.* ob-

Warwick v. Warwick, 3 Atk. 294.; ||and see 1 Vernon, 57. 122. 286. Duke's Char. Us. p. 64. 638.||

Steed v. Whitaker, Barnard. 220.

Vane v. Barnard, Gilb. Eq. Rep. 7, 8.

Bury v. Bury, Sugd. V. & P. (6th ed.) 713. and append.

Whalley v. Whalley, 1 Vern. 484.; ||et vide 15 Ves. 335. Coote on Mortg. 376.||

Collett v. De Golls, Ca. temp. Talbot, 65. ||The doctrine

of this case, though over-ruled by Lord *Erskine*, in

Ex parte
Herbert,

13 Ves. 183., and doubted by Lord *Redesdale* in *Latouche v. Dunsany*, 1 Scho. & Lef. 152., and apparently questioned by Lord *Eldon* in *Ex parte Knott*, 11 Ves. 619. (the report of which, however, is ambiguous and inaccurate,) seems to be good law. See *Hitchcock v. Sedgwick*, in Dom. Proc. 2 Vern. 156. *Sugden, V. & P.* 722. (6th ed.) *Coote*, 430. *Powell*, 592. note. (a) See the 86th section of the new bankrupt act, 6 G. 4. c. 16.||

Wilkes v.

Bodington,
2 Vern. 599.;

||and see

S. C. com. sem.
nomine Read

v. Ward,
7 Vin. Abr.

119.||

||Vide this doctrine confirmed by Lord *Eldon* in *Ex parte Knott*, 11 Ves. 618.||

Bedford v.
Backhouse,
1 Eq. Ca. Abr.
615. 12.

Wrightson
v. Hudson,

W. obtained a lease of the equity of redemption from *T.*, for a valuable consideration; on a suit brought by the assignees against *W.* to set aside these conveyances, it was held, that a purchaser for a valuable consideration, without notice of the bankruptcy, could not be relieved against within 21 Jac. 1. ||c. 19. § 14.|| (a)

H. B., on May 1st, 1710, was arrested at the suit of one *S.*, for a just debt of 790*l.* secured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff above six months, which, although he afterwards paid the debt and many thousand pounds to others, and appeared publicly on the Exchange, was adjudged an act of bankruptcy by the statute of Jac. 1. Afterwards, in 1717, *H. B.*, on the marriage of the defendant, his son, made a settlement, by which, after reciting that he had on his own marriage settled land on trustees, in trust, to secure 2000*l.* to his wife if she survived; *H. B.*, with the privity of the trustees, who were parties to it, assigned all his estate, right, title, and interest to the wife's relation for the benefit of *H. B.* for life, and of his wife for life, &c. The plaintiff *W.* was the assignee under a statute of bankruptcy, taken out against *B.* subsequent to the settlement. The question was, Whether a court of equity would decree the trustees of the first settlement to assign the term to the plaintiff, or suffer it to rest in them, to protect the settlement? For the defendants it was insisted, that they being purchasers without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themselves at law; and that, although they had not the legal estate in them, yet the trustees of the first settlement, in whom the legal estate was, being parties to the last settlement, were become their trustees. And it was so held by the Chancellor, who said, he took it to be the rule in equity, that where a man was a purchaser without notice, he should not be annoyed in equity, not only where he had a prior legal estate, but where he had a better title, or right, to call for the legal estate than another; and therefore dismissed the bill.

A. lent money on lands, the mortgage being duly registered, and afterwards *B.* lent money on mortgage on the same security, and his mortgage was also registered, and then *A.* advanced a farther sum on the same lands without notice of the second mortgage; it was held by Lord Chancellor *King*, that the registering of the second mortgage was not constructive notice to the first mortgagee before his advancement of the latter sums: for though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered, than they had before.

So, in a later case, where *W.* advanced 800*l.* on a mortgage in *Yorkshire*, and registered it; afterwards *K.* lent a sum of money, and

and took a judgment for it, which was also registered; then *W.* advanced a farther sum, but without any express notice of the judgment; and it was argued, on a bill brought by *W.* to foreclose, that *K.* ought to redeem, on paying the first mortgage; for that, where such registers prevailed, every incumbrancer should be satisfied according to the priority of his register; and that the registering *K.*'s judgment was constructive notice to *W.* sufficient to deprive him of the common benefit of a court of equity, whereby a first mortgage, without notice, was to hold till all subsequent incumbrances due to him were discharged: it was resolved, that these statutes avoided only prior charges not registered, but did not give *subsequent* conveyances registered any farther force, against *prior* conveyances registered, than they had before; and that to have affected *W.*, *K.* ought to have given him notice when he advanced his money; for, though *W.* might have searched the register, yet he was not bound so to do.

¶ So, also, where a subsequent mortgagee obtained the legal estate, Lord *Camden* decided, that he should have priority over a prior equitable incumbrance of which he had no notice, notwithstanding such equitable incumbrance was duly registered. The doctrine that mere registration is not equivalent to notice, has also been laid down by Lord *Redesdale* in several cases in *Ireland*. In *Bushell v. Bushell*, where the question was, Whether the registration of certain marriage-articles amounted to notice, his Lordship pointed out the difference between the *Irish* act and the *English* registry acts, the former of which declares, that every registered deed shall be good and effectual, in law and equity, "according to the priority of time of registering the memorial;" but his Lordship thought that the registry was not notice more under the one act than the others: and in a subsequent case, in which he decided that the *Irish* registry act would not permit tacking, his Lordship pointed out the inconveniences arising from holding registry to be notice, and said, "if it be notice, it must be notice whether the deed be duly registered or not; it may be unduly registered, and if it be the act does not give a preference; and thus this construction would avoid all the provisions in the act for complying with its requisites." In reply to this forcible observation, it has been contended, in a very learned work, that the courts might hold that the registry of a deed should not amount to notice unless it was *duly registered*. But it is humbly conceived that Lord *Redesdale*'s argument is unanswerable; and that as the effect sought to be given to the registry does not rest on any intrinsic efficacy in the registering, but merely on the ground of the registry being constructive notice, it would be contrary to principle to hold that it should not have that effect merely on account of a technical informality, in no way rendering it less an actual notice of the incumbrance.¶

A subsequent mortgagee, having notice of a prior mortgage not registered, will not gain a priority by registering, because such conduct is considered, in equity, as fraudulent, and the party

2 Eq. Ca. Abr.
609. 7.

Morecock v.
Dickens,
Ambl. 678.

Bushell v.
Bushell,
1 Scho. & Lef.
105.

Latouche v.
Dunsany,
1 Scho. & Lef.
157.; et vide
Underwood
v. Courtown,
2 Scho. & Lef.
64. Pentland
v. Stokes,
2 Ball & B. 68.

Sugd. V. &
P. (6th ed.)
677. Coote
on Mort. 385.

Cowper's
Rep. 712.

party hath that notice which the act of parliament intended he should have.

Le Neve v. Le Neve, 1 Ves. 64. 3 Atk. 646. S. C.; *et vide* Cheval v. Nichols, Str. 664., *et* Sheldon v. Cox, Ambl. R. 624. ||2 Eden, R. 224. Bushell v. Bushell, 1 Scho. & Lef. 103. Bid-dulph v. St. John, 2 Sch. & Lef. 521.||

Thus, *N.*, in 1718, married his first wife, and on the marriage a leasehold estate, in the possession of his father, was covenanted, in consideration of the marriage, to be settled on trustees, in trust for *N.* for life, then for his intended wife for life, remainder to the issue of the body of *N.* by his wife, in such manner as he, by deed or will, should appoint. The marriage was had, and a settlement made, in pursuance of the articles; the wife had issue, and died. In 1743, *N.* married a second wife, but, previous thereto, entered into articles with her trustees for settling the very same estate on himself for life, then on her for a jointure, remainder to the issue of that marriage; and a settlement was made pursuant thereto. The estate was subject to the statute 7 Ann. c. 20., which requires registry. The first marriage articles and settlement were never registered; the second were. *N.* also mortgaged this estate, as absolute owner thereof. The bill was brought by the children of the first marriage, to have the benefit of the settlement made on them, and, in order thereto, to have the subsequent articles and settlement postponed, though registered. The ground of this application was, that the agent who made the last settlement had notice of the first. And notice to the agent having been fully made out, the principal question was, Whether it would affect the defendant's purchase, and oblige the court to postpone the second articles and settlement to the first, notwithstanding the registering act? And the court determined it would; for the intent of the act was to secure subsequent purchasers and mortgagees against prior secret conveyances, by letting a subsequent purchaser, having registered, prevail against a prior secret conveyance, of which he had no notice; but if he had notice of a prior conveyance, which was vested property, that was no secret conveyance. The statute did not say, that the subsequent purchaser should not be affected by any equity whatsoever; therefore, though the manifest operation of it was to vest the legal estate according to the prior registering, yet it was left open to all equity; for there was no danger to the subsequent purchaser, who might refuse, if he had notice of the prior good conveyance.

Recited in last case, 1 Ves. 67. 2 Brown's Parl. Ca. 425.

||See 1 Scho. & Lef. 100. Powell, 626. note.||

And this doctrine was confirmed in the House of Lords, upon an appeal, in the case of Lord *Forbes* v. *Deniston*, which arose in *Ireland*.

Hine v. Dodd, 2 Atk. 275. ||S.C. Barnard. 258. recognized by Lord *Manners*, 2 Ball & B. 301.; and see Jollond v. Stainbridge, 3 Ves. 478.

But though apparent fraud, or *clear* and *undoubted* notice are held to be a proper ground of relief in cases circumstanced like the preceding ones, *suspicion* of notice, though a *strong suspicion*, was held by Lord *Hardwicke* not to be sufficient to justify the Court of Chancery in breaking in upon this *act of parliament*. And therefore, where a mortgagee of lands in *Middlesex* swore in his answer, that, to *his belief*, he did not know of a judgment which had not been registered, until after his mortgage executed; this was contradicted by *one witness only*, who swore, that, on a convers-

conversation at which she was present, the mortgagee admitted that it was true "he knew of the judgment, but that he knew, "at the same time, that it was not registered; and what were "acts of parliament for, unless they were effectually observed?" Lord *Hardwicke* said, that, undoubtedly, this was *material* evidence, but then it was only *one* witness against the answer of the defendant, and the evidence amounted merely to a defendant's *confession* in contradiction to his *answer*, and was contrary to a positive act of parliament made to prevent any temptation to perjury from contrariety of evidence. His lordship, therefore, dismissed the plaintiff's bill as to this part of the case.

It is an infallible rule, that a mortgagee may, in a court of equity, protect himself from discovery of his title-deeds if he denies notice. For, if a plaintiff brings his bill to redeem ever so strongly, he is not entitled to see the mortgagee's title-deeds, because a third person may find out a flaw in them. The rule appears to be the same on motion, where there is to be a sale to raise the mortgage-money; this is a first principle, and not to be argued, and depends on the denial of notice.

If *A.* purchases an estate, with notice of an incumbrance, or that it is redeemable, and then sells to *B.*, who has no notice, who afterwards sells to *C.*, who has no notice; by this the notice to *A.*, the first purchaser, will not be revived; for, if it were so, an innocent purchaser, without notice, might be forced to keep his estate; he could not sell, and would be accountable for all the profits received *ab initio*. But the interest must be the same in *every* respect, or the principle does not apply.

||*M'Queen v. Farquhar*, 11 Ves. 478. *Kennedy v. Daly*, 1 Scho. & Lef. 379. 224. (3d edit.)||

Upon this ground, where *A.*, who was entitled to the equity of redemption in certain lands, had brought his bill against the representatives of *B.*, who was the mesne purchaser, and likewise against *C.*, who was the puisne purchaser; *A.* had not replied to the answer of the representatives of *B.*, and the question was, Whether they should not have been brought before the court as proper parties? *Per* Lord *Hardwicke* Chancellor, — The representatives of *B.* deny he (*B.*) had any notice of *A.*'s title at the time he purchased; and it is admitted on all hands that *C.*, who purchased of *B.*, had notice of the title; now, if I should go on with this cause, I should deprive *C.* of the benefit he would have from the defence which is set up by the representatives of *B.* It is like the cases at law by warranty, &c. where one defendant is allowed to pray in aid the evidence of another defendant, who has an interest in the thing contested, if it is of use or advantage to him in strengthening his own case. And for this reason, his Lordship allowed the objection, for want of parties in not bringing the representatives of *B.* before the court.

Again, where a bill was brought to discover whether the defendant, who was assignee of a mortgage, had not notice that the original mortgagor was only tenant for life, stating that the title-deed, by which this appeared, was in the defendant's hands; the

478. *M'Queen v. Farquhar*, 11 Ves. 467.||

Senhouse v. Earle, 2 Ves. 450. *Perrat v. Ballard*, 2 Ch. Ca. 73. *Ibid.* 135, 136. 1 Vern. 27. *Hall v. Atkinson*, 1 Eq. Ca. Abr. 333.

Harrison v. Forth, Prec. Chan. 51.; *et vide* also *Lowther v. Carlton*, Ca. temp. Talb. 157. *Et vide* *Brandlyn v. Ord*, 1 Atk. 571.

Redesd. Tr. Pl

Lowther v. Carlton, 2 Atk. 159. ||*Ca. temp. Talb.* 187. *Barn. C. C.* 353. *Forr.* 187. *S. C.*||

Sweet v. Southcote, 2 Bro. R. Chau. 66.

||2 Dick. 671.
S. C.; *et vide*
11 Ves. 478. ||

defendant pleaded that he was assignee of the mortgage for valuable consideration, and through many assignments from persons who had no notice: it was argued, that this plea was not good; for it should have stated, whether the defendant personally had notice: but the Master of the Rolls allowed the plea, holding that the plaintiff could not call upon the defendant to shew whether he had or had not notice; for whether he had, or had not, was immaterial, if those through whom he claimed had not, he having a right to avail himself of their being purchasers without notice.

Andrew Newport's case,
Rep. T. Holt,
477. Skin.
425. S. C.
||*nom.* Smartle
v. Williams,
1 Salk. 245.
3 Lev. 587.
Holt, 478.
Comb. 247. ||;
et vide Shirk
v. Clark *et al.*,
Prec. Chan.
275.

A mortgage made by *K.* in 1659, by divers mesne assignments vested in *N.*; it was objected, that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent: and being fraudulent in the creation, though *N.* paid a valuable consideration, yet this would not purge the fraud, and make it good against one who was purchaser *bonâ fide*, and for a valuable consideration. *Sed non allocatur*; for Holt C. J. said, that the first mortgage was good between the parties, and being so, when the first mortgagee assigns for a valuable consideration, this was all one as if the first mortgage had been upon a valuable consideration, for then the second mortgagee stood in the first mortgagee's place, and therefore was within the proviso of the statute 27 Eliz. c. 4., "that no mortgage *bonâ fide*, and "upon good consideration, should be impeached by force of this "act, but it should stand in such force as before the act made;" and if this proviso did not extend to the case, to what case should it extend?]

5. *Of the Equity which must be done by him, who would redeem, to the Person against whom a Redemption is prayed: || And herein* of the Doctrine of tacking. ||*

It is a rule in equity, that he, that will have equity to help where the law cannot, shall do equity to the party against whom he seeks to be relieved; and that therefore where there is an estate subsisting in law, as there is in the mortgagee after forfeiture, equity will not destroy it, unless the party redeeming will satisfy all equitable demands out of the estate.

Godfrey v.
Watson, 5 At-
kins, 518.
Lucam v.
Mertins,
1 Wils. 34.
Manlove v.
Ball, 2 Vern.
84. Hamilton
v. Denny, 1 Ball & B. 202.

||Therefore the debtor, before he can redeem in equity, must pay not only the principal and interest of the debt, but all costs necessarily incurred by the creditor in maintaining the title to the estate; in renewing leases; making necessary repairs, or permanent improvements, but not in opening mines and quarries. And the court will award interest on the sums from the time of their being advanced.

Wetherell
v. Collins,
3 Madd. 255.

And where the mortgagee had carried the mortgage into settlement, whereby it became necessary to make the trustees, and *cestui que trusts* parties, defendants, the mortgagor was obliged to pay the costs of all.

So,

So, the mortgagee will be allowed the costs of taking out administration to the mortgagor, as principal creditor, or to an incumbrancer under the will of the mortgagor, as a necessary party to foreclosure.

Ramsden v. Langley,
2 Vern. 556.
Hunt v. Fownes, 9 Ves.
70.

If, however, the costs incurred are altogether irrelevant to the mortgage, they will not be allowed to the mortgagee: thus, in a case in which a devisee of a mortgagee filed his bill against the heir and executor of the mortgagor for a foreclosure, and also against the heir at law of the mortgagee for establishing the will, the Master of the Rolls ordered that the plaintiff should pay the heir of the mortgagee his costs, and should not be allowed them out of the estate.

Skip v. Wyatt, 1 Cox, R. 555.; *et vide* Wilson v. Metcalf, 3 Madd. 45.

If a mortgagee be guilty of gross misconduct, he will be refused costs; and even, under certain circumstances, be compelled to pay them.||

Mocatta v. Murgatroyd,
1 Will. R. 393.
Detillin v.

Gale, 7 Ves. 585.; *vide* Trimleston v. Hamell, 1 Ball & B. 585. Loftus v. Swift, 2 Scho. & Lef. 642.

On this foundation it hath been frequently adjudged, that if a mortgagor borrows more money of the mortgagee upon bond, where the heir is bound, and dies, the heir of the mortgagor shall not redeem without paying the bond-debt, as well as that secured by the mortgage; because when the condition is broken, so that the term or interest becomes absolute in the mortgagee, if the heir of the mortgagor will have equity, he must do equity by the payment of the whole money due to the mortgagee; and this is called a rebutter. But if the bill was exhibited by the mortgagee to foreclose, there, if the heir of the mortgagor tender principal and costs, it sufficeth, without tender of the money due on the bond, because such bond was not originally any lien on the land itself; and if that be tendered for which the land was originally pledged, there is no reason to debar the heir of his right of redemption.

2 Chan. Ca. 164. 2 Chan. R. 247.
Vern. 245.
2 Chan. Ca. 194.

So, where a husband and wife levy a fine of the wife's land, to enable them to take up the sum of 400*l.*, and they make a mortgage for it, and after the mortgage is forfeited, the husband pays in part of the mortgage-money, but afterwards borrows again the sum of the mortgagee; it was decreed, that the mortgagee having the estate in law in him by the forfeiture of the mortgage, he should hold the land against the heir of the wife until the whole money was paid; and if the heir would not pay in the whole principal, interest, and costs, he should be foreclosed.

Vern. 41.
Reason v. Sacheverel.
|| See S. C.
2 Ch. Ca. 98.
It appears, Reg. Lib. 1681.
B. fol. 409., that an indorsement was subscribed by baron and *feme* on the

mortgage-deed, that the land should stand charged with the money, and the wife, with consent of husband, devised the land for payment of debts, the plaintiff's debt in particular. See Raithby's Vern. v. 1. p. 41. note (1).||

So, if a lessee for years mortgages his term, and afterwards borrows money of the mortgagee on bond, and dies, his executor shall not redeem without paying the bond as well as the mortgage.

2 Vern. 177.
Preced.
Chan. 18.
S. C.

Préc. Chan.
419.
2 Vern. 691.
Demainbray
v. Metcalf.
||Gilb. Rep.
Eq. 104. Eq.
Abr. 324. S.C.;
and see Green
v. Farmer,
Burr. 2214.
S. C. 1 Bl. R.
651. Jones v.
Smith, 2 Ves.
jun. 372.||

So, where a man borrowed 200*l.* on the pawn of some jewels, which were worth about 600*l.*, and took a note from the pawnee, acknowledging the jewels to be in his hands for securing the 200*l.*, and afterwards the pawner borrowed at several times three several other sums of money of the pawnee, and gave his note for each sum, without taking any manner of notice of the jewels, and died; and his executors having brought their bill to redeem the jewels, on payment of the 200*l.* first lent thereon, and interest; it was held, that to entitle them to such redemption, they must pay all the money due on the several notes, on this foundation, that he who will have equity must do equity; and that therefore, since the plaintiffs could not have back these jewels without the assistance of this court, it is reasonable and just they should pay the defendant all monies due to him, it being natural to suppose, the pawnee would not have lent those sums, but on the credit of the pledge he had in his hands before.

Ex parte
Hooper,
19 Ves. 477.
1 Mer. 7. S. C.

||But still it seems that a mortgagee cannot tack a mere simple contract debt against a mortgagor. *Hopkins* demised land to *Ford* for a term of years, for securing 400*l.* and interest; *Ford* lent a further sum, and then died, and *Hopkins* became bankrupt. The executors of *Ford* prayed a sale, and an application of the produce to the discharge of both sums. Lord *Eldon* said, he was confident there never was a case where a man, having taken a mortgage by a legal conveyance, was afterwards permitted to hold that estate as further charged, not by a legal contract, but by inference from the possession of the deed; and the order was consequently confined to the mortgage debt.||

Chan. Ca.
97. St. John
v. Halford.

If *A.* is bound in several bonds with *B.* as his surety for 4000*l.*, and *B.* conveys the manor of *C.* to *A.* by way of mortgage, to counter-secure him against the bonds for 4000*l.*, and *A.* dies, and after *D.*, the son and heir of *A.*, becomes bound with *B.* for 2000*l.* more; but there is no agreement that the mortgage should be a security to *D.* against the bond for 2000*l.*, and after *B.* dies, his heir shall not be permitted to redeem upon payment of the 4000*l.* only, but must save *D.* harmless, as well touching the 2000*l.* as the 4000*l.*; for he that would have equity to help where the law cannot, must do equity to the party against whom he seeks to be relieved.

Blackwell v.
Symes, cited
Ambl. Rep.
686.

[Where a woman, being a bond creditor, married a mortgagee, and died, and the husband took out administration to his wife, he was allowed, on a bill brought by him to foreclose, to tack the bond to the mortgage, against the heir at law.

Price *et al.*
v. Fastnedge,
Ambl. Rep.
685.

So, where *E.*, seised in fee, mortgaged to *P.* for years, and *P.* died, having devised his real and personal estate to his daughter *S.*, and made her executrix; and *S.* afterwards lent *F.* 500*l.* upon bond; the question was, Whether *S.* could tack the bond debt to the mortgage? which depended upon the question, Whether *S.* was to be considered as entitled to the bond and mortgage in different rights, the one in her own right, and the other as executrix? And it was held by Sir *Thomas Sewel*, Master of the Rolls, upon the authority of the last-mentioned case, that *S.* might tack these debts.

But

But if one be indebted to *A.* by mortgage of a term for years, and also indebted to him by bond; if, on the death of the mortgagor, the executor assigns over the equity of redemption of the mortgaged term, and the assignee of the executor brings a bill to redeem, *he* shall only pay the mortgage-money. 1 P. Will. 777.

Upon the same principle, where, on a bill by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and interest, the defendant insisted to have a judgment, which had been assigned to him, first satisfied before he should redeem, Lord *Harcourt* Chancellor said, *Copyhold lands are not liable to an execution upon a judgment; ergo*, the judgment shall not be tacked to the mortgage in this case, but the mortgagor shall redeem upon payment of the principal, &c. without satisfying the judgment. Cannon and Pack, 2 Eq. Ca. Abr. 226. 6. 6 Vin. Abr. 222. 6.

|| But it is decided that a mortgagee may tack a judgment debt, although the mortgagor have become bankrupt, and no execution has been issued on the judgment at the time of the bankruptcy; notwithstanding the statute of 21 Jac. 1. c. 19. § 9., which declares that creditors having security by judgment, whereof there is no execution issued on the lands or goods of the bankrupt before his bankruptcy, shall not be relieved upon such judgment for more than a rateable part of the debt with the other creditors. The Master of the Rolls said, that the subsequent bankruptcy could not affect the mortgagee, who before the bankruptcy had a complete lien on the land, as well for the judgment as the mortgage debt. The statute related only to judgments that continue merely such at the time of the bankruptcy; not to those which had acquired all the effect of an actual mortgage, as was the case of a judgment obtained by a party having an antecedent mortgage.|| Baker v. Harris, 16 Ves. 397. See 2 Christ. B. L. 112. (2d ed.) Powell, 526. note (6th ed.)

Where *A.* mortgaged lands to *B.* for 60*l.*, and was also indebted to *C.* 50*l.* on bond, and *B.* assigned his mortgage to *C.*, the court determined that, as the estate vested was a *chattel lease* liable to debts, and *C.* had an assignment of it, and the bond debt was just, *A.*, the plaintiff, ought not to be let into redemption of the mortgage, but upon payment of both debts; and it was decreed accordingly. Halliley v. Kirtland, 2 Ch. Rep. 361. || Baxter v. Manning, 1 Vern. 244.||

If the money due on the bond be lent first, and the mortgage made afterwards, yet there is the same equity for the mortgagee to have both sums paid him. Thus, where *A.* borrowed of *B.* 300*l.* on bond, and afterwards mortgaged lands to *B.* for 2000*l.* lent, and then died, the plaintiff, the heir of *A.*, prayed a redemption; and the defendant insisted that the 300*l.* was agreed to be secured also by the mortgage; the plaintiff was decreed to pay the defendant both debts. Wyndham v. Jennings, 2 Rep. Ch. 247. || See Powell, 347. note G. (6th edit.)||

But, if the mortgagee or assignee, to whom money is due on bond, countenance a fraud upon a third person, by concealment thereof, he shall be redeemed upon payment of the principal money only: therefore, where the plaintiff, devisee of an estate, subject to a mortgage term for 1000 years, let the interest run in arrear, and gave several bonds for securing it, and then died; Barrett v. Wells, Prec. Ch. 151.

his son and heir being about to marry, the intended wife's father applied to the mortgagee to enquire what was due on the mortgage, who, being desired not to discover the bonds, said, that there was only 500*l.* due, and that all interest was paid; and that, upon payment of the 500*l.*, he would deliver up the mortgage; the court held, on application to redeem, that the mortgagee, by concealing the bonds, had discharged the lands from being liable to more than what was then pretended to be upon them, and decreed a redemption, upon payment of the 500*l.* with interest from that time, and without costs.

In respect of the heir, if there be several *incumbrances* upon an estate, and the prior incumbrancer claims a bond likewise, it will be postponed to all real incumbrances, whether by mortgage, judgment, or statute; for the bond is no charge on the estate, and he hath not the same equity against a *puisne* incumbrancer, as against an heir at law, who is liable to the bond in respect of assets.

Morret v. V. Haske, 2 Atk. 52.
Gory's case, 3 Salk. 240.
Troughton v. Troughton, 1 Ves. 87.
Powis v. Corbett, 3 Atk. 556. 3 Salk. 84. 7. ||And it seems notice of the bond to the purchaser, &c. will not vary the case. Powell, 350. a. note R. ||

Upon the same principle, if the person, claiming the equity of redemption, is a purchaser for a valuable consideration, the mortgage may be redeemed by him without discharging the bond; because the lands, in the hands of the alienee, can be charged with nothing but what is an immediate lien thereon, which the bond is not.

Bayley v. Robson, Prec. Ch. 89.
Archer v. Snatt, 2 Str. 1107.
Wood v. Mortimer, cited in the last case, 1 Eq. Ca. Abr. 325. 10. 1 Ves. 87. Coleman v. Wynce, Prec. Ch. 511.
Fide Troughton v. Troughton, 1 Ves. 87. ||Adams v. Claxton, 6 Ves. 229. ||

Nor shall a bond be discharged on redemption of a prior mortgage, against creditors under a deed of trust of the equity of redemption; for it is only a charge upon the assets.

Anon. 2 Ves. 662.

Therefore, where the question was, Whether a mortgagee, who had lent a farther sum afterwards upon a bond, should be allowed to tack it to his mortgage, in preference to the other creditors of the mortgagor, under a trust for payment of debts created by the will of the mortgagor, it was decided that the mortgagee should not tack the bond to the mortgage; for there being a devise for the payment of debts, the descent was consequently broke; therefore the mortgagee could have no priority with regard to his bond, but, as to that, must come in, *pro rata*, with the rest of the creditors under the trust.

Heams v. Bance, 3 Atk. 630.
||Adams v. Claxton, 6 Ves. 229. ||

And a mortgagee cannot take a bond to his mortgage, even against other specialty creditors. This point was so determined on reference to the principle upon which the rule, in respect of tacking a bond debt to a mortgage, is founded, and which furnishes an obvious solution of all the cases which we have stated as exceptions to the rule. For the only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuitry of suits; it is solely matter of arrangement for that purpose; for the right has no foundation in natural justice. A creditor's having another specific security, cannot give him in justice any priority.

Lowthian v. Hasel, 3 Brow. Rep. Chan. 162.

It is not done in any case but that of the heir, and merely to prevent circuitry.

A. purchased of *B.* the lands in question, and re-mortgaged them for securing part of the purchase-money, and for other part thereof gave a note payable on demand, on which 200*l.* remained unsatisfied, and *A.* devised his lands to be sold for payment of his debts, and died, not leaving sufficient assets: the question was, Whether this 200*l.* remaining due on the note, being for part of the consideration-money, should have a preference to other debts, and be looked on in equity as a charge upon the land? And it was insisted upon, that it should, because *B.*, as mortgagee, had the real estate in him. But it was held, that *B.* could have no preference, but must accept satisfaction in proportion only with the other creditors.]

If *A.* acknowledge a statute to *B.* for payment of 800*l.* with interest, which being forfeited, and the lands extended upon it, *A.* for a valuable consideration settle the same lands in tail, and after borrow money of *B.*, and by articles it be agreed, the statute and extent shall stand a security for the last money, and after *A.* die, and the 800*l.* with interest be satisfied by reception of the profits; yet the issue in tail shall not be relieved against the penalty of the statute; for though the heir has an equity, by reason of the tail made upon a consideration, yet the money lent raises an equity for *B.*, so that *B.* hath both law and equity, whereas the issue in tail hath equity only till the penalty is satisfied.

The plaintiff, as assignee of a statute of bankruptcy, brought his bill to redeem a mortgage of the manor of *Newington* in *Kent*, made by the bankrupt to the defendant: the defendant by answer insisted, that he first lent the bankrupt 200*l.* on a mortgage of a particular tenement, and afterwards lent him 300*l.* on a mortgage of the manor of *Newington*, which was of greater value than the money due, but the first mortgage was deficient in point of value: it was held, that if the plaintiff would redeem one he must redeem both.

2 Vern. 286.
Pape v. Onslow. [In *Ex parte* King, 1 Atk. 500. Lord *Hardwicke* said, he was not satisfied that this was the established rule of the court; that this case was very imperfect, and that he would not have it cited for the future, till it had been compared with the entry in the registrar's office. He said farther, he was very apt to believe that the tenements were parcel, and holden of the manor of Dale; and that was the reason Lord *Cowper* so determined.—Search has since been made for it in the register's book, but no minute of it has been found there.—But the rule, as here stated, is recognized in other cases; viz. *Purefoy v. Purefoy*, 1 Vern. 29. *Shuttleworth v. Lawick*, *Id.* 245.]; and was subsequently confirmed by Lord *Hardwicke* in *Titley v. Davies*, cited in *Ex parte* Carter, Amb. 733. *Vide* *Fribourg v. Pomfret*, cited *ibid.* And the rule has been confirmed at common law in a case where an assignee of a bankrupt moved to stay proceedings in ejectment on payment of the principal, interest, and costs on the mortgage in question. But it was objected by the mortgagee, that there were two other mortgages of different premises for different sums due from the bankrupt, on which the Court refused to stay proceedings on the payment of the first mortgage only, and discharged the rule with costs. *Roe v. Soley*, 2 Black. 726.]

So, if a man makes two several mortgages of several lands, and dies, and one of the mortgages is of an entailed estate, or is deficient in value, the heir of the mortgagor shall not be admitted to redeem one without the other; neither shall the mortgagor himself

himself redeem the one, and leave the defective mortgage, but he must take both together.

Cator v. Charlton, 21st June 1775, in the registrar's book, 1774. cited in 2 Ves. jun. 377. In Collet v. Munden, May 31. 1786, in the registrar's book, 1785, cited also *ibid*.

Sir L. Kenyon, upon the above authority, in the same sort of case of separate mortgages declared, that both must be redeemed. "These cases," said the Master of the Rolls, in *Jones v. Smith*, 2 Ves. jun. 377. "amount to this; that if a man makes a mortgage, and afterwards makes another mortgage for a farther sum, and then assigns the equity of redemption of one, both must be redeemed; and the case of the assignee is not better than that of the original mortgagor." || And this doctrine is confirmed in *Ireson v. Denn*, 2 Cox, 425; *sed vide Willie v. Lugg*, 2 Eden, 78. Coote on Mort. 407. ||

Vanderzee v. Willis, 3 Br. Ch. Ca. 21

A bill was filed by the widow and executrix of *James Vanderzee* to redeem securities pledged by the testator to the house of *Moorhouse* and Co. bankers, of which the defendants were the present partners. The case was as follows:—In the year 1778, the deceased kept an account with the house of *Moorhouse* and Co. as bankers; and upon the 10th of *August* in that year, he borrowed of the then partnership 1000*l*. (having then 400*l*. in the hands of the house), and gave a promissory note, and deposited several bonds and other securities as a pledge for the repayment thereof. These securities he frequently changed, and as one was taken away, another of equal value was deposited in its room. In 1784, *Vanderzee*, owing the above 1000*l*., and above 400*l*. on his banking account, the partnership required an assignment of the securities, and *Vanderzee*, being an attorney, prepared a bond and deed-poll for securing 1000*l*., although there were 400*l*. then due; and he overdrew his account, after the execution thereof, and was, at his death, in 1785, indebted to the partnership in the sum of 541*l*. over and above the 1000*l*. — The bill prayed, that the plaintiff might redeem, on payment of 1000*l*. and interest only, insisting, that the deposit was made as a security for that sum only, and the rather, as a larger sum was then due, and that the defendants had no lien on the securities for any further sum; and also stated that the personal and fee-simple real estate of the testator were no more, or little more, than sufficient to pay his specialty debts, and that a bill had been filed by creditors against the present plaintiff and the heir at law, in which suit there had been a decree for the creditors to come in. — The defendants insisted, by their answer, upon a right to retain the securities to the amount of their whole demand, stating their practice to be, never to suffer a customer to overdraw his account more than 100*l*. without security, and that it was intended by the partnership, that the assignment should

should cover as well the balance due, and to become due from *Vanderzee*, on his cash account, as the 100*l.* and interest; and that the partnership always considered themselves to have a lien upon the securities for the whole debt. Lord Chancellor,—All cases agree, that if the executor assigned the equity of redemption, it would put an end to the tacking: so it would, if the specialty creditor brought the bill. I am afraid, the rule has been laid down too broad, and that there being a decree for creditors to come in, they must redeem on payment of the 1000*l.* with interest.

Sir *James Cockburne* and *Henry Douglas*, carrying on business in partnership, as *West India* merchants, borrowed from *Joshua Smith* 5000*l.* for which they gave their joint promissory note dated April 25. 1775; and as a further security, Sir *James Cockburne* transferred 2000*l.* *Scotch* mine stock to *Smith*, who signed a memorandum promising to transfer the same to the order of Sir *James* on payment of the note. By indentures of lease and release December 11th and 12th, 1775, Sir *James Cockburne*, Sir *George Colebrook*, and *John Nelson*, mortgaged an estate in the island of *Dominica* to *Thomas Rumbold*, *George Wilson*, and *Joshua Smith*; and by indentures of the same date it was declared, that 10,000*l.*, part of that sum, was the property of *Smith*; and a trust was declared for him as to that; and the mortgagors joined in a bond to him for that sum; and Sir *James Cockburne* and *Douglas* joined in a bond to him for the interest. Sir *James Cockburne* and *Douglas* had various money transactions with *Smith* subsequent to 1775; and upon May 7th, 1788, *Smith* having then in his hands, besides the *Scotch* mine stock, and the joint note of the partners, several bills of exchange and notes delivered by them to him, an account was settled, and a memorandum signed by all parties, that the balance to *Smith* was 9246*l.* 13*s.* 7*d.*, and declaring, that that sum should carry interest from the 1st of the preceding *October*: and that the several bills and stock set forth in the account were paid to *Smith* at sundry times by the partners, “which, when paid, are to be passed to the credit of their joint “or separate notes and bills.” Upon this occasion no notice was taken of the mortgage of the *West India* estate. In *October*, 1788, *Douglas* died. By indentures of *March* 1. 1791, Sir *James Cockburne*, in consideration of 500*l.* lent by *Jones*, transferred to him, his executors and administrators, all the said 2000*l.* *Scotch* mine stock, and the joint promissory note of April 25th, 1775, and a bill of exchange for 1575*l.*, dated April 6th, 1775, payable three years and a half after date, all then in the possession of *Smith*, upon trust subject to the rights of *Smith*, for satisfaction of the said 500*l.*, and all other sums then due by Sir *James Cockburne* to *Jones*; and then to pay the surplus to Sir *James*, his executors and administrators. *Smith* having obtained judgment against the drawer and indorser upon two bills for 5000*l.* and 5250*l.* drawn by *Ninian Horne* upon Sir *James Cockburne* and *Douglas*, indorsed by *Campbell*, and delivered by Sir *James Cockburne* and *Douglas* to *Smith*, *Horne* gave *Smith* ten other

Jones v.
Smith,
2 Ves. jun.
372.

other bills and notes for 10,000*l.*, and by indentures of *September 16th, 1778*, *Smith* covenanted to stand possessed of the principal sum of 10,000*l.* secured by the *West India* mortgage, subject to the payment of the securities so given to him by *Horne*, as to one moiety for *Horne*, his executors and administrators; and as to the other, for such persons as should be then entitled thereto. Upon these bills and notes *Smith* received 4200*l.* only; and by indentures of *May 26th, 1787*, in consideration of 4200*l.* paid him by *George Horne*, he agreed to give up the remaining securities; and assigned the remaining 5000*l.* of the mortgage-money secured upon the *West India* estate. The bill was brought by *Jones* against *Smith* for an account of the money remaining due to the defendant in respect of the balance of the account of *May 7th, 1778*; and that, on payment of what should be due on that account, the defendant should transfer to the plaintiff the sum of 2000*l.* *Scotch* mine stock, and deliver up the joint promissory note of *Sir James Cockburne* and *Douglas* for 5000*l.* dated *April 25th, 1775*, and the bill of exchange of *April 6th, 1775*, for 1575*l.* upon the trusts of the indentures of *March 1791*. It was admitted by the answer, that it was agreed, the defendant should retain the several notes, bills, and stock set forth in the account of *May 7th, 1778*, by way of mortgage for payment of the balance of 9246*l.* 13*s.* 7*d.*, and apply the sums he should receive on account thereof in discharge of that balance, and pay the surplus to *Sir James Cockburne*; and that pursuant to that agreement he subscribed a memorandum dated *May 7th, 1788*, acknowledging payment of the said bills and stock to him: but the defendant referred to the memorandum for certainty as to the date and contents. The answer stated, that the defendant had received interest upon the *West India* mortgage only to *December 12th, 1776*; and he claimed interest of the whole 10,000*l.* from that day to *September 16th, 1778*; and from that day he claimed the interest of a moiety of that sum, and of so much of the other moiety as he was entitled to under the deeds of *September 16th, 1778*, to *May 26th, 1787*; and so much of the interest of the last moiety during that period, as he was not so entitled to, and the interest of the whole 10,000*l.* from *May 26th, 1787*, he claimed as trustee for *Ninian* and *George Horne*, and *Campbell*; and he insisted, that the securities, the redemption of which was sought by the bill, could not be redeemed without paying those arrears of interest upon the *West India* mortgage; which was the only question. The Master of the Rolls,—It is determined, that in the case of two mortgages both must be redeemed; but as to sums advanced on other securities, a mortgagee cannot tack those to his mortgage, and insist on a redemption of the whole. Here is a mortgage, in which *Sir James Cockburne* is one of three mortgagors, and the defendant one of three mortgagees: afterwards, the former and his partner pledge with the defendant bills and notes for payment of an account current between them, of which account the money due upon the mortgage makes no part. If they were deposited expressly for one purpose, is there any pre-

tence to say, the money was advanced upon security of the mortgage; and that he would not have advanced any more money but on security of the mortgage? I could not permit him to say that. What confusion would arise, if upon a bill of redemption by the mortgagors they were not to redeem without paying what was due upon the distinct transaction with Sir *James Cockburne* and *Douglas*? They are transactions totally distinct. Nothing has happened since to make any variation. This is not a case in which the plaintiff comes to take out of a mortgagee the legal estate he has acquired; but he comes to have these personal securities; the debt for which they were pledged being discharged. The whole transaction proves, there was no intention of tacking at the time; and if the defendant ever could, he waived it in 1778. That transaction was an acknowledgment by him, that he had the legal possession for one sum; and then, according to *Green v. Farmer* (a), he cannot set up another. Therefore, these securities must be delivered over to the plaintiff on paying what is due upon that account in 1778. I rather think the defendant ought to have his costs; for it is not a frivolous point; therefore, let the account be directed, and costs reserved.]

If a man has a debt owing to him by mortgage, and another on bond from the same person, he cannot tack them together against the (b) mortgagor, but he shall be let into a redemption without payment of both; because the land in his hands is chargeable with the bond even at law. And (c) since the statute against fraudulent devises, the devisee of the equity of redemption is in the same case with the heir, and cannot redeem without payment of both; because the statute makes such devise void as against creditors, and then the devisee stands in the place the heir must have done if no devise had been made.

gagor himself must pay both bond and mortgage. And in *Prec. Chan.* 419. it is said by my Lord Chancellor, that if a sum be secured by a mortgage of lands, the mortgagor shall not be admitted to redeem after the day of payment is lapsed, without paying likewise all that is due to the mortgagee on notes or simple contract; but that it is otherwise if such subsequent debts had been secured by bond. (c) But before the statute, the devisee of the equity of redemption was not obliged to pay both. *Abr. Eq.* 325. *Prec. Ch.* 89.

Also it hath been held, that if the heir of the mortgagor alien the lands, the purchaser, on a bill brought by him for a redemption after forfeiture, shall not be obliged to pay both the mortgage-money, and also a bond-debt due from the mortgagor; for though the heir must have paid both in such a case, yet the reason of that is, because the heir is expressly bound, and his person is become debtor, and not the lands, and, consequently, the lands in the hands of the alienee can be charged with nothing but what is an immediate *lien* thereon, which the bond is not.

So, if a man, possessed of a term for years, mortgages it, and dies indebted to the mortgagee in a bond-debt, if the executor brings a bill to redeem, he must pay both; because the equity of redemption of the term is assets in his hands; but if he alien the equity of redemption of his term, though he shall be answerable for

(a) 4 Burr.
2214. and
1 Bl. R. 651.

Abr. Eq. 325.
Challis v.
Casborn;
||*cont.* *Bing-*
ham v. Gregg,
Barn. 182.
Felton v. Ash,
id. 177.; and
see *Powell,*
348. a. note.||
(b) In *Vern.*
244. it is held,
that the mort-

Prec. Ch. 511.
Coleman v.
Wince.

Prec. Ch. 512.
per cur.

for the value, as it is so far a *devastavit*, yet the purchaser shall be charged with no more than was immediately borrowed upon it.

If a bill is brought by an heir at law, or any other person, against a mortgagee, whereby the party would avoid the mortgage, under pretence his ancestor was only tenant for life, and he seeks for a discovery of deeds and writings to avoid the title of the mortgagee, he shall never have such a discovery, unless he, by his bill, submits to confirm the title, and then he shall.

Father tenant for life, remainder to the son in tail; the father mortgages the land, and dies; the mortgagee, by a third hand, procures the son to borrow money of him, as tenant in fee, on a mortgage of the premises: this shall not enure to make good the money lent the father; for though the mortgagee hath got the legal estate, yet it is only pledged for money lent to the son, and the money lent to the father was on another estate, to which the son is an absolute stranger; and therefore the court will not compel the son to pay the debt of the father, from whom he did not claim. But, if the tenant in tail had mortgaged without notice of the entail, and the mortgagee had got the deed into his possession, equity would not compel him to discover such deed to overthrow his own possession, since his estate arises upon a valuable consideration, and the heir in tail claims under the ancestor who made the mortgage, especially if the mortgage work a discontinuance.

So, where a lunatic, before he became such, made a mortgage of a good part of his estate for 50*l.*, and the committee transferred this mortgage, and took up 300*l.* or 400*l.* more upon it; my Lord Chancellor declared the mortgage should stand a security for the 50*l.* only.

[A mortgage being assignable, a purchaser shall hold it against the mortgagor or his heirs for the sum due on the mortgage, although he bought it for less than was due, or for less than it was worth: for he stands in the place of the mortgagee who assigned, and who might have given it to him *gratis*. And what was due will be the measure of allowance, not what was given, for that might be more than it was worth as well as less; and he that runs the hazard if a loss happens, ought to have the benefit in case it turns to advantage. Thus, where *A.* mortgaged his lands to *B.*, and *C.*, a stranger, bought the interest for less than was due on the mortgage, and the heir of the mortgagor brought his bill to redeem, the question was, Whether *C.* should be allowed more than he actually paid? And the Lord Chancellor said, that this case had neither point nor edge, for there was no colour why, when the heir came to redeem, he should not pay the whole money due on the mortgage: for that, if another man had met with a good bargain, there was no equity for the heir of the mortgagor to deprive him of the benefit of it, and take the advantage thereof himself.

But where a man dies in debt and under several incumbrances, namely, judgments, statutes, mortgages, &c. and the heir at law buys in any of them that are of the first date; if creditors, who have

2 Chan. Ca.
23. Bromley
v. Hammond.
||cont. Mar-
grave v. Le
Hooke,
2 Vern. 207.||

Vern. 262.
Foster v.
Merchant.

Williams v.
Springfield,
1 Vern. 476.
1 Salk. 155. 4.;
||sed vide
Morret v.
Paske,
2 Atk. 54. and
5 Ves. 620.
n. (a).
Phillips v.
Vaughan,
1 Vern. 336.
Baker v.
Kellet, 3 Rep.
Ch. 23.
||S. C. Nelson,
117.||

2 Vent. 353.
1 Vern. 49.
479. 1 Eq. Ca.

have the latter securities, prefer their bill, the incumbrances brought in shall not stand in their way for more than the heir really paid for them. For a creditor has equal equity with a purchaser, and the taking away the gain of the latter to supply the loss of the former, is making both equal; and therefore the gain the heir would make, if the whole money due on the incumbrance were allowed him, shall be taken from him to make up the loss of the other incumbrancers upon the estate.

So, if an heir at law, trustee, executor, or agent compound debts or mortgages, and buy them in for less than is due upon them, he shall not take the benefit of it himself, but the creditors and legatees shall have the advantage of it; and, for want of them, the benefit shall go to those entitled to the surplus.

And where a mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's dower, it was decreed, that the heir of the mortgagor, on his bringing a bill to redeem, should have the benefit thereof, on this principle, that the mortgagee is but a trustee for the mortgagor after his money paid.

In the case of *Bishop* and *Sharpe*, one as a guardian to an infant took in an assignment of a mortgage; and the Lord Keeper, it is said, was of opinion, that as to the profits received out of the mortgaged lands, the guardian should be taken to be in possession as mortgagee, and not as guardian. But the reporter puts a *quære*; and the law seems to be otherwise; for where a guardian compounded debts, it was decreed it should be for the benefit of the infant, and that case turns upon the same principle as that by which the case of *Bishop* and *Sharpe* must be governed.

And the equity seems to be the same if a stranger purchase, as against incumbrancers, creditors, or real purchasers.

||*sed vide cont.* 2 Atk. 54. 5 Ves. 260. note (a).||

Thus, on a master's special report, to whom the account in question was referred to be taken, it was determined by the court, that an heir or any other person should not, as against a real purchaser, be allowed more on any incumbrance bought in than what he paid for it, without regard to what was actually due thereon.

If an heir purchases in an incumbrance on an estate charged with portions to younger children, he shall be allowed no more than what he really paid for it.

But if an heir or trustee buy in incumbrances to protect others to which he is himself entitled, the whole money due shall be allowed on account, although it was purchased for less.]

6. *At what Time the Redemption must be.*

When a man made a feoffment in fee upon condition, that if the feoffor paid a sum of money at a day he should re-enter at law; if the money was not paid at the day, the estate was gone for ever. This made pledging, according to the rules of the common law, very insecure, and also made it necessary for a court

Abr. 530. 3.
1 Salk. 155.

Darcy v. Hall,
1 Vern. 49.
1 Salk. 155.
2 Atk. 54.

Baldwyn v.
Banister,
3 P. Will. 251.
note A.

Bishop v.
Sharpe,
2 Vern. 471.

Powell v.
Glover,
3 P. Will. 251.
note A.

Williams v.
Springfield,
1 Vern. 476.;

Long v.
Clopton,
1 Vern. 464.

Brathwaite v.
Brathwaite,
1 Vern. 335.

Darcy v. Hall,
1 Vern. 49.

Chan. Ca. 20.

court of equity to interpose. For though the words of the condition bind down the construction at common law to the payment at the precise day, yet a trust is supposed between the mortgagor and mortgagee, that in case the payment be afterwards made, the mortgagor may have up the lands: and this the rather, because the land is esteemed only a pledge for money, and it would be a very unconscionable thing, that the mortgagee should take advantage of the nonpayment at the precise day, when lands are generally pledged but for half value. And in this the chancellors, who were ecclesiastics, were more generally confirmed from the reasonings of the civil law hereinbefore mentioned.

Chan. Ca. 102.
Chan. R. 97.
184. 206.
Abr. Eq. 315,
314.
2 Vern. 377.

But though a redemption has been allowed, yet no time has been limited when the same may be. But when a man comes in at an old hand, it hath been sometimes decreed, that the possessor shall account no farther than for the profits made in his own time, to discourage the stirring in such dormant titles. However, it is the common doctrine in the courts of equity, that there is no time limited; for it is not within the statute of limitations, and the courts of equity are tender of settling any set time; because a man can never be injured, if he receives principal, interest, and costs; and the proprietor is injured, if he parts with his possession under the true value. Sometimes, indeed, the court hath allowed length of time to be pleaded in bar, where the mortgaged estate hath descended, as a fee, without entry or claim from the mortgagor, and where the possessor would be entangled in a long account.

2 Vent. 340.
Ewre v.
White.
||(a) As to this
rule now set-
tled in equity,
see Beckford
v. Wade,
17 Ves. 99.
Hicks v.
Cooke,
4 Dow. P. Ca.
27. Medlicot
v. O'Donnell,
1 Ball & B. 156.
and remarks of

And therefore, at a rehearing before my Lord Keeper, assisted with Justices *Vaughan* and *Turner*, concerning the redemption of a mortgage, which had been made above forty years, my Lord Keeper declared, that he would not relieve mortgages after twenty years (a); for that the statute of limitations did adjudge it reasonable to limit the time of one's entry to that number of years, unless there are some particular circumstances that may vary the ordinary case; as infants, femmes covert, &c. who are provided for by the very statute; though these matters in equity are to be governed by the course of the court, and it is best to square the rules of equity as near the rules of reason and law as may be.

Bond v. Hopkins, 1 Scho. & Lef. 427. *Hovenden v. Annesley*, 2 *Id.* 632.; and remarks of *Plumer M.R.*, 1 Jac. & W. 63.||

Vern. 418.
Orde v.
Heming.
[(b) Whether
length of time
can be taken
advantage of
by way of de-
murrer, see

A bill was exhibited to redeem a mortgage; to which the defendant demurred (b); because, by the plaintiff's own shewing, it appeared the mortgage was sixty years old: but, upon argument, the demurrer was over-ruled; because it was charged in the bill, that the mortgagor agreed the mortgagee should enter and hold till he was satisfied, which is in the nature of a (c) *Welsh mortgage*.

Jenner v. Tracey, and *Belch v. Harvey*, 5 P. Wms. note (B). *Frazer v. Moor*, Bunb. 54. *Saunders v. Hard*, 1 Ch. Ca. 184. *Aggas v. Pickerell*, 5 Atk. 225. *Beckford v. Close*, cited in 5 Br. Ch. R. 644. *Edsell v. Buchanan*, 2 Ves. jun. 83.] ||But it seems now settled that such a demurrer is good. *Hardy v. Reeves*, 4 Ves. 478. *Hodley v. Healey*, 1 Ves. & B. 536. *Foster v. Hodgson*, 19 Ves. 184. and see 2 Scho. & Lef. 638.|| (c) In a conveyance by lease and release

lease there was a proviso, that if *A.*, his heirs or assigns, should, on Michaelmas day then next ensuing, or any other Michaelmas-day following, pay to *B.*, his heirs or assigns, the sum of 300*l.* (the mortgage-money), and all arrears of rent or interest which should be then due, then the said conveyance was to cease, without any other covenant for payment of the money: this was held to be a Welsh mortgage, being in nature of a conditional purchase, subject to be defeated on payment, by the mortgagor, or his heirs, of the sum stipulated between them at any Michaelmas-day, at the election of the mortgagor, or his heirs; and that here being an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, the same could not be forfeited at law, like other mortgages; and this was said to be a common practice in Wales (proceeding from their pride), being done with a design to keep the estate for ever in their family. Prec. Chan. 423, 424. ¶ In the late case, *Fenwick v. Reed*, 1 Mer. 114. the court fully recognized the security by Welsh mortgage, and held that time was no bar to redemption in such cases, unless twenty years had elapsed after payment of principal and interest by perception of profits. S. C. 5 Barn. & A. 252. 6 Madd. 7.; and see *Cooke v. Soltan*. 2 Sim. & Stu. 154.¶

[*A.*, in 1699, having borrowed 50*l.* of *B.*, conveyed several houses to the use of *B.* and his heirs, until he should have received by the rents and profits thereof the 50*l.* with interest, and all other sums by him advanced to the mortgagor; and after payment by such rent of the 50*l.*, and all such sums as should be advanced, then to the use of *A.* for life, with remainder over. No application was made to redeem until 1740; and it was held, on a question, whether this mortgage might be then redeemed, that the estate was then a redeemable interest, and that no bar arose from length of time. For it was said, that this differed from a common mortgage, this being a conveyance of the inheritance, for securing the money lent, or any other sum advanced by the mortgagee, in trust that the mortgagee should continue in possession till, by perception of the rents and profits, he should be satisfied the principal and interest upon such sums as he had already lent, or should lend, and subject thereto in trust for the mortgagor, &c. Now there never could be a forfeiture under this deed, because the mortgagee was only in the nature of a tenant by *elect*; and as soon as his principal and interest was satisfied by being paid off, or by perception of rents and profits, the estate ceased in *B.*, and *A.*, or those claiming through him, might have brought an ejectment; nor would any bar have arisen from length of time, unless the statute of limitation had run by the mortgagee's continuing in possession twenty years after the money had been paid off. And the mortgagor in such case may also come into a court of equity for an account of the profits received, as on an *elect*, and to have the surplus, if any, after discharging the mortgage, paid over to him; and in such cases there is nothing for the statute of limitations, or the rule adopted in equity by analogy to operate upon, for there is no forfeiture. But it was observed, in the preceding case, that if, after the account should be taken in Chancery, it should appear that the mortgage was satisfied by perception of profits twenty years before, and that the mortgagee had continued in possession from that time, the statute of limitations would run.

But in the case of *Hartpole v. Walsh*, where *H.*, in consideration of 600*l.* lent him by *W.*, conveyed estates to him in fee, subject to a proviso, that "the conveyance should be void, when—
"ever

Yates v. Hambly,
2 Atk. 360.
¶ 1 Mer. 125.¶

Hartpole v. Walsh,
4 Brown's
Parl. Ca. 369.

“ever *H.*, his heirs, executors, administrators, or assigns, should, “on any last day of *June* or *December*, pay unto *W.*, or his heirs, “the sum of 600*l.* ;” and it was agreed by the indenture, that *W.* and his heirs should receive the yearly rent of the premises in lieu of his interest, with a view to which possession was delivered to him; and afterwards *H.*, in consideration of 2300*l.* paid by *W.*, granted and conveyed the premises comprised in the former mortgage, together with others, to him, his heirs and assigns, and covenanted that, whenever *W.* should give to him, his heirs or assigns, eighteen months notice by letter in writing, requiring payment for the 2300*l.*, *H.*, his heirs or assigns, should pay the same with interest within eighteen months after such request; and *W.* was in like manner let into possession of the last-mentioned premises; a bill for redemption brought, after the lapse of one hundred years, was dismissed, and that decree for dismissal affirmed in the House of Lords.

Proctor v.
Cowper,
2 Vern. 377.
||Pre. Ch. 116.||

Where a bill was to redeem a mortgage made in 1642, it appeared the mortgagee entered in 1650, and there were three descents on the defendant's part, and four on the part of the plaintiff; but, the length of time being answered for the greatest part by infancy or coverture, and an account having been made up by the mortgagee on a bill brought by him in 1686, to foreclose, the court decreed a redemption and an account from the foot of the account in 1686.

Anon.
2 Atk. 333.

Where a mortgage was made in 1713, and the clerk to the solicitor for the mortgagor, in order to pay off the mortgage, settled an account, in 1730, of what was due for principal and interest, and no farther proceedings were had; yet that was held by Lord *Hardwicke*, on application in 1742, to save the right of redemption.]

2 Vern. 418.
Abr. Eq. 314.
Saint John v.
Turner.

A mortgage was made to *A.* in the year 1639, to indemnify him against debts for which he was engaged for the mortgagor; and in the year 1649, he entered into the mortgaged premises, and had possession, and afterwards conveyed away several parts of the mortgaged premises to several persons; and several sales and marriage-settlements had been made on them. In the year 1663, a bill was brought to redeem; but all the assignees were not parties; and a decree to account, and a report made, and exceptions taken to that report; and so it rested for about eighteen years; and then another bill was brought; and another decree to redeem; but no prosecution upon it from the year 1676 till 1697, and then the plaintiff, having purchased the equity of redemption of those lands (*inter alia*) from the heirs of the mortgagor, brought his bill to redeem. The objections against it were the length of time, the many derivative titles that had been made, and when no suit was depending, and the difficulty of taking the account. To which it was answered, that there had been fresh pursuits, and that the difficulty of the account had been occasioned by the mortgagees themselves, and that there were infants in the case. My Lord Keeper held, there ought to be no redemption; and that length of time excuses the mortgagee for

for taking the estate as his own, and using it accordingly; and none that have come under him have done amiss; and though there were infants in the case, yet the time having begun on the ancestor, it shall run even upon infants, as it is at law in the case of a fine; and there is one great objection to a redemption in this case, that it does not appear that the plaintiff paid any thing for this equity of redemption, only had it thrown into his bargain.

The plaintiff's grandfather, in the year 1686, had made a mortgage of the estate in question, which was proved to be about nine or ten pounds per annum, for securing about 100*l*. In the year 1696 this mortgage was assigned over to the defendant; who by agreement was then let into possession, and had continued so ever since, and was now about ninety years of age: the mortgagor died several years since, leaving the plaintiff's father, his eldest son and heir, of full age, who likewise died in the year 1714, leaving the plaintiff his eldest son and heir, then about twelve years of age; who brought this bill for an account, and to be let into a redemption of the estate in question, of which the defendant had been in possession thirty-three years, and so was greatly overpaid his principal and interest. But my Lord Chancellor dismissed his bill; and ordered it to be entered down as one of the reasons for dismissing the bill, that the plaintiff had no remedy by ejectment at law to recover the possession, being barred by the statute of limitations; and he thought that a reasonable guide for this court to follow, as to the redemption in equity; and though the plaintiff was an infant at his father's death, yet the computation of time began long before, when there was no infancy in the case, and therefore will run on against infants after. (*a*)

proviso in the statute of limitations. *Per*

||If the mortgagee enters in the lifetime of the tenant for life of the mortgaged estate, the remainder-man will be barred of his right to redeem after twenty-years from such entry.||

Corbett v. Barker, 1 Anst. 138. (*3. id.* 755.)

[Any act of the mortgagee, by which he acknowledges the transaction to be a mortgage within twenty years, will take the case out of this rule; as, by devising the money in case the mortgage should be redeemed, or exhibiting a bill to foreclose.

So, a man taking notice by a will, or any other deliberate act, that he is a mortgagee, will take the case out of the rule that a mortgagor shall not redeem after forty years.

||So, also, if the mortgagee treat the estate as redeemable in a mere private account kept by himself of the profits. But the accounts kept by the receiver of the estate will not amount to such an acknowledgment, nor will a mere demand by the mortgagor without process, or acknowledgment by the mortgagee, be sufficient.

Lake v. Thomas, 5 Ves. 17. 22. *Barron v. Martin*, Cooper, C. C. 189. 1 Ves. & Beam. 540. 19 Ves. 327.

Abr. Eq.
315. *Knowles v. Spence.*
(*a*) As twenty years possession will bar an entry or ejectment, unless in cases of infancy, coverture, imprisonment, or being beyond sea (but not absconding), so will it bar a redemption. *Jenner v. Tracy.* *Belch v. Harvey*, 5 P. W. 288. After the disability removed, ten years should be the rule in equity, as it is in the *Talbot C., ibid*

Harrison v. Hollins, 1 Sim. & Stu. 471.; and see

Orde v. Smith, Sel. Ca. Ch. 9. *suprà*.

||*Hansard v. Hardy*, 18 Ves. 455.||

Fairfax v. Montague, cited 2 Ves. jun. 84. *Campbell v. Beckford*, cited 4 Ves. 474.

Smart v. Hunt, 4 Ves. 478. n. A conveyance by the mortgagee or his heir of the lands subject to the equity of redemption is a clear acknowledgment, although it is said that the words "subject to the subsisting equity of redemption, *if any*," will not have that effect.

Reeves, *ibid.* 480. Parol evidence of the acknowledgment is admissible; but it must be clear and unimpeachable.

Perry v. Marston, 2 Bro.C.C. 597.
Whiting v. White, 2 Cox, R. 295.

2 Scho. & Lef. 295. Acknowledgments of the mortgage by recitals in deeds, often render estates redeemable which otherwise would not be so. Hansard v. Hardy, 18 Ves. 455. And an acknowledgment by the mortgagee, or those claiming under him within twenty years, will have this effect, though the transaction be with third persons, and the mortgagor and his heirs are not party to it. Reeves, 4 Ves. 466.
Price v. Copner, 1 Sim. & Stu. 347.

Fenwick v. Reed, 6 Madd. 8. So, an acknowledgment of the mortgage as a redeemable interest in a letter to a friend, or in a settlement between third parties, or by an assignment treating the estate as subject to redemption, will keep alive the equity of redemption. || 2 Cox, Ca. 294.
Smart v. Hunt, 4 Ves. 478.
n. (a).

Perry v. Marston, 2 Bro. Rep. Chan. 397. A surrender was made by *P.* to *M.*, the re-conveyance to be to such uses as *P.* should direct, or to himself in fee. There was a subsequent surrender to the use of himself for life, remainder to his wife for life, remainder to *M.* in fee, subject to the trusts of the former conveyance. Under these conveyances *P.* enjoyed the estate without paying interest until the year 1751, when he died, and after his death his wife enjoyed in like manner during her life. In the year 1751, upon the decease of the husband, part of the premises were sold, and the wife joined in the conveyance. She dying soon after, *M.* took possession, and held the same without any account to 1765, and from thence to 1779 no act was before the court to shew under what title *M.* held. In 1776 a bill was filed to redeem. In the first answer put in 1780, *M.* denied that he held as a mortgagee, and claimed to hold by title under the second deed. In the same year the conversation passed, which was considered as a declaration, that *M.* held only as a mortgagee. It was a conversation between the son of *P.* and *M.*, in which *M.* asked the son, *why his father did not pay the money; to which he answered, because he was so poor that he could not pay it. The reply of M. to this was, he was ready to settle the matter without suit.* An amended bill was afterwards filed, and the cause was heard at the Rolls, and on the above evidence being read, a redemption was decreed. But, upon appeal to the Chancellor, the decree was reversed, on the ground that the second conveyance must have been in consequence of a new agreement, not a mode of keeping up the mortgage: as otherwise the mortgagee would have got the equity of redemption for nothing, and the *P.*'s would have estates for life, subject to the mortgage money, which was more than they were worth: the words "subject to the trusts" must therefore mean, "subject

“subject to the life-estates of the mortgagor and his wife.” Then if it was considered as matter of title, the rule did not apply. If *M.* had been the surrenderor (which he ought to have been), it could not have been, that a conversation should defeat a clear act. Then there was evidence of a clear possession in *P.* and his wife. After her death the *M.*'s took the estate, and treated it as their own. On the whole the Chancellor was of opinion, that the surrender was an instrument of title; and the decree was reversed.

So, where a bill was demurred to, because it was to be relieved against a mortgage after forty-one years, yet, on a promise being proved that the mortgagor should be at liberty to redeem after twenty-seven years, the demurrer was disallowed; because, though forty-one years had passed since the mortgage, yet but fourteen had elapsed after the time agreed for redemption.

So, a mortgage was decreed to be redeemed upon the foot of an account stated previous to the mortgagee's entering upon the premises, notwithstanding he had been in possession forty years; the husband of the heir of the mortgagee having entered into an agreement with the heir of the mortgagor, about seven years before the bill for redemption came to a hearing, for the purchase of the equity of redemption. For although, for reasons sufficiently evident in the case, the court refused to decree a specific performance of that agreement, yet it seems to have been considered as an admission by the mortgagee, that at that time he conceived the mortgagor had a right to redeem, which occurring within seven years of the time of exhibiting the bill, brought this case within the reasoning of that immediately preceding.

[Husband and wife, seised in fee in right of the wife, mortgaged for a term of years, and levied a fine to the use of the mortgagee, his heirs and assigns, subject to the proviso for redemption. They afterwards conveyed the equity of redemption by lease and release to the mortgagee. The mortgagee remained in possession as complete owner for more than twenty years, during the life of the husband, tenant by the curtesy, from whom he had gotten the conveyance. The heir of the wife was allowed to redeem notwithstanding this lapse of time. By attending to the different rights of the mortgagee it appears, that he stood in the place of the tenant by the curtesy of the equity of redemption; for he claimed to hold under him by the last conveyance, and immediately upon taking it he entered into possession: in that character it was his duty to keep down the interest of the mortgage: uniting these two characters, he is to be considered as having supported the different rights and discharged the duties of each. In the general case, a presumption arises from no payment of the surplus rents being made, nor account delivered for so long a period of time as twenty years: here the presumption cannot arise, because it was the same person to pay and to receive: the case does not therefore fall within the general rule.]

Upon the same principle, a redemption was decreed upon a *Palmer et al.* bill

White v.

Pigeon,
Tothill, 232.

Conway v.

Shrimpton,
1 Bro. Parl.
Ca. 509. Vin.
vol. 5. p. 505.
Ca. 5. 2 Eq.
Ca. Abr. 596.
Ca. 10. 758.
Ca. 2.

Corbett v.

Barker, Anstr.
158. 755.

v. Jackson
et al., 5 Bro.
Parl. Ca. 194.

bill filed fifty-five years, after the original mortgage, and forty-seven years after the mortgagee got into possession, after five ejectments brought to defeat his estate by a title paramount, and after refusal by four different answers to come to an account upon the foot of the mortgage, and to redeem. For, the non-redemption for thirty-eight years of the time elapsed being accounted for, by having been occupied in different suits brought by the contending parties, a period of seventeen years only had run out between the time of settling that dispute and the exhibiting the bill to redeem.

Proctor v.
Oates, 2 Atk.
Rep. 140.;
||and see Sey-
mour v. Tin-
dell, Finch's
Rep. 284.||

And if the mortgagee *submit* to be redeemed, time will be no bar. Thus, where a bill was brought to redeem after the mortgagee had been in possession from 1707 to 1732, the year in which the bill was filed; and the defendant (it being a family affair) submitted by his answer to be redeemed, notwithstanding the length of time; Lord *Hardwicke*, though he said he saw no colour for the redemption, yet, on the defendant's submission, decreed an account of what was due for principal, interest, and costs, and directed the plaintiff to pay the same in six months after the master's report, or, in default, the bill to be dismissed without costs.

Rakestraw v.
Brewer, Sel.
Ca. Ch. 55.
Mosely, 190.

Time will be no bar, if the mortgagor remain in possession. Thus, a person had chambers in *Gray's Inn*, and mortgaged them in 1687, but continued the possession till 1700; at which time an order of the Bench was made to deliver possession of the mortgaged premises to the mortgagee; upon part of which he entered; but as to the other part, the mortgagor continued in possession till 1708, when he died, leaving the plaintiff an infant, who came of age in 1714. From the death of the mortgagor, the mortgagee had possession of the whole. A bill was brought to redeem in 1726, and it was so decreed at the Rolls, and the decree was affirmed by Lord Chancellor *King*, who said nothing was more clear than that, if the mortgagor was in possession of any part, he should be admitted to redeem the whole; for part of the chambers he might redeem as being in possession thereof, and part he could not, separately from the whole; therefore he should redeem the whole. If the mortgagee were in possession for twenty years, and no interest paid, there should be no redemption allowed. In this case the mortgagor was in possession of part till 1708; from 1708 till 1714, the plaintiff was an infant, so that was accounted for, and from that time it did not amount to twenty years.]

7. Of the Manner of Redeeming and Foreclosing.

7 G. 2. c. 20.
For the more
easy redemp-
tion and fore-
closure of
mortgages,
||vide 15 Ves.
560. 3 Ves. &
B. 15.||

The methods of redemption and foreclosing being dilatory, expensive, and inconvenient, not only to the mortgagee but also to the mortgagor, the same seems now remedied by the 7 G. 2. c. 20., which reciting, that whereas mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay money secured by such mortgages, and for performing the cove-
nants

nants therein contained ; and likewise commence suits in his majesty's courts of equity to foreclose their mortgagors from redeeming their estates ; and the courts of law, where such ejectments are brought, have not power to compel such mortgagees to accept the principal money, and interest due on such mortgages, and costs, or to stay such mortgagees from proceeding to judgment and execution in such actions, but such mortgagors must have recourse to a court of equity for that purpose ; in which case the courts of equity do not give relief until the hearing of the cause ; for remedy thereof, and to obviate all objections relating to the same, it is enacted, " That where any action shall be brought on any bond for the payment of the money secured by such mortgage, or performance of the covenants therein contained ; or where any action of ejectment shall be brought in any of his majesty's courts of record at *Westminster*, or in the court of sessions in *Wales*, or in any of the superior courts in the counties palatine of *Chester*, *Lancaster*, or *Durham*, by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of his majesty's courts of equity, in that part of *Great Britain* called *England*, for or touching the foreclosing or redeeming such mortgaged lands, tenements, or hereditaments ; if the person or persons having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become defendant (a) or defendants in such action, shall, at any time pending such action, pay unto such mortgagee or mortgagees, or, in case of his, her, or their refusal, shall bring into court, where such action shall be depending, all the principal money and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity, upon such mortgage (such money for principal, interest, and costs to be ascertained and computed by the court where such action is or shall be depending, or by the proper officer by such court to be appointed for that purpose), the money so paid to such mortgagee or mortgagees, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage ; and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly ; and shall and may, by rule or rules of the same court, compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or reconvey such mortgaged lands, tenements, and hereditaments, and such estate and interest, as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences, and writings in his, her, or their custody, relating to the title of such mortgaged lands, tenements, and hereditaments, to such mortgagor or mortgagors who shall have paid or brought such monies into the court, his, her, or their heirs, executors, or administrators, or to such other person or persons

||(a) The clause only extends to cases where the mortgagor appears and defends. But if the mortgagee recovers in an undefended ejectment against a tenant of the mortgagor, the court will, on payment of costs, set aside the judgment, that the mortgagor may defend as landlord, and be in condition to apply to the court to stay proceedings under the statute. Doe d. Tubb v. Roe, 4 Taunt. 887.||

||If the bill embrace any other object distinct from the foreclosure of the mortgage, an order of reference cannot be made under this statute.

Bastard v. Clark, 7 Ves. 489. The application for the reference in equity must be made before the mortgagee is entitled to sue out execution, at law. *Amis v. Lloyd*, 5 Ves. & B. 16. And it will not be granted if the mortgagor be in contempt. *Hewitt v. McCarthy*, 15 Ves. 560.

The reference under the statute must proceed on the admission that the principal and interest contained in the foreclosure bill are due, and the master cannot admit evidence to shew the contrary. *Huson v. Hewson*, 4 Ves. 103. The time appointed for payment of the mortgage-money may be enlarged under the statute in like manner as if the cause were brought to a hearing. *Wakerell v. Delight*, 9 Ves. 36. S. C. *Coop.* 27. Where no mention was made in the bill, of proceedings at law, the court refused to direct the master to take into consideration costs at law, but allowed the bill to be amended in that respect. *Millard v. Magor*, 3 Madd. 435. It seems that this statute gives no new powers to courts of equity, but only to courts of law; and a court of equity will accordingly stay proceedings in cases not within the statute, if the defendant will submit to the same decree as the plaintiff would be entitled to at the hearing. *Praed v. Hull*, 1 Sim. & Stu. 331. Where the mortgagor becomes bankrupt, pending a suit for foreclosure, and a supplemental bill is filed against the assignees by the mortgagee, the court will not, on application of the assignees alone, make an immediate decree under the statute. *Garth v. Thomas*, 2 Sim. & Stu. 188.||

“persons as he, she, or they shall for that purpose nominate or appoint.”

§ 2. “And where any bill or bills, suit or suits shall be filed, commenced, or brought in any of his majesty’s courts of equity in that part of *Great Britain* called *England*, by any person or persons having or claiming any estate, right, or interest in any lands, tenements, or hereditaments, under or by virtue of any mortgage or mortgages thereof, to compel the defendant or defendants in such suit or suits (having or claiming a right to redeem the same) to pay the plaintiff or plaintiffs in such suit or suits the principal money and interest due on any such mortgage, or the principal money and interest due on such mortgage, together with any sum or sums of money due on any incumbrance or specialty, charged or chargeable on the equity of redemption thereof; and, in default of payment thereof, to foreclose such defendant or defendants of his, her, or their right or equity of redeeming such mortgaged lands, tenements, or hereditaments; such court and courts of equity where such suit or suits shall be depending, upon application made to such court by the defendant or defendants in such suit, having a right to redeem such mortgaged lands, tenements, or hereditaments, and upon his or their admitting the right and title of the plaintiff or plaintiffs in such suit, may and shall, at any time or times before such suit or cause shall be brought to hearing, make such order or decree therein as such court or courts might or could have made therein, in case such suit or cause had then been regularly brought to hearing before such court or courts; and all parties to such suit or suits shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such court at or subsequent to the hearing of such cause or suit; any usage to the contrary thereof in anywise notwithstanding.”

and interest contained in the foreclosure bill are due, and the master cannot admit evidence to shew the contrary. *Huson v. Hewson*, 4 Ves. 103. The time appointed for payment of the mortgage-money may be enlarged under the statute in like manner as if the cause were brought to a hearing. *Wakerell v. Delight*, 9 Ves. 36. S. C. *Coop.* 27. Where no mention was made in the bill, of proceedings at law, the court refused to direct the master to take into consideration costs at law, but allowed the bill to be amended in that respect. *Millard v. Magor*, 3 Madd. 435. It seems that this statute gives no new powers to courts of equity, but only to courts of law; and a court of equity will accordingly stay proceedings in cases not within the statute, if the defendant will submit to the same decree as the plaintiff would be entitled to at the hearing. *Praed v. Hull*, 1 Sim. & Stu. 331. Where the mortgagor becomes bankrupt, pending a suit for foreclosure, and a supplemental bill is filed against the assignees by the mortgagee, the court will not, on application of the assignees alone, make an immediate decree under the statute. *Garth v. Thomas*, 2 Sim. & Stu. 188.||

§ 3. Provided always, “That this act, or any thing herein contained, shall not extend to any case where the person or persons, against whom the redemption is or shall be prayed, shall (by writing under his, her, or their hands, or the hand of his, her, or their attorney, agent, or solicitor, to be delivered before the money shall be brought into such court at law, to the attorney or solicitor for the other side,) insist either that the party praying a redemption has not a right to redeem, or that the

“premises

“premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted or questioned, by or between different defendants in the same cause or suit; nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer; any thing in this act to the contrary thereof in anywise notwithstanding.”

[On a motion to stay the proceedings in an ejectment brought by a mortgagee against a mortgagor, on the latter paying principal, interest, and costs, it appeared that the mortgagor five years before, by agreement under seal, in consideration of a certain sum, had agreed to convey the estate to the mortgagee absolutely, and that a sum of money due from the mortgagor to the mortgagee should be deducted out of the purchase-money so to be paid; and that several applications had been since made to the mortgagor to complete the purchase, which he had refused. It was contended therefore, that, under the proviso in the stat. 7 G. 2. c. 20. § 3. the mortgagor had no right to the benefit of the statute; and so thought the court.]

Goodtitle v. Pope, 7 Term Rep. 185.

But in a former case, where the like objection was made to such a motion, the court permitted the redemption, and that after time taken to consider of it, because it appeared that the mortgagee had not tendered to the mortgagor a deed of conveyance for execution, and that no bill in equity was brought.]

Skinner v. Stacy, 1 Wils. 80.

Where a mortgagee who had gotten possession by ejectment sued at law on the covenant for nonpayment, and was proceeding in a suit in equity to foreclose; a motion was made to restrain him from proceeding at law: but the court said, the plaintiff is regular in his proceedings; we cannot deprive him of the benefit of his action, unless the defendant will bring in the money.

Rees v. Parkinson, Anstr. 497.; *sed vide* Schoole v. Sall, 1 Scho. & Lef. 176. ||

[On a bill brought to redeem a mortgage of long standing, an objection was made for want of parties; namely, that as there had been an absolute conveyance made of this estate by the mortgagee without any clause of redemption, with several limitations over, the persons in remainder under this conveyance ought to have been parties. *Et per curiam*, — When a mortgagee, who has a plain redeemable interest, makes several conveyances upon *trust*, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, then it is not necessary that the plaintiff should trace out all the persons who have an interest in such trusts to make them parties. But, where the redemption depends upon equitable circumstances, and the plaintiff is not in the common case of redemptions, and where the mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the court.]

Yates v. Hambly, 2 Atk. 237.

H. the elder and *A.* the younger (his second son), by surrender, conveyed the reversion of copyhold estates (after the decease of *H.* the elder) to *B.* in fee, subject to redemption on the payment

Fell v. Brown, 2 Bro. R. Chan. 276. || See Palk

v. Clinton,
12 Ves. 59.
Schoole
v. Sall,
1 Scho. & Lef.
177.]]

ment of 30*l.* and interest, and *B.* was admitted tenant to the land. The estate was afterwards charged with a farther sum lent to *H.* the elder and *H.* the younger by *B.* Then *H.* the younger, who survived his father, devised the estate to *S. H.*, subject to the mortgage, and died. Afterwards *S. H.* surrendered the same estate, subject to the first mortgages, to *F.* in fee, to secure the repayment of a sum borrowed of *F.* by himself. And by a deed bearing even date with the last-mentioned surrender, the uses thereof were declared to be in trust to sell the same, and in the first place to pay himself the money by him advanced, with interest, and to pay the surplus to *S. H.*, his heirs, executors, or administrators. *F.* was admitted tenant to the lord. Then *B.*, the first mortgagee, entered into possession of the said copyhold estates. *S. H.* died, leaving *R. H.* of *Baltimore*, in the province of *Maryland*, his heir at law. *F.* filed a bill against *B.* and *R. H.*, charging the latter to be abroad in *America*, and praying an account of what was due to *B.* for principal and interest, and that *B.* might account for the rents and profits, and pay to *F.* what should appear to be due to him after paying such principal and interest; and in case that should not be sufficient to satisfy *F.*'s demand, that the estate might be sold, and proper parties join for that purpose, and *F.* be paid out of the purchase-money, and the residue paid and applied as the court should direct. *B.* by his answer acknowledged the possession, and said, that he was ready to account to such person as should appear to be entitled to the equity of redemption; but that he did not know who was so entitled, not knowing what was become of *T. H.*, whether he was living or dead, or whether he was ever married, or had left any child or children. One question which arose in the cause was, Whether there were proper parties before the court, the supposed heir at law of *T. H.*, the mortgagor, being in *America*, and his personal representative not being before the court? On the part of *F.* it was insisted that there were sufficient parties; that *B.* had the real pledge in his hands, and although there might be a contract between the heir and the executor, that did not affect him. Between the first and second mortgagees, it was not necessary to make the mortgagor a party. All the decree was redemption of the first mortgage, and a conveyance to the second, not on account of rents and profits, unless the mortgagee was in possession. That neither the mortgagor nor the first mortgagee were hurt by its being unnecessary to make the mortgagor a party to the bill between them; for the first mortgagee was liable to no farther account to the original mortgagor, the second mortgagee being bound only to make him just allowances, and if he should do otherwise, being liable to all charges which might have been made against the first mortgagor in his account with the original mortgagee. *Sed per curiam*,—It is impossible that a second mortgagee should come into this court against the first mortgagee, without making the mortgagor or his heir a party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or stand foreclosed. It therefore

therefore must be necessary to have the real representative before the court, though it is not necessary to have his personal representative.

¶So also, if a man mortgage an entire estate, which on the death of the mortgagor descends on two different persons, and one of those persons mortgage his share to second mortgagee, such second mortgagee, in order to redeem, must make not only the first mortgagee and his own immediate mortgagor parties, but also the owner of the other share not included in his mortgage. Lord *Oxford* made a mortgage of estates in *Dorset, Devon, and Cornwall* to Sir *E. Hughes*, which vested in the executors of Lady *H.* On the death of the mortgagor the *Dorsetshire* estate became the property of *Horatio Walpole*, and the estates in *Devon and Cornwall* of Lord *Clinton*. Lord *Clinton* conveyed these estates in *Devon and Cornwall* to trustees upon trust, to raise money by sale or mortgage, and the trustees mortgaged them to Sir *L. Palk* for 25,000*l.* Sir *L. P.* having filed a bill praying an account of what was due on the first mortgage to Lady *H.*'s executors, it was objected that Mr. *Walpole* ought to have been made a party; and the Master of the Rolls decided accordingly, on the ground that the second mortgagee being obliged to redeem the first mortgage *in toto*, not only as it affected the estate of Lord *C.*, but also as it affected the estate of Mr. *W.*, he had a right to call on him to attend the account.

Palk v. Clinton,
12 Ves. 48.
Woodcock v. Mayne,
cited *ibid.*

Redemption will be decreed according to the priorities of the claimants; that is, if there are several mortgagees, the court will decree in detail that the second shall redeem the first, the third the second, and so on.¶

Arcedekne v. Bowes,
5 Mer. 216. n.

Where a mortgagee assigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occasion to bring the original mortgagee before the court, for the assignee as standing in his place will be decreed to convey.

Hill v. Adams,
2 Atk. 59.

Where the mortgage is of money in the stocks, or the like, no decree of foreclosure is necessary; therefore, where a bill was brought in 1729 by the plaintiff, to redeem the sum of 2500*l.* East India stock, transferred to the defendant in 1708, for the securing the sum of 2000*l.* and interest; the defendant having executed a defeasance, whereby he obliged himself to transfer the stock on payment of the 2000*l.* and interest, on the 2d of *July* following the mortgage of it; the Lord Chancellor said, this was a very plain case for the defendant. In a mortgage of land a bill of foreclosure ought to be brought, but on a mortgage of stock it was not necessary, and therefore a strong reason for the mortgagor's departing from the right. And the stock having increased in value, which is a mere accident, will be no inducement to a court of equity to decree a redemption.

Lockwood v. Ewer,
2 Atk. 305.
But it is observable on the last-mentioned case, that the period of time had elapsed between the mortgage and the bill to redeem, after which, it will be shewn here-

after, a court of equity refuses its aid to a mortgagor, unless under special circumstances.
2 Pow. Mortg. 284.

If there be several mortgagees of an entire thing mortgaged, they must all be made parties to the bill of foreclosure. This was

Lowe v. Morgan,

Brown's R.
Ch. 568.

was held to be necessary in the case of *Lowe v. Morgan*, where a share of *Covent Garden* theatre having been mortgaged, the mortgagee assigned the mortgage to a trustee, in trust for three persons, who contributed equal proportions of the money. One of the three filed a bill to foreclose the equity of redemption. The cause was opened as a common bill of foreclosure, and the ordinary decree pronounced; but the Registrar finding some difficulty in drawing up the decree, applied to the Lord Chancellor, who said, it was a new case in respect of their being joint-tenants, and that it would be impossible for one to foreclose without making the other two parties. The cause therefore stood over for that purpose.

Palmer
v. Carlisle,
1 Sim. & Stu.
425.

¶ And so where two persons lent 12,000*l.* on mortgage, one 2000*l.* and the other 10,000*l.*, and the party lending the 2000*l.* filed his bill for foreclosure, the Vice-Chancellor held there could be no foreclosure or redemption, unless the parties entitled to the whole money were before the court.

Montgomerie
v. Marquis
of Bath,
3 Ves. jun.
560.; but see
note (1)
1 Bro. Ch. Ca.
by Belt, 568.
Wood v.
Williams,
4 Madd. 186.

But where trustees lent on mortgage the money of several *cestuis que trust*, and one of the *cestuis que trust* alone filed a bill of foreclosure against the mortgagor and the trustees, stating that the trustees refused to assist him, no objection was made on the ground of the other *cestuis que trust* not being made defendants, and the usual decree was made. In all cases, however, the *trustee* himself must be made a party to a bill of foreclosure by the *cestuis que trust* on account of his having the legal estate.¶

Hobart v.
Abbot, 2 P.
Will. 645.

In a bill to foreclose, the case was:—*A.* made a mortgage for a term of five hundred years, for securing three hundred and fifty pounds and interest to *B.*, who, so long before as 1705, assigned the term to *C.*, redeemable by himself on the payment of 300*l.* *B.* died; *C.* brought a bill against *A.* to redeem, or be foreclosed; and though but a derivative mortgagee, yet he did not make the representatives of *B.*, the original mortgagee, parties. *Et per cur.* Here is plainly a want of proper parties; *B.* had a right to redeem *C.*; and to prevent another account, as to what is due upon the original mortgage, his representatives ought to be before the court.

Norrish v.
Marshall,
5 Madd. 475.

¶ But where a mortgage was made by *N.* to *C.* to secure 1000*l.*, and *C.* assigned the mortgage to *M.* to secure 700*l.*; but no notice of the assignment was given to *N.*: it was held, on a bill filed by *N.* against *M.* to have the mortgage-deeds delivered up, 1st, That *C.* was not a necessary party, as he had been examined as a witness, and had admitted that *N.* had paid him his mortgage money. 2d, That delivery of goods by *C.* to *N.* was a valid discharge of the mortgage debt, and was a good payment as against *M.* But 3d, An account was directed as to what part of the mortgage money was paid, as *C.*'s evidence, from his conduct, could not be admitted as sufficient proof.¶

Bonham v.
Newcomb,
2 Vent. 365.

Courts of equity will never decree a foreclosure until the period limited for payment of the money be passed, and the estate, in consequence thereof, forfeited to the mortgagee; for it cannot shorten

shorten the time given by express covenant and agreement between the parties, as that would be to alter the nature of the contract, to the injury of the party affected thereby.

1 Vern. 232.
S. C. *supra*.
|| See Stanhope
v. Manners,
2 Eden, R. 197. ||

On a bill for foreclosure, the title of the mortgagee cannot be investigated; but he will be left to pursue legal means to establish it. And, therefore, where a mortgagee sued to have his money, or that the defendant should be barred of his equity of redemption; it happened that, by subsequent orders, possession was directed to be given to the mortgagee, and contempt prosecuted for not delivering it accordingly; upon which, the heir of the mortgagor set forth a title in his examination, that the mortgagee would have debated, but he was not admitted; it being insisted, that the course of the court upon such a bill was, and the court could go no farther than, to take away the equity of redemption, and leave the mortgagee to such title as he had at law, but could not amend it; which the Lord Chancellor agreed to, and discharged the contempt.

Anonymous,
2 Ch. Ca. 244.

A mortgagee may bring an ejectment at law, at the same time that he hath a bill of foreclosure depending; for he will not be prevented from pursuing *all* his remedies for the recovery of his debt.

Booth v.
Booth,
2 Atk. 344.

But special circumstances may arise which will take the case out of the common rule, and induce the court to grant an injunction to stay proceedings upon the ejectment. Thus, where a bill was brought by the plaintiff against the defendant, for an account of the rents and profits of an estate, during the time that he was guardian to the plaintiff's brother, and for an injunction to stay proceedings upon an ejectment for the possession thereof, it being mortgaged to him; the court, because he was proceeding to foreclose the equity of redemption, it being entangled with an account of the personal estate, agreed to grant an injunction, provided the plaintiff consented to give security to redeem.

Ibid.
|| See Powell,
966. a.
note (H)
(6th ed.). ||

Although a mortgagee be, of right, entitled to a decree for foreclosure, after the estate becomes forfeited, if he act fairly, yet, if there be any injustice in the case, the court may refuse such decree. Thus, where a mortgagee, having notice of a voluntary settlement, procured the trustees of the estate to convey to him to protect his incumbrance; the court, on a bill filed by him to foreclose the children claiming under the settlement, refused to do so; saying, that if he might be suffered to protect himself by getting in the legal estate, they would not carry it on by a decree in equity to foreclose.

Saunders v.
Dehew,
2 Vern. 271.

|| Where the bill of foreclosure admitted that the plaintiff could not produce the deeds, alleging that they had been stolen from the mortgagee; the court directed the account, with an enquiry what had become of the deeds, and the Master afterwards reporting that the deeds were not to be found, a reconveyance was directed, with an indemnity and costs against the plaintiff. ||

Stokoe v.
Robson,
3 Ves. & B. 51.
19 Ves. 385.
Smith v.
Bicknell,
ibid. note (b).

A mortgagee of a copyhold estate, who is not in possession, may exhibit his bill against a mortgagor, before admittance, for a decree of foreclosure; and, after he has obtained such a decree,

Sutton v.
Stone,
2 Atk. 101.

may

may bring his ejectment for the possession of the mortgaged premises.

Where a mortgagee is made party to a bill, praying relief || by the mortgagor, it|| is the same thing as praying to redeem, for redemption is the proper relief; and if, upon a reference to a Master to see what is due for principal, interest, and costs, the plaintiff does not redeem the mortgagee, the court will, on his application, dismiss the bill, as against him, which is equivalent to decreeing a foreclosure.

|| And not only the mortgagor and his heirs, but a purchaser of the equity of redemption *pendente lite*, will be bound by it.

And the court will not enlarge the time for payment on a bill for redemption as is done on a bill of foreclosure. In a case where a motion for that purpose was made, the Lord Chancellor said, that the difference in principle between this case and that of a bill to foreclose was obvious, and that he would not begin such a practice.

But if a bill to redeem is dismissed for want of prosecution, and not for want of payment, the mortgagor may file a second bill to redeem.||

If the heir of the mortgagee exhibit a bill to have the mortgagor pay the money, or to be decreed to make farther assurance, and be foreclosed of redemption; it is a good cause of demurrer, that the executor of the mortgagee, who may have title to the mortgage-money, is no party.

And, since it has been determined that, in all mortgages, the money belongs to the executor or administrator, and not to the heir; if it comes out, upon the hearing, that the executor or administrator are not parties, the plaintiff in the cause cannot be permitted to proceed.

The executor of the mortgagor need not be party; for where, on a bill brought by a mortgagee against the mortgagor to foreclose, it was objected, that he ought to have been a party, as it did not appear, but that he might have paid the debt; it was held by the Master of the Rolls and the Registrar, that there was no necessity to make him party; because, the bill being *only* to foreclose the equity, the plaintiff need *only* make *him* a party that *had* the equity, *viz.* the heir (*a*); and the course was so; neither was the mortgagee any ways bound to intermeddle with the personal estate, or to run into an account thereof; and, if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it.

A sale, however, after the death of the mortgagor, the personal representative should be a party, because the personal estate must be first applied. Daniel v. Skipwith, 2 Bro. C. Ca. 155.; and see *per* Sir T. Plumer, in Cholmondeley v. Clinton, 2 Jac. & Walk. 135. and Christopher v. Sparke, 2 Jac. & Walk. 229. (*a*) The heir is not a necessary party if the equity of redemption has passed to a devisee. Powell, 968. note; and see Cholmondeley v. Clinton, 2 Jac. & Walk. 135 ||

But a foreclosure, obtained on a bill exhibited by the heir at law, will be binding, although the executor or administrator be not

Cholmley v.
Countess
Dowager of
Oxford,
2 Atk. 267.
|| Bishop of
Winchester
v. Payne,
11 Ves. 199. ||

Garth v.
Ward,
2 Atk. 175.

Novosielski v.
Wakefield,
17 Ves. 417.

Hansard v.
Hardy,
18 Ves. 460.

Freak v.
Hearsey,
1 Ch. Ca. 51.
|| S. C.
2 Freem. 180.
Nelson, R. 95. ||

Meeker v.
Tanton,
2 Ch. Ca. 29.

Duncomb v.
Hansley,
5 P. Wms.
335. in notes.
|| In Bradshaw
v. Outram,
15 Ves. 234.
the bill was
dismissed as
against the
executrix of
mortgagor,
and, by *consent*,
without costs.
In a bill for

Clarkson v.
Bowyer *et al.*,
2 Vern. 66.

not a party; for if the executor or administrator of the mortgagee should afterwards come against the heir of the mortgagee, to have the benefit of the mortgage, the heir, in case the land be worth more than the money, may pay him the money, and take the benefit of foreclosure to himself.

Where the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party; upon a bill by the executor, against the heir of the mortgagee, and against the mortgagor, the land was decreed to the executor.

Globe et ux. v. Earl of Carlisle, cited in the last case.

But it is observable that, in this case, the heir made no offer to pay the mortgage-money to the executor, which is the basis of the resolution in the former case.

¶ If a mortgagor become bankrupt, he will not be a necessary party to a bill for foreclosure by the mortgagee. Where the mortgagor executed a composition-deed, and was afterwards declared bankrupt, a collusive foreclosure against the assignees only, without the trustees of the deed, was set aside, and mortgagee (a) charged with costs.¶

Adams v. Holbrooke, *Harr. C. P.* 50. and see *Bainbridge v. Pinhorn*, 1 *Buck. Ca.* 135. *Lloyd & Walk.* 197.

v. Lander, 5 *Madd.* 288. (a) *Harvey v. Tebbutt*, 1 *Jac.*

A plea of a decree for foreclosure in the common form, with an averment of nonpayment of the money, &c., *but no final order for foreclosure*, on appeal from Lord King, was held not to be good (b); for, although such plea, and length of time, might be a good defence, yet, as a plea, it could not stand for want of a final order.

Senhouse v. Earl, 2 *Ves.* 450. ¶ (b) The estate does not lose the quality of a pledge until the final order

of foreclosure. *Thompson v. Grant*, 4 *Madd.* 438.¶

On a decree to foreclose at a period certain, the computation of time must be according to calendar months, and not according to lunar ones.

Anonymous, *Barnard.* 324. 2 *Eq. Ca. Abr.* 605. p. 38. *S. C.*

Although where there is a clear tenancy in tail, there is no occasion for the remainder-man's being a party to a bill of foreclosure, yet, if there be an express estate for life, the remainder-man ought to be a party.

Sutton v. Stone, 2 *Atk.* 101.; and see *Gore v.*

Stacpoole, 1 *Dow. P. R.* 31.¶

¶ But where the tenant in tail was abroad, and out of the jurisdiction of the court, a decree of foreclosure was obtained against the parties before the court.¶

Fishwick v. Lowe, 1 *Cox*, 411.

If there be many incumbancers, some of whom are not made parties to a bill to foreclose, the plaintiff in the bill may notwithstanding foreclose such defendants as he has brought before the court.

Draper et al. v. Jennings et al., 2 *Vern.* 518.

But those not parties to the suit will not be bound by such decree.

Sherman v. Cox, 3 *Rep. Ch.* 84. *S. C.* ¶ 2 *Freem.* 14.¶

Nelson's R. 71.

If there be tenant for life, reversion in fee, and he in reversion mortgage his estate in fee, and the mortgagee devise it, the devisee may bring his bill to foreclose against the mortgagor, and need not make the heir of the devisor a party; because he hath

How v. Vignes, 1 *Ch. R.* 33. 1 *Eq. Ca. Abr.* 318. 5.

no

no interest in the land, it being all devised away from him; and therefore the devisee need only foreclose the mortgagor.

Skipp v. Wyatt, 1 Cox, 353. ¶ And if the devisee make the heir a party, he will not be allowed the costs out of the estate.

In giving the mortgagee relief by foreclosure, the court has been liberal in granting extension of the time of payment to the mortgagor, even after a decree of foreclosure signed and enrolled. In a late case the time was enlarged on the application of the mortgagor, under special circumstances, by four several orders. And although the proceedings be under the 7 G. 2. c. 20. § 2. the court has equally jurisdiction to enlarge the time.

Edwards v. Cunliffe, 1 Madd. 287. Wakerell v. Delight, 9 Ves. 56. Even in cases where the decree has been signed and enrolled, and the mortgagee has been in possession many years, the court will, under special circumstances, open the foreclosure, and permit the mortgagor to redeem.

Burgh v. Langton, 15 Vin. 476. 2 Eq. Ca. Ab. 609. 5 Bro. P. C. 213.; vide 1 Ch. Ca. 61, 62. Where the decree of foreclosure has been obtained fraudulently and unfairly by the mortgagee, and without bringing proper parties before the court, the foreclosure will be opened; and in a late case of this kind the mortgagee was ordered to pay the costs occasioned by his resistance of the redemption, on the ground of a decree so improperly obtained. Where sales of the mortgaged estate had taken place under a decree of foreclosure, collusively obtained in 1733, by making only the tenant for life party, without any of the remainder-men; and the Chancellor of *Ireland* had dismissed a bill for redemption, filed by a remainder-man in tail, in 1796, on the ground of the lapse of time, the House of Lords, in 1813, reversed the decree of dismissal, and decided that the remainder-man was entitled to redeem, at least that part of the estates which had been sold to a party cognizant of the fraud.

Harvey v. Tebbutt, 1 Jac. & W. 197. If after foreclosure the mortgagee proceed against the mortgagor on his bond or other collateral security, as he may do at law, a court of equity will open the foreclosure.

Gore v. Stacpoole, 1 Dow. P. R. 18. Whether equity will grant an injunction against the proceedings at law if the mortgagee has sold the estate, and deprived himself of the means of letting the mortgagor redeem, is not a settled point. In *Perry v. Barker* the Lord Chancellor said, if there was any probability that the mortgagee could get the estate back again, he ought to have a limited time for that purpose; then he ought to tender a conveyance, and the mortgagor should have a given time to redeem; but the mortgagee's demand in that case was so inconsiderable that his Lordship decreed a perpetual injunction against proceeding at law.

Dashwood v. Blithway, 1 Eq. Ca. Ab. 517. 15 Vin. Abr. 476. Tooke v. Hartley, 2 Bro. C. C. 126. Equity will not open a decree of foreclosure by reason of the overvalue of the estate, and a parol agreement to permit a redemption; and after twenty years possession the court will not set aside the foreclosure for mere form; nor will a bill of revivor and supplement be a waiver of the decree; nor will the mere fact of the

Perry v. Barker, 3 Ves. 527. 13 Ves. 498. Wishal v. Short, 5 Bro. P. C. 558. Jones v. Kenrick, 5 Bro. P. C. 244. Birch's ca.

the

the mortgagee devising the estate as money, or noticing it for a collateral purpose, as a debt, open the foreclosure. And if there have been considerable alterations made in the estate, accompanied with length of possession, the decree will not be opened. || Gilb. Rep. in Eq. 186. Silberschidt v. Schiott, 3 Ves. & B. 45. Tooke v. Bishop of Ely, 5 Bro. P. C. 181. Lant v. Crisp, *ibid.* 200. *Vide* Coote on Mortg. 516.

||(As to foreclosure against infants, *vide* tit. "INFANCY AND AGE," (K).)||

(F) Mortgagees and their Assignees, how to account, and what Allowances to make: ||And herein of Interest.||

THE mortgagee is answerable in equity, when he comes into the possession of lands, for the profits he has made of the lands, and not for the profits which he might have made, unless there be fraud; for it is the fault and laches of the mortgagor, that he would let the lands lapse into the hands of the mortgagee, by the nonpayment of the money, and when they do, he is only a bailiff for what he actually receives, but is not bound to the trouble and pains of making the best of what is another's.

And therefore a mortgagee shall not be bound by any proof that the land was worth so much, unless it can likewise be proved that he did actually make so much of it, or might have done so had it not been for his wilful default; as, if he turned out a sufficient tenant that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it.

[If the mortgagor make proof that the estate was let at *such* a price, whilst in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shew the contrary, which it is in his power to do, as being let by him.

Where mortgagees or trustees manage the estate themselves, there is no allowance to be made them for their care and pains; but, if they employ a skilful bailiff, they will be allowed such sums as they have paid him; for a man is not bound to be his own bailiff.

And though there be a private agreement between the mortgagee and the mortgagor, for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate, yet the court will not carry it into execution, for equity will not allow him any more than his principal and interest.

||The mortgagee may stipulate with the mortgagor for the appointment of a receiver to be paid by the latter, although the mortgagee himself is clearly not entitled to charge for his personal trouble.

But if the mortgagee *having the legal estate* neglect to make such stipulation, he cannot obtain the appointment of a receiver, by order of the court, but must proceed to eject the mortgagor; and

Chan. Ca. 258. Vern. 476, 45. ||1 Eq. Ca. Ab. 328.||

Vern. 45. ||Hughes v. Williams, 12 Ves. 493.||

Blacklock v. Barnet, Sel. Ca. Ch. 53. ||See Trimleston v. Hamill, 1 Ball & B. 585.||

Bonithon v. Hockmore, 1 Vern. 516. 5 Atk. 518. ||Davis v. Dendy, 5 Madd. 170.||

French v. Baron, 2 Atk. 120.

Chambers v. Goldwin, 9 Ves. 271.

Berney v. Sewell, 1 Jac. & W. 647. Codrington v.

Parker, 16 Ves. 469. Quarrell v. Beckford, 13 Ves. 377. Bryan v. Cormick, 1 Cox, 422. Dalmer v. Dashwood, 2 Cox, 378. Price v. Williams, Cooper, C. C. 31.

and if the first mortgagee be in possession, the court will not in general, on application of a subsequent mortgagee, appoint a receiver; but the second mortgagee must redeem the first. But if the first mortgagee be not in possession, a second mortgagee may have a receiver without prejudice to the rights of the first.

Brooks v. Greathed, 1 Jac. & W. 178. Angell v. Smith, 9 Ves. 335.; as to examination

When a receiver has been appointed by the court, it is a contempt in the first mortgagee to proceed by ejectment without the consent of the court; and upon his application for such purpose, the course has been either to permit him to bring ejectment, or to be examined *pro interesse suo*.

pro interesse suo, and as to receivers, vide Coote on Mortg. 597. and cases there cited.

Berney v. Sewell, 1 Jac. & W. 650.

When a mortgagee is in possession without notice from the second mortgagee, he may pay the surplus over to the mortgagor; and the second mortgagee, if he is so imprudent as not to give that notice, cannot have an account of the by-gone rents, for he could not have such an account against the mortgagor, and therefore not against the first mortgagee.

Parker v. Calcraft, 6 Madd. 11. Archdeacon v. Bowes, 15 Price, 368.

But after notice by subsequent mortgagees, the first mortgagee in possession has no right to pay over the surplus proceeds to the mortgagor. Nor, after a bill filed by a second incumbrancer against the first incumbrancer, can the latter safely pay the surplus rents to a general creditor who has filed a bill for the establishment of his lien.||

Godfrey v. Watson, 5 Atk. 518. || Lomax v. Hide, 2 Vern. 185. Manlove v. Ball, *ibid.* 81. 2 Bro. C. C. 653. Lacon v. Martins, 5 Atk. 4. Lyster v. Dolland,

A mortgagee in possession is not obliged to lay out money *any farther* than to keep the estate in necessary repair; but, if a mortgagee hath expended any sum of money in supporting the right of the mortgagor to the estate, where his title hath been impeached, || or in renewal, fines, necessary repairs, and lasting improvements; or in performing covenants of the mortgagor with third persons; or in copyhold admissions, heriots, or fines; || the mortgagee may certainly add this to the principal of his debt, and it will carry interest.]

1 Ves. jun. 436. Hardy v. Reeves, 4. *id.* 482. Quarrell v. Beckford, 1 Madd. 281. *Ex parte* Sykes, 1 Buck. 549. *Ex parte* Brightwen, 1 Swanst. 5. Swan v. Swan, 8 Price, 518.||

Russell v. Smithers, 1 Anstr. 96.

|| A mortgagee will not be bound to keep up buildings in as good repair as he found them, if the length of time will account for their being dilapidated.

Rowe v. Wood, 2 Jac. & W. 553.; and see Marshall v. Cave, Powell, 957. a. (6th ed.)

And a mortgagee in possession of mines is not bound to spend more in working them than a prudent owner would do.||

3 Chan. Ca. 5. 1 Eq. Ca. Abr. 328.

If a mortgagee in possession assigns over his mortgage without assent of the mortgagor to an insolvent person, the mortgagee is bound to answer the profits both before and after the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge, and it is a breach of trust to assign such pledge to a person insolvent. But *quære*, if the mortgagor hides, so that he cannot be served with a *subpœna* to foreclose,

close, whether the mortgagee may not assign, and not be answerable for the profits after assignment?

If the mortgagee assigns his mortgage, and the mortgagor comes to redeem against the assignee, all monies really paid by the assignee, either as principal or interest, shall be principal to the assignee, and shall bear interest; otherwise it is, if the assignee had not paid the money, and the assignment was only colourable, in order to load the mortgagor with compound interest.

Chan. Ca. 67.
258. Vern.
169. 2 Vern.
135.

If a stranger get an assignment of a mortgage for less than is due, the mortgagor, or his heir, shall not redeem without paying all the money due; but if a man purchases the mortgaged lands without notice of this incumbrance, whether he has not an equity to redeem them for what was really paid by the stranger is made a *quære*?

Vern. 336.

But if there are subsequent incumbrances, or creditors in the case, a man who buys in a prior incumbrance shall, against them, be allowed only what he really paid, though there was in truth a greater sum due.

Vern. 476.

If an infant, by his guardian, endeavours to overthrow the mortgage by a supposed entail, and after a special verdict, and great agitation at law, the mortgagee prevails, and the infant brings his bill to redeem; the mortgagee having sworn he paid and expended above 120*l.* in defending his mortgage at law, although he had but 60*l.* costs allowed him there, shall not be held down to the taxation at law, but shall on the account be allowed all he laid out or expended; and if the mortgagee in this case, fearing that his mortgage would be defeated at law, gets administration, as principal creditor, in the spiritual court, he shall be allowed the costs expended there also.

2 Vern. 526.
Ramsden v.
Langley. || See
cases cited
ante, 736. as to
allowance of
repairs, fines,
and costs of
defending
title.||

The mortgagee obtained judgment in ejectment, and entered on the mortgaged premises, and thereby prevented other creditors that had subsequent incumbrances from entering, and yet permitted the mortgagor to take the profits; and the other incumbrancers coming to redeem him, the court ordered, that the mortgagee should be charged with all the profits he had, or might have, received since his entry.

Coppring v.
Cooke, Vern.
270.

So, where a bankrupt, before he became such, had made a mortgage of his estate, and the assignees of the statute brought an ejectment for recovery of the lands comprised in the mortgage, and the mortgagee refused to enter, but suffered the bankrupt to take the profits, and to fence against the assignees with the mortgage; it was held, that the mortgagee should be charged with the profits from the time of ejectment delivered.

Buckingham
v. Gayer,
Vern. 258.
267. || Penrhyn
v. Hughes,
5 Ves. 106.||

A. mortgaged the manor of *T.* to *B.*, to which an advowson was appendant; *B.* brought a bill to foreclose; the church became void, and he likewise brought a *quære impedit* at law; and on a motion to stay the proceedings on the *quære impedit*, the court held, that though *A.* had no bill, yet being ready, and offering to pay the principal, interest, and costs; if *B.* would not accept his money, interest should cease, and an injunction to stay pro-

Amhurst v.
Dawling,
2 Vern. 401.
|| Ivry v. Cox,
Prec. Cha. 71.
see Gubbins v.
Creed, 2 Scho.
& Lef. 218.

ceedings on the *quare impedit* should be granted; for the mortgagee can make no benefit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt; and the mortgagee therefore, in that case, is but in the nature of a trustee for the mortgagor.

Prec. Ch. 50.
Walker v.
Penrin,
[This cause
was first
brought to a
hearing before
Lord Chan-

cancellor *Nottingham*, on the mortgagee's bill to foreclose, and he being of opinion that the two per cent. should go towards sinking the principal, the then plaintiff dismissed his bill. Afterwards, the mortgagor brought his bill to redeem, and that coming to a hearing before the Lord Chancellor *Jeffries*, he was of opinion, that the eight per cent. being paid, and received as interest, no part of it ought to be applied to sink the principal; and that the statute had no retrospect beyond 1660, but looked forward to contracts and agreements then after to be made, and not to any contracts or agreements before that time, and decreed the account to be taken accordingly. 2 Vern. 78. But, upon a bill of review, *Rawlinson and Hutchins* Lords Commissioners held, that the decree should be reversed, against Lord *Trevor*. 2 Vern. 145. It seems, however, to be now settled, that the statute of 12 Ann. c. 16., which reduces the interest of money to 5l. per cent., has not a retrospect to any debts contracted before, but that they shall carry interest according to the interest allowed, or agreement made at the time when the debt was contracted. 1 Eq. Ca. Abr. 288.]

Vern. 179.
Knight v.
Bampfild.

A. makes a jointure of an equity of redemption, and afterwards becomes a bankrupt, the commissioners assign this equity of redemption, and the assignees state an account. The jointress brings her bill to be relieved, alleging combination between the assignees and the mortgagee, and that they had allowed more money than was due on the mortgage. Lord Keeper, — The assignees stand in the place of the husband, and the account stated by them ought to be as conclusive as if stated by the husband, and the charge is not right in the bill, being too general. However, the plaintiff had leave to amend her bill.

2 Cha. Ca.
123. Brent v.
English.

A. mortgages to *B.*, and *C.* obtains a judgment in debt against *A.*, and then *A.* mortgages to *D.*, and then *B.*, *D.*, and *A.* account together for what was due to *B.*, and *D.* pays the money, and *B.* assigns the mortgage to *D.* *C.* sues for his debt, and to have an account of what was really due to *B.* and *D.* on both securities; *D.* pleads the account thus made up in bar to *C.*; but it was disallowed; because their account, being voluntary, shall never conclude a third person, so that he shall not come into the redemption; for it were unjust, that their accounts should shut him out of his security, where he had no opportunity to litigate or examine the account.

Chan. Ca. 299.
Needler v.
Deeble.

Mortgagor and mortgagee settled an account before a Master, and now a subsequent mortgagee sues for a new account, supposing the former account to be false, and made by consent, but did not insist upon any particulars; and the Lord Chancellor declared, that the account should bind the second mortgagee, if the fraud and collusion were answered.

1 Chan. Ca. 68.
[(a) Unless he

[But the account between the mortgagee and assignee will not conclude the mortgagor (*a*); but it will be referred to the Master
to

to see what was really due, on making the assignment, and what money was *actually* paid thereon.

he cannot dispute it with the assignee, though, it seems, he may with the mortgagee. 9 Ves. 270.||

An account on a bill to redeem or foreclose, taken in a cause in which tenant for life of the equity of redemption is party, and when no other person is entitled, will be binding on any contingent remainder-man, when his title afterwards vests; nor shall he open it, unless fraud or errors are shewn therein; for thereby accounts upon mortgages, to which all who can claim the equity of redemption are parties, would often be infinite. But, if a reasonable objection be made against such account, the court will so far open it. But the court will only give leave to surcharge and falsify the account; which often happens upon settlements, where there is tenant for life with limitations in remainder, upon a bill for an account, when none but tenant for life is in being, a child afterwards coming *in esse* shall, if no fraud, only have liberty to surcharge and falsify.

And where a man made a mortgage, and, after a forfeiture for nonpayment of the mortgage-money, married, and conveyed the equity of redemption to trustees, to the use of himself for life, remainder to his wife for her jointure; and afterwards became a bankrupt; and the commissioners assigned the equity of redemption in trust for the creditors, and the assignees stated an account with the mortgagee. The jointress brought her bill to be relieved against this account, alleging, that it was not fairly stated, but that the assignees, by combination with the mortgagee, had allowed more money than was really due on the mortgage; and the defendant pleaded this stated account: *per* Lord Keeper, the assignees stand in the place of the husband, and the account by them stated ought to be as conclusive as if it had been stated with the husband; and the bill is not right in charging a general fraud in the stating of this account, but the plaintiff ought to have assigned particular errors in the account.

|| If an attorney take a mortgage from his client for his bill of costs, the account being unsettled, a bill for a general account will at any time lie against him; and although it is a rule that an account shall not be opened unless specific errors are pointed out, yet if the bill allege error generally, and the attorney admit the fact, the account will be opened.

And if a solicitor, having taken a mortgage from his client, charges poundage for receiving the rents in his account, without informing the client that legally he has no right to do so, the mortgagor will be allowed to surcharge and falsify, notwithstanding his acquiescence in the charge; for it was the solicitor's duty to inform his client of the rule of the court.||

see Newman v. Payne, 4 Bro. C.C. 350. Cane v. Allen, 2 Dow. R. 289. 9 Price, 79. Lewis v. Morgan, 3 Anst. 769. 5 Price, 42. 4 Dow. R. 29. 4 Dow. R. 417.

Where, upon the assignment of a mortgage, the debt was stated between the assignee, the mortgagee, and some of the coheirs that

acquiesce in the account, after which the mortgagee.

Allen v. Papworth, 1 Ves. 164. || See 3 Ves. 103. 5 Ves. 837.||

Knight v. Bamfield *et al.*, 1 Vern. 179. || Drew v. Power, 1 Scho. & Lef. 192.||

Detillin v. Gale, 7 Ves. 583. Matthews v. Wallwyn, 4 Ves. 118.

Langstaffe v. Fenwick, 10 Ves. 405.; and as to mortgages from clients to their attorneys,

Pitcher v. Rigby, Dalby v. Kelly,

Earl of Macclesfield v.

were

Fitton,
1 Vern. 168.
infra, 427.;
||and see
Chambers
v. Goldwin, 9

were looked upon to have a right to the redemption: it was insisted, that this ought to conclude the plaintiff, who claimed as devisee under the will of the mortgagor, as a stated account: but he being no party thereto, that was over-ruled by the court. Ves. 264.||

Pearson v.
Pulley,
1 Chan. Ca.
102.;
||*sed vide per*
Lord Eldon,
9 Ves. 269.||

An assignee, after several assignments, will not be obliged to account for profits before his own time. Thus where, on a bill to redeem a mortgage made in 1632, it was insisted by the defendant, that he came in as an assignee at the third hand, and therefore that it would be hard to put him to an account *then*; the Lord Keeper said, that as there had been no stint put to the time at which a mortgage was to be redeemed, the defendant should account; but, in regard he came in at an old hand, it should not be taken, but so far only as went in discount of his money, *not* for the surplusage.

Cloberry v.
Symonds,
2 Ch. Rep.
592.;
||*sed vide*
contra Cham-
bers v.
Goldwin,
9 Ves. 268,
269.||

So, where lands were extended in 1625, and held in extent, and then a bill was exhibited to redeem, and the lands not being redeemed, that bill was dismissed in 1641; afterwards, he who had the extent, by virtue of the dismission, sold the premises to the defendant, and the plaintiff having since bought the equity of redemption came to redeem; the court, notwithstanding the dismission, and length of time, ordered an account from the purchase, not from any time before, but till then the profits to go against the interest.

Badham v.
Odell,
4 Brown's
Parl. Ca. 447.

An account taken by a Master upon a decree in a bill of revivor, brought by an infant heir, will bind the heir, unless he can surcharge or falsify. S.C. *infra*.

Gould v.
Tancred,
2 Atk. 534.

Where the yearly rents and profits of an estate in mortgage greatly exceed the interest of the money lent, rests are annually made on making up the account, and the surplus applied to sink the principal. But as this is often attended with great hardships to mortgagees (especially when the sum is large, and the mortgagee forced to enter upon the estate, and then can only satisfy his debt by parcels, and is a bailiff to the mortgagor, without salary, subject to an account), the Master is not obliged, on every small excess of interest, to apply it to sink the principal; nor has the court ever laid it down as an invariable rule, that the Master must always, in taking such account, make annual rests.

Webber
v. Hunt,
1 Madd. 13.;
and cases
there cited.
Shepherd
v. Elliott,
4 Madd. 254.

||The Master must not take annual rests unless specifically directed by the court; and it appears not to be the general practice to direct rests unless under special circumstances, as where no interest was in arrear when the mortgagee entered into possession; and rests are never directed for part of the time, but must be for the whole or none.

Davis v. May, Cooper, C. C. 240., and cases there cited; and see Raphael v. Boehm, 11 Ves. 92. Stokoe v. Robson, 19 Ves. 585.

Quarrell v.
Beckford,
1 Madd. 269.

If the mortgagee was paid in full at the time of filing the bill, he will be charged with interest on the balance in his hands.||

Balstrode v.

It is the constant practice of the Court of Chancery, in decrees

crees against a mortgagee upon a bill for redemption, or against an executor to account, to direct it with future words, to wit, to account for what they have received, or might have, if it had not been for their own default; and yet if the person decreed to account receive any thing subsequent to the decree, it is enquirable before the Master, and the defendants in such case must bring such sums so received to account.

¶ In directing a second account on the same mortgage, the court will order it to be taken from the foot of the preceding account, or from the date of the report, as the case may happen.

Bradley,
3 Atk. 582.

Proctor v.
Cooper,
2 Vern. 377.
Badham v.
Odell, 4 Bro. P. C. 584. (8vo. edit.)

A mortgagee who has been appointed an executor to the mortgagor renouncing the executorship, and then settling his accounts with the other executors, will be subject at any time to have those accounts opened by the parties entitled to the equity of redemption.

See Lord Eldon's remarks,
9 Ves. 274.

In a case where the title-deeds had been stolen from a mortgagee, the account was directed with an enquiry what had become of them.

Stokoe v.
Robson, 3 Ves.
& B. 51. S. C.
19 Ves. 585.;

and see *Shelmerdine v. Harrop*, 6 Madd. 39.

A mortgagee may take advantage of a recital in the deed of assignment to shew what the mortgagee and assignee considered due, which will be binding on the parties in the deed, according to Lord *Redesdale*.||

Carew v.
Johnstone,
2 Scho. &
Lef. 295.; and
see *Druce v.*

Dennison, 6 Ves. 885.

Thomas Odell, an infant, to whom the equity of redemption of a mortgage for years descended on the death of his father, (who had exhibited his bill in the court of Exchequer in *Ireland*, against the mortgagee and his assignee, to redeem the premises, and for an account of the money due on the mortgage,) filed his bill of revivor; the cause was heard, and the court decreed, that it should be referred to the Remembrancer to state and settle an account; who made his report, that 1883*l.* 18*s.* was due for principal and interest, which, there being no objections made, or exceptions taken thereto, was absolutely confirmed. And the cause coming on for farther hearing, it was decreed, that upon the mortgagor's paying the sum of 1883*l.* 18*s.* so reported due, with interest for the same, from the time of the report being confirmed absolute, the premises should be re-conveyed, and all bonds and securities delivered up. Afterwards, *Odell* neglecting to pay the money reported due, or any interest for the same, the mortgagee, who had likewise had a suit depending, filed an amendment and supplemental bill, in order to have the benefit of the decree by a sale or absolute foreclosure; and therein, in regard the account of what was due on the said mortgage had been stated in the former cause, prayed to have the benefit thereof, and that the account should be taken, in his present suit, on the foot of the report or decree made in the former suit. To this bill *Odell* put in his answer, and thereby, amongst other things, admitted the former report, decree, and proceedings; but insisted

Badham v.
Odell an infant, and
Fitzmaurice
his guardian,
4 Brown's
Parl. Ca. 447.

insisted that, apprehending he was much aggrieved by those proceedings, he chose to have his bill, upon which the said decrees were made, dismissed, rather than submit thereto. Afterwards, the cause came on to be heard, when the court declared, they were of opinion that the defendant, the minor, was not to be concluded by the account taken in the said former cause; but that the plaintiff was entitled to an account, as between mortgagor and mortgagee; and therefore decreed, that it should be referred to the Chief Remembrancer, or his deputy, to audit, and state an account between the plaintiff and defendant on the foot of the mortgages and securities in the pleadings mentioned, in which account both parties were to have all just allowances. From this decree the mortgagee appealed, insisting, that the infant ought to be concluded by the account taken in the former cause, on a bill originally brought by his father, revived, and carried on by himself, confirmed by subsequent orders of the court, and signed and enrolled; and that he ought not to be permitted to waive or vary the same, especially when neither fraud nor error in the account were even suggested. And so it was adjudged, as to that point, and the decree reversed; and it was farther ordered, that the account taken upon the former decree should stand, with liberty for the infant to surcharge, or falsify the same; and that, in case of any surcharge, or falsification, the Remembrancer should deduct so much as ought to be deducted on account thereof: and that the Remembrancer should carry on the account of the *subsequent interest, from the time of the confirmation of the former report*, for the sum thereby reported due, after such deductions made thereout as aforesaid.]

Abr. Eq. 287.
Earl of Ches-
terfield v. Lady
Cromwell.
[On a bill that
an infant might
redeem a
mortgage, or
be foreclosed;
it was decreed
upon the
hearing, to an
account, and
that the infant
should pay
what was re-
ported due,
unless he
shewed cause
to the contrary
six months after
he came of age.
A report was made,
and confirmed, of
2600*l.* due; and upon
a subsequent order
being made to compute
interest, the Lord
Keeper doubted
whether interest
ought to be allowed
for the interest.
Bennett v. Edwards,
2 Vern. 392.]

J. S. mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate; and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herself, who was then near of age, signed it; and the account being admitted to be fair, it was held by my Lord Chancellor, that though regularly interest shall not carry interest, yet that in some cases, and upon some circumstances, it would be injustice if interest should not be made principal; and the rather in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence.

Brown v.
Barkham,
1 P. Wms. 652.

[In general, interest shall not carry interest upon a mortgagor's signing an account, whereby he admits so much due for interest; because that of itself does not shew any agreement, or intent to alter the interest or nature of that part of the debt, or to turn it into

into principal; nor does it appear to have ever been so determined; for it seems, that, to make interest on a mortgage principal, it is requisite there should be a *writing* signed by the parties, *the estate in the land being to be charged therewith.*

||As equity considers the interest converted into principal in the light of a *further advance*, it follows that the mortgagee cannot convert interest into principal against a subsequent incumbrancer, of whose charge he had notice at the time of the agreement respecting interest.

Digby v. Craggs, Ambl. 612. 2 Eden, 200.

In a late case, one *Bassett* had executed a mortgage to *Brooman* for 750*l.*, and interest half-yearly. He subsequently executed a second mortgage to the same mortgagee for 1200*l.*, which was composed of the principal and interest on the first mortgage, and of interest on that interest. The mortgage was assigned to *Sackett*, who filed his bill of foreclosure against *Bassett* and *Brooman*. On the usual reference to the Master he reported his opinion that nothing was due on the second mortgage, on the ground of its being usurious; and that nothing was due on the first mortgage, it having been satisfied by the second. For the assignee of the mortgage it was contended that the second mortgage was valid, because the interest having become due was a *debt* recoverable at law; but that even if it were usurious, yet the first mortgage was good. The Vice-Chancellor directed an issue on the covenant to try whether the second mortgage were usurious or not.||

Sackett v. Bassett, 4 Madd. 58.

Lord Keeper *North* was of opinion, in the case of *Howard v. Harris*, that if there were a covenant in the mortgage-deed for payment of the interest, upon which an action of debt would lie, the court would allow interest on interest, though no account was taken before a Master. In that case, a mortgage for 1000*l.* had been made upon a reversion ten years, and in the deed there were covenants for payment of the principal and 60*l.* per annum interest, and 7*l.* per annum rent was *only* reserved; and it was urged, that the mortgagee, against whom the bill was exhibited to redeem, ought, in this case, to have interest upon interest, otherwise he would be a great loser. To which it was answered, that the bill had been filed six years, and that the mortgagee had, by answer, opposed the redemption, and therefore, from that time, he had no pretence for an allowance of interest for his damages; and that it was never known in the court that interest upon interest was at any time allowed in such case. But the Lord Keeper was clearly of opinion, that as to so much interest as was reserved in the body of the deed, that should be reckoned principal; for it being ascertained by the deed, an action of debt would lie for it, and therefore it was reasonable that there should be damages given for the nonpayment of that money. As to what had been urged, that this had never been practised, and that there was not any such precedent in the court, and that if this were to be established for a rule, every scrivener would reserve all his interest, half-yearly, from time to time, as long as the money should be continued out upon the security, which would be to change the law and practice of the court, and make all

Howard v. Harris, 2 Ch. Ca. 147—150. S. C. 1 Vern. 194. 1 Vent. 364. ||This case is not law; it was overruled in effect in *Proctor v. Cowper*, Prec. Cha. 116. 2 Vern. 377. and has been since considered of no authority; and see *Coote on Mort.* 441. 4 Madd. 64. note.||

mortgagors pay interest upon interest; the Lord Keeper said, that he was clear in the distinction between debt and damages, and he saw no inconvenience that could ensue; it would serve only to quicken men to pay their just debts. And it was decreed accordingly, that after a deduction of the yearly rents of the mortgaged premises out of the 60*l.* a year, payable for the interest, the defendant should be allowed interest for the residue of the said 60*l.* a year, *for which the mortgagee might have sued at law, and recovered damages.*]

2 Vern. 135.
Gladman v.
Henchman.

If *A.* mortgages for 450*l.* payable at the end of five years, with interest at 5*l.* per cent. in the mean time, and about two months before the end of the five years the mortgagee assigns over the mortgage for 560*l.*, being the principal and interest then due, the 560*l.* shall carry interest, though the five years were not elapsed, the mortgage being forfeited by the nonpayment of interest.

Earl of Mac-
clesfield v.
Fitton,
1 Vern. 168.

[A bill was to have the redemption of a mortgage of the manors of *B.* and *S.*, in the county of *C.*, which mortgage had been assigned to *F.*; one point was, Whether, there being great arrears due at the time of the assignment, which were paid by *F.*, the money paid for interest, *then* in arrear, should be reckoned principal as to him, and carry interest with it? And it was insisted for the mortgagor, that interest was never made principal in such case, unless the mortgagor had joined in the assignment; and the case of *Porter* and *Hubbart* was cited, where, in a like case, it was decreed that interest should be reckoned principal; but the decree was reversed in the House of Lords, because the executor of the mortgagor was no party. But the Lord Keeper said, *that* precedent could not weigh much with him; he was of counsel therein, and it was hard in all its circumstances. For although he thought it reasonable that the interest paid upon the assignment should be reckoned principal, yet he would not now make a new precedent. However, his Lordship directed the defendant's counsel to search for precedents, and said, that if they could find any one he would follow it in this case; but no such precedent could be found.

Porter v.
Hubbart,
2 Ch. R. 86.
||S.C. 5 *Id.* 78.
Nels. 150.||

Ashenhurst
v. James,
3 Atk. 271.

But, where creditors procure a decree for sale of an estate before a Master, and one (by consent of all parties entitled to the estate, being confirmed the best bidder by authority of the court, all the incumbrancers agreeing he shall be purchaser,) takes an assignment of all incumbrances; in this case, he will be a creditor of the mortgagor for the whole sum, as well what he paid for interest due, as for principal, together with interest upon the interest, their consent being the same thing as if they had been made parties to the assignment.

Proctor v.
Cooper,
Proc. Ch.
116.
Trin. 1700.

But, where *G.*, in 1641, made a mortgage in fee of lands, worth about 30*l.* per annum, to *C.*, to secure 300*l.*; in 1652 the mortgagee took possession, and in 1660 devised the lands to *A.*; in 1680 the devisee brought a bill to foreclose: the wife of the mortgagor had recovered a third part, as dower, against the mortgagee, so that the profits did not answer the interest of the money, which was then 8*l.* per cent., and there had been infancies

on the plaintiff's part for several years: the Master of the Rolls decreed the plaintiff to redeem, and pay 8*l.* per cent. *only*, that being then legal interest; and said, that though the profits were not sufficient to answer the interest, yet the arrears could not carry interest, although the costs and charges must.

A Master's report, computing interest, makes that interest principal, and to carry interest; for a report is as the judgment of the court, and appoints a day for the payment, carrying on interest to that day; and the party's disobedience to the court, in not complying with the time of payment, ought to subject him to interest.

Bacon v. Clerk,
1 P. Wms.
478.
Prec. Ch. 500.
S. C. Eq. Ca.
Abr. 530. 9.
||In case of a

mortgage, interest is computed on the whole sum of principal and interest reported due; but in case of bonds and legacies, only on the principal. *Turner v. Turner*, 1 Jac. & Walk. 47.; and see 1 Bro. Ch. Ca. 574.||

But the report must be confirmed; for where *A.*, the defendant, insisted that 800*l.* was owing to him, and, upon the Master's report, only 180*l.* appeared due; the court ordered interest for that sum from the time of confirming the report absolute, *and not before*; because, until then, it was not any liquidated sum.

1 P. Wms.
453. 480.
Kelly v.
Lord Bellew,
1 Brown's
Parl. Ca. 202.

Ibid. 566. Mosely, 27. Attorney General v. Islington Overseers *et al.*, 1 P. Wms. 576, 577.
2 Eq. Ca. Abr. 530.

Where creditors are decreed to be paid according to their priority, if the estate is deficient, the principal only shall bear interest after the confirmation of the report.

Mosely, 247.

And although the report *be* confirmed, yet, if the suit be for a sale, and not to foreclose, interest shall not carry interest, if there be other mortgagees, and bond creditors, parties thereto. Thus, the plaintiff, a mortgagee, brought a bill, in conjunction with several bond creditors, against the heir at law of the mortgagor, for a sale of the mortgaged premises, and had a decree accordingly, with a direction to pay the mortgagee his principal and interest in the first place. The Master made a report of a stated sum due, which was confirmed; the mortgagee then moved, that the Master might compute subsequent interest and costs upon the sum reported due. There was not near enough arising from the sale to pay the second mortgagee and the bond creditors. The rest of the creditors and the mortgagor opposed this motion, and endeavoured to shew a difference between the present bill and a bill of foreclosure, insisting that, in the latter, the court directs the Master to allow subsequent interest upon the sum reported due, because it is a compensation to the mortgagee for being kept out of his money, by the court's allowing time to the mortgagor to redeem; but that here a sale was directed in the first instance, and the interest of the other creditors was concerned; therefore, it would be hard to give interest upon interest in favour of one creditor, to the prejudice of the rest. And the Lord Chancellor allowed the distinction, saying, that it would be rather too much to give such an advantage to the mortgagee over the rest of the creditors, especially as the mortgage carried 5*l.* per cent., and proposed to the counsel, that, from the time of the Master's report being confirmed, it should carry only 4*l.* per cent., in which the plaintiff acquiesced.

Harris v.
Harris,
3 Atk. 722.

Where

Neal v. Attorney General, Mosely, 246, 247.
 ||See Bickham v. Cross, 2 Ves. 471.||

Where the court enlarges the time for a mortgagor, or a subsequent mortgagee, that is a favour, for they would otherwise be foreclosed, and it is but just and reasonable they should pay for it, and that the first mortgagee should be no loser thereby; therefore, if on a bill to foreclose, principal, interest, and costs are lumped into one sum by a Master; if the mortgagor, or a puisne mortgagee, pray longer time to redeem, they always pay interest for the whole sum.]

Chan. Ca. 29.
 2 Chan. Ca. 206.

||WHAT TENDER SHALL HAVE THE EFFECT OF STOPPING INTEREST.||—If the mortgagor tenders the money, and the mortgagee refuses, he loses the interest from the time of the tender; because it is but a pledge for the money, and if the money be tendered, he ought not to keep the pledge; and no man ought to pay for the forbearance when he hath the money ready.

Abr. Eq. 318, 319.
 Sir John Austen v. Executors of Sir William Dodwell.
 ||Vide Meade v. Earl of Brandon, 2 Dow. 268.||

The plaintiff had made a mortgage in fee of his estate, which by several mesne assignments was come to Sir *William Dodwell*, and there being likewise two several terms for years standing out, they were assigned to trustees, in trust for Sir *William Dodwell* to protect the inheritance, and subject to the same equity of redemption: the plaintiff and Sir *William* settled an account of what was due; and there appearing to be due thereon 4400*l*. principal money, the interest was then paid off, and at the same time Sir *William Dodwell* gave a note, whereby he promised, that on payment of the sum of 4479*l*., or thereabouts, on the 23d *October* then next, being the interest computed to that time, he would reconvey the inheritance to the plaintiff and his heirs, and would procure his trustees to assign the two terms for years, as the plaintiff should direct. In *August* following Sir *William Dodwell* died, and the defendants were his executors; and he likewise left the defendant *Mary*, his only child and heir at law, an infant of about eight years of age; the plaintiff provided the money, and on the 23d of *October* tendered a bank-bill of 4500*l*. to one of the executors (there being four in all), for him to take thereout what was then due for principal and interest; but the executors having none of them proved the will, he refused to accept the tender; upon which the plaintiff asked him, if he objected to the legality of the tender, being in a bank-bill and not in money, and that if he did, he would immediately turn it into money; to which the other answered, he had no objection to the tender, but not having proved the will, he could not accept of the money. Afterwards the plaintiff made the like tender to another of the executors, who likewise refused to accept of it, not having proved the will; but he objected to the legality of the tender, not being in money. Afterwards all the four executors proved the will; and the bill was brought to redeem, on payment of 4400*l*. and interest, to the 23d *October*, being the time mentioned in the note, and that the plaintiff might not be obliged to pay interest beyond that time, as the executors insisted he ought. And it was held by my Lord Chancellor, that this tender in a bank-note was not, strictly speaking, a legal tender (a); but since it was proved the plaintiff offered to turn it into

(a) Although it hath never yet been determined, that bank-notes are a legal tender, yet the Court of King's Bench have

into money, that made it a good tender. 2dly, It was clearly agreed, that any or either of the executors, before probate, might have received, and given a good discharge for the money, especially when, as appeared in this case, they afterwards proved the will, and so were executors *ab initio*. 3dly, That though they were executors only in trust for the daughter, who was an infant, yet none of them could be in a better case than Sir *William Dodwell* himself would have been, if he had been living; and as such tender, under these circumstances, would have bound him, so it will his executors and devisee; and therefore decreed a redemption on payment of the 4400*l.* and interest to the 23d *October*, the time mentioned in the note, and no longer, and no costs on either side: and the infant heir at law, on payment of the money to the executors, was to convey the inheritance descended to her, according to the act 7 Ann. c. 19. for obliging infant trustees and mortgagees to assign and convey.

[Although, according to the above case, a mortgagee, refusing to receive his money on tender, after forfeiture, will lose his interest from the time of the tender, yet notice of paying off the mortgage must have been given to the mortgagee at least *six calendar months* before, and the money must have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the *very* day on which the notice expired, and, in consequence thereof, the mortgagee refused the tender, the payment of the interest was held by Lord *Hardwicke* not to be *thereby* suspended; for that by the omission of the mortgagor, the mortgagee was become entitled to a farther notice of *six calendar months*, at the expiration of which a strict tender must be made.

But, it seems, the plaintiff ought to make oath that the money was always ready, and no profit was made of it; which may be controverted by the mortgagee, who may prove the contrary; namely, that the mortgagor was not ready to pay it, in which case the interest must run on.

A tender must be made by a person actually interested; and, accordingly, it was said by *Croke* to have been adjudged, Trin. 27 Eliz., that where one, who was not guardian, nor was to have any interest in the land, tendered money upon a mortgage for an infant, it was adjudged a void tender.

241. || — The above case in *Croke* is reported more at large in *Owen*, by the name of *Watkins* and *Astwick*, and is thus stated: — A man made a feoffment on condition, that if he, his heirs or executors, did pay 100*l.* before such a day, that he might re-enter; the feoffor died, his heir within age; the mother, without any notice to the son, requested *I. S.* that he would pay the money for her son. All this was found by special verdict, but it was not found of what age the son was. *Clinch* said, that if the jury had found that the son was of the age of seventeen years, the payment had been good. But by *Wray*, if a bond be upon condition, that the obligor or his heirs shall pay 100*l.*, and the obligor die, his heir within age, I conceive payment by the guardian, or by some other friend, is good. And afterwards, all the justices agreed, that if the infant were within the age of fourteen years, the tender of the money by his mother had been good, but otherwise if he had been more than fourteen years of age; and because no age was proved, but that he was within age, it should not be intended that he was within the age of fourteen years; and therefore, they advised the party to begin *de novo*, and that it might be found, that the infant was within the age of fourteen years. *Owen*, 137.

holden, that if such notes are presented in payment, and no objection made to the receipt on that account, they are a *good tender*. *Wright v. Reed*, 3 Term Rep. 554. || *Vide Biddulph v. St. John*, 2 Scho. & Lef. 534. *Grigby v. Oakes*, 2 Bos. & Pull. 526. ||

Hix v. Ling, before Lord *Hardwicke*, Pow. Mortg. 933. (6th ed.) || *S. C.* 5 Supp. Vin. Abr. 261. ||

Sutton v. Rodd, 2 Ch. Ca. 206. *Gyles v. Hall*, 2 P. Wms. 378.

Watkins v. Ashwicke, Cro. Eliz. 152. || and see per Lord *Eldon*, 5 Swanst. 237.

Co.Lit. 210. b.
2 Eq. Ca.
Abr. 603. 34.

Co.Lit. 211. b.
212.

Gyles v. Hall,
2 P.Wms. 378.
||See Lansdown
v. Lansdown,
2 Bligh, R.60.||

The money being a sum in gross, and collateral to the title of the land, the mortgagor must tender it to the *person* of the mortgagee, and it is not sufficient for him to tender it *upon the land*.

But, if a time and place for payment of the money be appointed, in that case he need not seek for the mortgagee, or be in any other place but in that comprised in the indenture, or *there* longer than the time specified therein.

And so it is, although a place be not appointed in the proviso, if the mortgagor give notice *where* he will pay it off. Thus, where the mortgagor gave personal notice, in writing, to the defendant the mortgagee, that he would tender the money and interest between the hours of ten and twelve in the morning, at *Lincoln's Inn Hall*, at a day and hour appointed therein, which accordingly was done; it was objected, that *Lincoln's Inn Hall* was not named in the proviso in the mortgage-deed as the place for payment, and therefore that the tender must be to the person; but it was held, that the money being lent in town, it would be very hard, after personal notice being given for payment thereof, and no objection made by the mortgagee to the place at the time of notice, to make the mortgagor travel with this sum of money to *Oxford*, where the mortgagee lived.

Manning v.
Burgess,
1 Ch. Ca. 29.

In some cases, a tender at the house of the mortgagee will be sufficient. Thus, where there was a mortgage, and the mortgagor afterwards meeting the mortgagee, said to him, I have monies now; I will come and redeem the mortgage: to which the mortgagee replied, he would hold the mortgaged premises as long as he could, and then when he could hold them no longer, let the devil take them if he would. Afterwards the mortgagor went to the mortgagee's house with money, more than sufficient to redeem, and tendered it there, but it did not appear that the mortgagee was within, or that the tender was made to him; the court decreed a redemption, and that the defendant should have no interest from the time of the tender, because of his wilfulness. And a like determination was made in the case of *Peckham* and *Legay*. (a)

||(a) Cited
1 Ch. Ca. 29.||

But, if there be a deed of assignment presented to be executed, at the time when the tender is made, in which there are covenants, the mortgagee is entitled to lay them before his attorney, and shall have reasonable time allowed him so to do before the interest shall stop. Thus, a bill was brought, in *May* 1742, to redeem a mortgage, in which the plaintiff insisted upon a redemption, on paying the principal money only, for that the interest ought to determine in *February* 1741, because he had given six months notice to pay it off, and had, on that day, tendered the principal and interest, with a deed of assignment, but the defendant absolutely refused to take the money: the defendant swore, that he offered to take the money, provided he might have time to consider of it, and to advise upon the deed of assignment, there being covenants therein on his part, upon which, as he was not of the profession of the law, it was reasonable he should consult his attorney, whether they were such as he might safely execute. And the Lord Chancellor said, that the plaintiff, not having sent a draught

Wiltshire v.
Smith, 3 Atk.
90. ||S. C.
9 Mod. 441.||

a draught of the assignment to the defendant any time before the money was tendered, as he ought to have done, he was in the wrong; for where there were covenants on the part of the mortgagee, it was very reasonable that he should have some time to look them over; the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have had an opportunity to advise upon it, and should have appointed a time to pay the money, after the defendant had had sufficient time to consider it. And his Lordship decreed the mortgage-money, with interest, to be paid within six months, otherwise the plaintiff's bill to stand dismissed.

So, if there be a controversy, to whom the equity of redemption belongs, no assignment can be made until that point is settled; therefore the interest of the mortgage will not cease, although the money be tendered to the mortgagee, and he refuse it.

Lord *Milton*, being possessed, under a conveyance from his father, of divers mortgaged premises, and all the securities for the same, and entitled to all the money due thereon, filed his bill in the court of Exchequer in *Ireland*, in *June 1764*, against *Moore Edgeworth* and *Damer Edgeworth*, infants, heirs to the mortgagor; praying the benefit of the proceedings in a former cause, and for an account; and that the money which should appear due thereon might be paid the plaintiff by a short day, or that the defendants might be ordered to pay, and the mortgaged premises sold, for payment of what should appear due. The defendants, by their answer to this bill, admitted most of the matters therein stated; but insisted upon the benefit of an agreement, which they alleged had been made between the plaintiff's father, *John Damer*, and the father of the defendants, for reducing the interest of the said mortgages, which, by the deed, was originally at 8 per cent. to 6 per cent. Issue being joined in the cause, several witnesses were examined; and the same came on to be heard in *November 1771*; when (upon reading an answer put in by the said *John Damer*, in 1758, to a bill filed against him by the defendant's father in 1757, whereby the former admitted, that, pending a former suit, the said defendant's father had told the said *John Damer*, "That the debts affecting the estates mortgaged were so great, that if *John Damer* did not make an abatement in the interest of the money due to him, he would have little benefit in case he succeeded in the said suit;" and that *Damer* then said, "that if that should be the case, he would leave any reasonable abatement to his friend *Ambrose Harding*." Whereby it appeared, that such conversation had passed between them; and that the said *Ambrose Harding* understood that *Damer* had agreed to accept of 6l. per cent. interest upon the money so due to him on the said securities; and also, upon reading other evidence, the court made an order, directing an issue to be tried at the next assizes, "Whether there was any and what agreement between *John Damer*, esq. deceased, and *Packington Edgeworth*, deceased, at any and at what time, for any and what abatement of interest, on the principal sums due to the said *John Damer*?" From this order Lord *Milton* appealed to the House of Lords, and

Sharpnel v. Blake, 2 Eq. Ca. 603. 34.

Lord Milton v. Moore Edgeworth and Damer Edgeworth, infants, 6 Brown's Ca. Parl. 580.

the principal objection urged by him against directing such issue was, that considering the state of the evidence before the court, it was unjust to direct an issue; because the answer of Mr. *Damer*, which was read by the defendants at the hearing, denied any agreement between him and *Packington Edgeworth*, to reduce the rate of interest; and this denial, being set in opposition to any conclusion drawn from *Harding's* evidence, took away all ground for the court's interposing: whereas, by directing an issue, upon the trial of which Mr. *Damer's* answer could not be read for the appellant, he would be deprived of that evidence which the defendants had made evidence at the hearing of the cause. But it was adjudged that the order should be affirmed, with this addition, *viz.* that the plaintiff should be at liberty at such trial to read the answer of *Damer*.

Edwards v.
Countess of
Warwick,
2 P.Wms. 171.

Interest due upon a mortgage of money which is in settlement will not be considered as in the nature of rent, and, consequently, go with the mortgage; but if the tenant, under the settlement, die in the broken part of the quarter or half year, the interest will be apportioned; and what is due from the last day of payment, to the day of the death of the tenant for life, will be paid to his executor, and the residue to him in remainder.

Wilson v.
Harman,
2 Ves. 672.
||See Wade
v. Wilson, 1 East, 199.||

The reason is, that interest increases on a mortgage from day to day; and the mortgagor, whenever he pays the principal and interest, must pay the interest up to the day of payment.

Wilson v.
Harman,
2 Ves. 672.

In this, a mortgage likewise differs from stock, for dividends upon stock are by the legislature made payable only half-yearly, and are in nature of rents, and, consequently, not liable to apportionment.

Pettat v. Ellis,
9 Ves. 563.

||A question has arisen, whether a devisee of an equity of redemption, in suing to redeem, could be allowed to set off against the principal money and arrears of interest due at the death of the mortgagor, a sum of money due for arrears of interest on a legacy given by the mortgagee to the mortgagor, and which had not been received by the mortgagor; and it was decided that he could not, but must pay the whole principal money and interest. The Master of the Rolls allowed, that if the parties had settled accounts the day before the mortgagor's death, the accounts must have been taken in the way the devisee intended, but it did not follow that the account after *King's* death was to be so taken. In our law, the debt still subsisted; and it was only by a process in our courts that the adjustment took place, though by the civil law it operated *ipso jure*. Until that adjustment, the debts might be separately assigned, for they were not extinguished.||

Adlington v.
Cann, 3 Atk.
154.

On the statute 12 Ann. stat. 2. c. 16. § 1., which enacts, "That
" all bonds and assurances for the payment of any principal, or
" money to be lent upon usury, whereupon there shall be re-
" served or *taken* above five in the hundred, shall be utterly
" void;" parol evidence has been admitted to shew *usurious* in-
" terest *taken* by a mortgagee, though there was none reserved
upon the face of the deed itself.

||Vide post,
tit. *Usury*, (B).||

MURDER AND HOMICIDE.

THE taking away the life of another, whether it amount to felony or not, is called by the general name of homicide, and is thus branched out and distinguished by our law:—

1. Into *murder*, which is usually defined the wilful killing of a person through malice prepense. And it is said, that anciently it signified only the private killing of a man, for which, by force of law, introduced by King *Canutus*, for the preservation of his *Danes*, the town or hundred where the fact was done was (a) amerced, unless it could be (b) proved that the person slain was an *Englishman*, or unless they could produce the offender. And this law was provided to avoid the secret murder of the *Danes*, who were hated by the *English*, and oftentimes privately murdered by them.

Bract. 154.
Stamf. 17.
Kelyng, 121.;
et vide For-
tescue's Pref.
to Absolute
and Limited
Monarchy, 59.
(a) The
amercement
was forty-six
marks. Wilk.
Sax. Law, 280.

(b) This proof was called *Engleshire*, and was various according to the custom of several places, but most ordinarily it was by the testimony of two males, of the part of the father of him that was slain, and by two females of the part of the mother. Hal. Hist. P. C. 447.

But this law having been abolished by 14 E. 3., the killing of any *Englishman* or foreigner through malice prepense, whether committed openly or secretly, was by degrees called murder, and punished with death. But by the common law, as also by the statute of 25 E. 3. c. 4., clergy was promiscuously allowed, as well in case of murder as of homicide or manslaughter, before the statutes of 23 H. 8. c. 1., 25 H. 8. c. 3., 1 E. 6. c. 12., 5 & 6 Ed. 6 c. 10., by which clergy is taken away from murder *ex malitiâ præcogitatâ*.

Hal. Hist.
P. C. 450.
Hawk. P. C.
c. 31. § 2.

2. *Manslaughter*, by which is understood such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all, and in which the offender is allowed his clergy, though it be felony, and differ from murder only in degree and quality. Hence it is, that upon an indictment of murder, the party offending may be acquitted of murder, and yet found guilty of manslaughter, as is every day's practice. As it is done without premeditation, it is held that there can be no accessories to it before the fact.

3 Inst. 55.
Dalt. c. 94.
Hal. Hist.
P. C. 450.
Hawk. P. C.
c. 30. § 1.

3. Homicide *per infortunium*, or *chance-medley*, is, where a man doing a lawful act, without any intent of hurt, unfortunately chances to kill another; and though this be not felony, yet, as the king hath lost a subject, and in order to make men the more careful of their actions, the law punishes the offender with the loss of his goods.

Hal. Hist.
P. C. 477.
Hawk. P. C.
c. 29. § 1.

4. Homicide *se defendendo* is, where one who has no other possible means of preserving his life from one who combats with him,

Hal. Hist.
P. C. 478.

Hawk. P. C.
c. 29. § 13.

him, on a sudden quarrel, kills the person, by whom he is reduced to such an inevitable necessity. And in this case, as in the former, the party forfeits his goods, though it be not felony.

Hal. Hist.
P. C. 424.
Hawk. P. C.
c. 28.

Justifiable homicide is, 1st, Where, in defence of a man's house, he kills one who attempts to burn it, or to commit in it murder, robbery, or other felony. 2dly, Where, in defence of a man's person, he kills one who assaults him in the highway, with an intent to murder or rob him. 3dly, When the killing happens in the advancement and due execution of public justice; and where a felon flies from those who endeavour to apprehend him, &c. And this is so far from being felony, that it causes no forfeiture whatsoever.

But for the better understanding these several species of homicide, it will be necessary to consider,

(A) In what Cases a Man may be said to kill another.

(B) Who are such Persons, by killing of whom a Person may be said to commit Murder.

(C) What shall be deemed Murder: And herein,

1. *Where it shall be said to be express Murder, and of Malice Prepenſe.*
2. *Where the Malice shall be said to be implied, or by Presumption of Law: And herein,*
 1. Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.
 2. When done on an Officer or Minister of Justice.
 3. When done by Persons in the Execution of some other unlawful Act.

(D) Of Manslaughter: And herein of Manslaughter exempt from Clergy by the Statute of 1 Jac. 1. c. 8.

(E) Of Justifiable Homicide: And herein,

1. *As it happens in the due Execution and Advancement of Public Justice.*
2. *As it happens in the Defence of a Man's Person, House, or Goods.*

(F) Of Excusable Homicide: And herein,

1. *Of Homicide per Infortunium, or Chance-medley.*
2. *Of Homicide se defendendo.*

(A) In what Cases a Man may be said to kill another.

AS there are as many ways of killing, as there are modes by which one may die, *moriendi mille figuræ*, it is laid down in general, that not only he, who by a wound or blow, or by poisoning, strangling, or famishing, &c. directly causes another's death; but also, in many cases, he, who by wilfully and deliberately doing a thing, which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him.

Hence, in the case of that unnatural mother, who left her child in an orchard covered only with leaves, in which condition it was struck by a kite, and died thereof, it was adjudged murder.

So, in the case of that unnatural son, who carried his sick father, against his consent, in cold frosty weather from one town to another, by reason whereof he died.

432. 1 Hawk. P. C. c. 51. § 5.

|| So, in the case of a mother who left her child in a hogsty, and it was devoured.

So also, where parish officers shifted a child from parish to parish, till it died for want of care and sustenance.||

So, if by duress of imprisonment a prisoner die, it is murder in the gaoler. And this duress is said to be inflicted on every one, that by the usage of his keeper is brought nearer to death and further from life; and therefore it is said, not to be material whether it proceeds from the neglect and carelessness of the gaoler, or from any actual violence; and may be effected by confining the prisoner too closely in a noisome place, loading him with fetters, &c. (a)

fore where any person dies in gaol, the coroner ought to be sent for to enquire of the manner of his death. Hale's Hist. 432. [(a) A gaoler, knowing that a prisoner infected with the small-pox, lodged in a certain room in the prison, confined another prisoner, *against his will*, in the same room. The second prisoner, who had not had the distemper, *of which the gaoler had notice*, caught the distemper, and died of it. This was holden to be murder in the gaoler. 2 Str. 856. Fost. Cr. L. 322. Another straitly confined his prisoner in a low, damp, unwholesome room, without allowing him the common necessities of chamber-pot, &c. for keeping things sweet and clean about him. The prisoner, having been long confined in this manner, contracted an ill habit of body, which brought on distempers, of which he died. This likewise was holden to be murder in the party guilty of the duress. 2 Str. 884. 2 Ld. Raym. 1578. Fost. Cr. L. 322.]

|| So, where a master upon his apprentice returning from Bridewell (whither he had sent him for misbehaviour), in a distempered condition, did not take proper care of him, but made him lie on the boards, and procured him no medical aid, and the apprentice died, the court left it to the jury to consider whether, the death of the apprentice was occasioned by the ill treatment of the master, and whether that ill treatment was evidence of malice, in which case they were to find him guilty of murder.||

So, where one, by duress of imprisonment, compels a man to accuse an innocent person, who on his evidence is condemned and executed; this is murder. *Nil refert an quis mortem inferat, aut causam mortis præbeat. Sed quære.*

5 Inst. 48.
Palm. 548.
Hal. Hist.
P. C. 451, 452.
1 Hawk. P. C.
c. 51. § 4.

Crompt. 24. b.
Dalt. c. 95.
Hal. Hist. 432.
1 Hawk. P. C.
c. 51. § 6.

Crompt. 24. b.
Pult. 122.
Dalt. c. 95.
Hale's Hist.

P. C. c. 51. § 5.
1 East,
P. C. 226.

Ibid. Palmer,
548.

Britt. c. 11.
§ 58. Fitz.
Indictment, 3.
Lamb. 240.
Stamf. 36.
5 Inst. 52.
Palm. 548.
Hale's Hist.
466.—And
that there-

of the manner
of his death. Hale's Hist. 432. [(a) A gaoler, knowing that a prisoner infected with the small-pox, lodged in a certain room in the prison, confined another prisoner, *against his will*, in the same room. The second prisoner, who had not had the distemper, *of which the gaoler had notice*, caught the distemper, and died of it. This was holden to be murder in the gaoler. 2 Str. 856. Fost. Cr. L. 322. Another straitly confined his prisoner in a low, damp, unwholesome room, without allowing him the common necessities of chamber-pot, &c. for keeping things sweet and clean about him. The prisoner, having been long confined in this manner, contracted an ill habit of body, which brought on distempers, of which he died. This likewise was holden to be murder in the party guilty of the duress. 2 Str. 884. 2 Ld. Raym. 1578. Fost. Cr. L. 322.]

Self's case,
1 East,
P. C. 226, 227.
et vide case of
Squire and
wife, 1 Russell
on Crimes,
621.

Stamf. 36.
5 Inst. 91.

Plow. 19. a.
Dalt. c. 93.
Hale's Hist.
454.

So, in judgment of law, a man may be said to kill one who in truth is killed by another, or by himself; as, where a man incites a madman to kill himself, or another; or, where *A.* by force takes the arm of *B.*, and the weapon in his hand, and therewith stabs *C.*, whereof he dies; this is murder in *A.*

9 Co. 81.
Plow. 474.

So, if a man lays poison with an intent to kill one man, which is accidentally taken by another, who dies thereof; this is murder.

Hal. Hist. 429.
|| See 45 G. 5.
c. 58. *et post.* ||

So, if a woman be with child, and a person give her a potion to destroy the child within her, and she take it, and it work so strongly that it kills her; this is murder.

1 Hawk. P. C.
c. 27. § 6.
Sawyer's case,
Old Bailey,
1915. MS.

|| So, if a man kill another upon his desire on command, he is in judgment of law as much a murderer as if he had done it merely of his own head.

Rex v. Dyson,
Rus. & Ry.
523.

If two persons encourage each other to murder themselves, and one does so, but the other fails in the attempt on himself, he is a principal in the murder of the other. ||

Fitz. Coron.
311.
Stamf. 17.
Crompt. 24.
Hawk. P. C.
c. 51. § 8.

Also, a person, who wilfully neglects to prevent a mischief, which he may and ought to provide against, is answerable for any ill consequences that may ensue his neglect. And on this foundation it is held by some opinions, that if a man have an ox, horse, &c. which he knows to be mischievous, by being used to gore or strike those who come near them, and he neglects to tie them up, by which they kill a person, that the owner may be indicted, as having himself feloniously killed him; which seems agreeable to the (*a*) *Jewish* law. But herein my Lord *Hale* lays down the following particulars, which, he says, seem to him to be agreeable to law:

(*a*) Exod.
c. xxi. v. 29.

Hale's Hist.
450.

1. If the owner have notice of the quality of his beast, and it do any body hurt, he is chargeable with an action for it.

2. Though he have no particular notice that he did any such thing before, yet, if it be a beast that is *feræ naturæ*, as, a lion, a bear, a wolf, yea, an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage; as was adjudged in *Andrew Baker's* case, whose child was bit by a monkey that broke his chain and got loose.

Hale's Hist.
450.

3. And therefore in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows it, he must, at his peril, keep him up safe from doing hurt; for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages.

Hale's Hist.
451.

4. But as to the point of felony, if the owner have notice of the quality of the ox, &c., and use all due diligence to keep him up, yet the ox break loose, and kill a man; this is no felony in the owner, but the ox is a deadand.

Hale's Hist.
451.

5. But if he do not use that due diligence, but through negligence the beast go abroad, after warning or notice of his condition, and kill a man, it is manslaughter in the owner.

6. But if he did purposely let him loose, or wander abroad, with design to do mischief; nay, though it were with design only to

to fright people, and make sport, and it kill a man, it is murder in the owner; and this, he says, he had heard had been so ruled at the assizes held at *St. Albans*; but he adds, this is only a hearsay.

[Whether taking away the life of an innocent man by perjury in a course of legal proceeding amount to murder?]

See *Fost.*
Cr. L. 131.
4 *Bl. Comm.*

196. note. ||1 *East, P. C.* 335. note (a) ||

If a physician gives a person a potion, without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a surgeon.

Hale's Hist.
429.

But some hold, that if a person, not duly authorised to be a physician or surgeon, undertake a cure, and the patient die under his hand, he is guilty of felony. But this opinion, says my Lord *Hale*, is erroneous; for physick and salves were before licensed physicians and surgeons; and therefore, if they be not licensed according to the statutes of 3 H. 8. c. 11., or 14 & 15 H. 8. c. 5., they are liable to the penalties in the statutes, but are not guilty of murder or manslaughter. And herewith agreeth *Hawkins*, who says, that the charitable endeavours of those gentlemen, who study to qualify themselves to give advice of this kind, in order to assist their poor neighbours, can by no means deserve so severe a construction from their happening to fall into some mistakes in their prescriptions, from which the most learned and experienced cannot always be secure. But as it is highly rash and presumptuous for unskilful persons to undertake matters of this nature, the law cannot well be too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed without the manifest hazard of the lives of those that have to do with them.

Stamf. 16 b.
Pult. 22 b.
Crom. 27.
45 E. 5.
35 b.
Fitz. Coron.
163. *Hale's*
Hist. 429.
Hawk. P. C.
c. 32. § 62.

If a person, who is infected with the plague, having a plague-sore running upon him, goes abroad to the intent to infect another, and another is thereby infected, and dies; this it seems is murder by the common law. But, if no such intention evidently appear, though *de facto* by his conversation another be infected, it is no felony by the common law, though it be a great misdemeanour. (a)

Hale's Hist.
432.
|| (a) By 45 G.
3. c. 10. § 25.
persons liable
to perform
quarantine,
and persons
having had

intercourse with such persons, and not repairing to the lazaret, &c. when required, and also persons escaping from the same before quarantine performed, shall be guilty of felony, and suffer death without benefit of clergy. ||

If a man, either by working upon the fancy of another, or possibly by harsh or unkind usage, put another into such passion of grief or fear, that the party either die suddenly, or contract some disease, whereof he dies; though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God; yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offered, whereof the common law can take notice; and secret things belong to God.

Hale's Hist.
429.

But in all these cases it is agreed, that no person shall be ad- judged,

Stamf. 21.

Dalt. c. 93.

Hawk. P. C.

79.

(a) Anciently
a barbarous

assault with an intent to murder, so that the party was left for dead, but yet recovered again, was adjudged murder and petit treason: but that holds not now; for the stroke without the death of the party stricken, nor the death without the stroke, or other violence, makes not the homicide or murder. Hale's Hist. P. C. 425, 426.

3 Inst. 55.

Kely. 26.

Keb. 17.

Hale's Hist.

P. C. 428.

judged, by any act whatever, to kill another, who doth not (a) die thereof within a year and a day after; in the computation whereof the whole day on which the hurt was done shall be reckoned the first.

If a person hurt by another, die thereof within a year and a day, it is no excuse for the other, that he might have recovered if he had not neglected to take care of himself.

But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines, the party dies; if it can clearly appear that this medicine, and not the wound, was the cause of his death, it seems it is not homicide. But then that must appear clearly and certainly to be so.

Ladd's case,
1 Leach, 112.

|| A question was raised whether an indictment for murder could be maintained for killing a female infant by ravishing her, but the point was not decided.

Rex v.

Evans,

O. B. 1812.

MS.

Bayley J.

Russell, p. 426.

If a man by ill-treatment and threats of violence, producing a well grounded fear of danger to life, induce another to throw himself from a window in order to escape the threatened violence, he is answerable for the consequences of the fall. ||

(B) Who are such Persons, by killing of whom a Person may be said to commit a Murder.

Hawk. P. C.

c. 31. § 15.

(a) If a man
kill an alien

enemy within this kingdom, yet it is felony; unless it be in the heat of war, and in the actual exercise thereof. Hale's Hist. P. C. 453. (b) Though outlawed of felony, or attainted in a *præmunire*, for the execution of the sentence must be by a lawful officer, lawfully appointed; and therefore, if a person be condemned to be hanged, and the sheriff behead him, this is murder, and the wife may have an appeal. Hale's Hist. P. C. 453.

Hale's Hist.

P. C. 453.

(c) But this *per*

Hawkins is

clearly murder,

notwithstanding

some opinions

to the

contrary.

Hawk. P. C.

c. 31. § 16.

43 G. 3. c. 58.

IT is agreed, that the malicious killing of any person, whatsoever (a) nation or religion he be of, or of whatsoever (b) crime attainted, is murder.

If a woman be quick or great with child, if she take, or another give her, any potion to make an abortion, or, if a man strike her, whereby the child within her is killed; it is not murder nor manslaughter by the law of *England*, because it is not *in rerum natura*, and it cannot be legally known whether it was killed or not; though it be a great crime, and by the judicial law of *Moses*, was punishable with death. So (c), if, after such child were born alive and baptized, and after die of the stroke given the mother, this is not homicide.

|| But now by statute 43 G. 3. c. 58. any person wilfully and maliciously administering poison, with intent to cause and procure the miscarriage of any woman then being quick with child, is declared a felon, and shall suffer death without benefit of clergy.

And

And by § 2. of the same statute, any person administering medicines, or employing any instrument or other means, to cause and procure the miscarriage of any woman not then quick with child, is declared guilty of felony, and shall be punished by fine, imprisonment, or transportation. ||

But, if a man procure a woman with child to destroy her infant when born, and the child be born, and the woman, in pursuance of that procurement, kill the infant; this is murder in the mother, and the procurer is accessory to murder; and this, whether the child were baptized or not.

7 Co. 9. Dyer,
186. Hale's
Hist. P.C. 433.
Hawk. P.C.
c. 31. § 17.

||As to the murder of bastards, *vide* tit. "BASTARDY," (E).||

(C) What shall be deemed Murder: And herein,

1. *What shall be said to be express Murder, and of Malice prepense.*

HEREIN it seems to be agreed, that any (*a*) formed design of doing mischief may be called malice; and therefore, that not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be a malice prepense.

another, whereunto by law he is not authorized; and the evidences of such a malice, says he, must arise from external circumstances discovering that inward intention; as, lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various, according to variety of circumstances. Hale's Hist. P.C. 451. ||*Vide*, as to malice in a legal sense, Kel. 127. Russell on Crimes, vol. 1. 422. note (i). (2d edit.)||

Hawk. P.C.
80. (*a*) My
Lord Hale de-
fines malice in
fact to be a
deliberate in-
tention of
doing any
bodily harm to

If two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder; and this the law adjudges to be of malice, and that the party cannot help himself by alleging, that he was first struck by the deceased, or that he often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation; or that he meant not to kill, but only to disarm his adversary; for since he deliberately engaged in an act highly unlawful, in defiance of the laws, he must, at his peril, abide the consequences thereof. And not only he who kills, but also his seconds, are guilty of murder. And some hold (*b*), that the seconds of the deceased are also equally guilty.

Roll. Rep. 560.
2 Bulst. 147.
Crompt. 22. b.
1 Hawk. P.C.
c. 51. § 21.
Fost. Cr. L.
297. ||*Vide*
5 East Rep.
581. || (*b*) By
reason of the
countenance
they give, and
it being done
by compact
and agreement.
But this con-
struction is said to be too rigid; and that it would be hard to make a man, by such reasoning, the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in his quarrel. 1 Hawk. P.C. c. 51. § 51. Hale's Hist. P.C. 453.

And some hold (*b*), that the seconds of the deceased are also equally guilty.

A man is esteemed to fight in cool blood, when he meets in the morning on an appointment over night; or in the afternoon, on an appointment in the morning; or, as some say, if he fell into other discourse after the quarrel, and talked calmly upon it; or, if he have so much consideration as to observe, that it is not proper

Keil. 56. Sid.
177. Lev. 180.
Oneby's case,
2 Stra. 773.
2 Ld. Raym.
1489.

per or safe to fight at present, for such and such reasons, which shew him to be master of his temper.

Mason's case,
Fost. Cr. 132.

[*A.* and *B.*, two brothers, were at play together; they then wrestled; afterwards cudgelled: *A.* gave *B.* a smart stroke; *B.* grew angry, threw away his cudgel: they fought in earnest, and were parted. *A.* went away angry, threatening to fetch something and stick *B.* He went home, took off a thin coat, and put on a thick one, returned with a sword concealed under his coat, drew on a discourse of the quarrel, and offered to cudgel, if *B.* would keep off his hands. *B.* went to him, and took up the cudgel which *A.* dropped, and gave him two blows on the shoulders. *A.* drew out the concealed sword, said, "Stand off, or I'll stab you," thrust at, but missed him. *B.* went back, *A.* shortened his sword, leaped towards *B.*, stabbed him, and killed him. This was adjudged murder.]

Rex v. Anderson, O. B.
1816, MS.
Bayley J.,
Richards B.,
and the Recorder agreed
in the direction. Russell
on Cr. 446.
(2d edit.)

¶If, after an interchange of blows on equal terms, one of the parties on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon, and kills the other party with it, such killing will only be manslaughter. But if a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon, without the knowledge of the other party, and kills the other party with such weapon; or if, at the beginning of the contest, he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon, the killing in both these cases will be murder. The prisoner and *Levy* quarrelled, and went out to fight; after two rounds, which occupied little more than two minutes, *Levy* was found to be stabbed in a great many places, and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed but the prisoner, who had a clasp knife before the affray. *Bayley J.* told the jury that if the prisoner used the knife privately from the beginning; or if before they began to fight he placed the knife so that he might use it during the affray, and used it accordingly, it was murder; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder.¶

Hawk. P. C.
c. 51. § 24.

If *A.* on a quarrel with *B.* tell him he will not strike him, but that he will give *B.* a pot of ale to strike him, and thereupon *B.* strike, and *A.* kill him, he is guilty of murder; for he shall not elude the justice of the law by such a pretence to cover his malice.

Hawk. P. C.
c. 51. § 25.
Hale's Hist.
P. C. 453.

In like manner, if *B.* challenge *A.*, and *A.* refuse to meet him, but, in order to evade the law, tell *B.* that he shall go the next day to such a town about his business; and accordingly *B.* meet him the next day in the road to the same town, and assault him, whereupon they fight, and *A.* kill *B.*, he seems guilty of murder; unless it appear by the whole circumstances that he gave *B.* such inform-

information accidentally, and not with a design to give him an opportunity of fighting.

And at this day it seems settled, that if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder, in respect of his first intent. Crompt. 22. b.
Dalt. c. 95.
Keil. 58. 129.

And it hath been adjudged, that even upon a sudden quarrel, if a man be so far provoked by any words or gestures of another, so as to make a push at him with a sword, or to strike at him with any such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kills the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he shewed that he intended not to fight with him, but to kill him; which violent revenge is no more excused by such a slight provocation, that if there had been none at all. Kelyng, the
Queen v. Maw-
bridge. Hawk.
P. B. c. 51.
§ 27. Post.
Cr. L. 295,
296.

But it is said, that if he, who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fight with him and kill him, he is guilty of manslaughter only; because that by neglecting the opportunity of killing the other, before he was on his guard, and in a condition to defend himself, with like hazard to both, he shewed that his intent was not so much to kill as to combat with the other, in compliance with those common notions of honour, which prevailing over reason, during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of malice prepense. Keil. 55. 61.
151.
Hawk. P. C.
c. 31. § 28.

And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kill the other, he is guilty of manslaughter only, because he did it in the heat of blood. Hawk. P. C.
c. 31. § 29.

And such an indulgence is shewn to the frailties of human nature, that where two persons, who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole (a) circumstances of the fact. Hawk. P. C.
c. 31. § 30.
(a) If upon
circumstances
it appears,
that the recon-
ciliation was
but pretended,

or counterfeit, and that the hurt done was upon the score of the old malice, then it is murder. Hale's Hist. P. C. 452.

[Three *Scotch* soldiers were drinking together in a public house; some strangers, who were sitting in the next box, used several opprobrious epithets, and reviled the character of the *Scotch* nation; whereupon one of the soldiers struck one of them with a *small rattan cane*. An altercation ensued; and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle. The altercation increased; and when the soldier had paid his reckoning, the stranger again shoved him from the room into the passage. Upon this, the soldier exclaimed, that "*he did not mind killing an Englishman more than eating a mess*" Rex v. Taylor,
5 Burr. 2794.

"of crowdly." The stranger, assisted by another person, then violently pushed the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart. This was adjudged manslaughter.

Brown's case,
Leach's Cases,
135. A quarrel arose between several soldiers, and a number of keelmen: one of the soldiers, to protect himself and his comrades from the assaults of the mob, drew his sword, and mistaking a person passing by for one of the keelmen, struck him on the head with his sword, of which blow he died. This was adjudged manslaughter.

Snow's case,
Id. 138. A. and B. suddenly quarrelled: upon some provoking language B. seized A. by the collar; a fight ensued; they both fell to the ground; and while struggling on the ground, B. received a mortal wound from a knife which A. held in his hand. This also was adjudged manslaughter.]

Hawk. P. C.
c. 31. § 33,
34. and several
authorities
there cited. If a man be so far provoked by a breach of, promise, or by a trespass on his lands or goods, or by any words or gestures whatsoever, as thereupon immediately to push at another with a sword, or strike him with a dangerous weapon before his sword is drawn, and thereupon a fight ensue, and the person assaulted be slain, the assailant is guilty of murder, though he was driven to the wall when he gave the mortal wound; for by assaulting the other in such abusive manner, he shews that his intent was not to fight with him, but to kill him. But if he had made no pass till the other's sword had been drawn, or had only beaten him, in such manner as made it appear that he meant only to chastise him, he would have been guilty of manslaughter only.

Hawk. P. C.
c. 31. § 35. So, if a person, seeing two others fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other, it is but manslaughter.

Hawk. P. C.
c. 31. § 36. So, if two strive for the wall, and one happen to kill the other, or a man happen to kill another, who, claiming a title to his house, attempts forcibly to enter it, &c., or to kill one who endeavours unlawfully to arrest him; or to force him from his possession of a room in a public house; or, if a man immediately kills one whom he finds in bed with his wife; or that pulls him by the nose; or fillips him in the forehead, or actually strikes him; in all these cases, the party is, at most, only guilty of manslaughter.

12 Co. 87.
Cro. Jac.
296. Hale's
Hist. P. C. 455.
Rowley's case.
[(a) According to Croke's report, a small cudgel, and according to Godbolt's, a rod. "It may be fairly collected," saith Sir M. Foster, "from Croke's manner of speaking, [and Godbolt's report,] that the accident happened by a single stroke, with a cudgel not likely to destroy, and that death did not immediately ensue." The words of Croke are, "Rowley struck the child with a small cudgel, of which stroke he afterwards died." The stroke was given in heat of blood, and not with any of the circumstances which import malice, and therefore manslaughter. Observe that Lord Raymond (Ld. Raym. 1498.) layeth great distress on this circumstance, that the stroke was with a cudgel not likely to kill! Post. Cr. L. 295.]

Hawk. P. C.
c. 31. § 38, 39. If a person in cool blood, by way of revenge, deliberately beat another

another in such a manner that he dies of it; or, if a man, upon a sudden provocation, execute his revenge in such a manner as shews a cruel and deliberate intent of doing a personal hurt, he is guilty of murder; as (a), where the keeper of a park, finding a boy stealing wood, tied him to a horse's tail, and beat him, whereupon the horse ran away, and killed him.

P. C. 454. S. C. cited and agreed; because the correction was excessive, and it was an act of deliberate cruelty.

(a) Cro. Car. 131.
Jon. 198.
Holloway's case, Keil. 127.
S. C. cited.
1 Hale's Hist.

|| But where a person whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into a pond, in order to duck him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter. ||

Fray's case,
1 East, P. C.
256.

[There being an affray in the street, one *Stedman* a foot-soldier ran hastily towards the combatants. A woman seeing him run in that manner cried out, "You will not murder the man, will you?" *Stedman* replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and *Stedman* struck her on the breast with the pommel of his sword. The woman then fled, and *Stedman* pursuing her stabbed her in the back. *Holt* was at first of opinion, that this was murder, *a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear*; and it was proposed to have the matter found specially. But it afterwards appearing in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter.

Fost. Cr. L.
292.

The smart of the man's wound, and the effusion of blood, might possibly keep his indignation boiling to the moment of the fact.

Mr. *Lutterel*, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as *Lutterel* pretended, to have the debt and costs paid. Words arose at the lodgings about *civility money*, which *Lutterel* refused to give; and he went up stairs pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying, *He did not intend to hurt the officers, but he would not be ill-used*. The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and words of anger arising, *Lutterel* struck one of the officers on the face with a walking-cane, and drew a little blood. Whereupon both of them fell upon him, one stabbed him *in nine places, he all the while on the ground begging for mercy, and unable to resist them*; and one of them fired one of the pistols at him *while on the ground*, and gave him his death's wound. This is reported to have been holden manslaughter *by reason of the first assault with the cane*.]

Rex v. Tranter,
1 Str. 499.
This is the case as reported by Sir John Strange; and an extraordinary case it is, that all these circumstances of aggravation, two to one, he, helpless and on the ground begging for mercy, stabbed in nine places, and then despatched with a pistol; that all these circumstances, plain indications of a deadly cane. But in the

revenge or diabolical fury, should not outweigh a slight stroke with a

the

the printed trial (6 St. Tr. 195.) there are some circumstances stated, which are entirely dropped, or very slightly mentioned, by the reporter.—1. Mr. Lutterel had a sword by his side, which, after the affray was over, was *found drawn and broken*. How that happened did not appear in evidence; for part of the affray was at a time when no witness was present, nobody spake to the whole. 2. When Lutterel laid the pistols on the table, he declared that he brought them down, *because he would not be forced out of his lodgings*. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot, for both the pistols were discharged in the affray, and slightly on the wrist by some sharp-pointed weapon: and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching Lutterel's begging for mercy was not, that he was on the ground *begging for mercy*; but that on the ground he held up his hands *AS IF he was begging for mercy*. The Chief Justice directed the jury, that if they believed Mr. Lutterel endeavoured to rescue himself, which he seemed to think was the case, and very probably was the case, it would be justifiable homicide in the officers. However, as Mr. Lutterel gave the first blow *accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings*, which it would have been their duty to have done, if the debt had not been paid, or bail given, he declared IT COULD BE NO MORE *than manslaughter*. Fost. Cr. L. 293. || *Vide case of Willoughby and another, MS. 1 East, P. C. 288. Russell on Cri. 437. (2d edit.); and Rex v. Freeman, 1814, MS. Bayley J. Russell, 439.*||

Rex v. Longden, 1812, MS.
Bayley J.;
and Russ. and
Ryan, 228.

||If *A.* stands with an offensive weapon in the door way of a room, wrongfully to prevent *J. S.* from leaving it, and others from entering; and *C.*, who has a right in the room, struggles with him to get his weapon from him, upon which *D.*, a comrade of *A.*'s, stabs *C.*, it will be murder in *D.* if *C.* dies. A drummer and a private soldier stopped at an inn with a deserter, and were pressed by one *Martin* to enlist him: they gave him a shilling for that purpose, but they had no authority to enlist any body. *Martin* wanted afterwards to go away, but they would not let him, and a crowd collected. The drummer drew his sword, stood in the door way of the room where they were, and swore he would stab any one that offered to go away. The landlord, however, got by him, and the landlord's son seized his arm in which the sword was, and was wrestling the sword from him, when the private who had been struggling with *Martin* came behind the son and stabbed him in the back. He was convicted upon the statute 43 G. 3.; and it was urged for the prisoner, that the soldiers had a right to enlist *Martin* and to detain him, and that, if death had ensued, the offence would not have been murder; but upon the point being saved, the judges were all of a contrary opinion, and the conviction was held right.

Halloway's
ca. Cro. Car.
151.; and see
Russell, 440.
(2d edit.).

It seems that it may be laid down, as the result of the decisions, that in all cases of slight provocation, if it may be reasonably collected, from the weapon made use of, or from any other circumstance, that the party intended to kill or do some great bodily harm, such homicide will be murder, as in the instance (*ante*, 761.) of the parker, who finding the boy stealing wood in his master's ground, bound him to his horse's tail and beat him, and the horse taking fright, the boy was dragged till his shoulder was broken, of which he died; for this correction was excessive and cruel.

It must be remembered, provocation will not avail, if there be evidence of express malice. In such case, not even previous blows or struggling will extenuate homicide.

Hazel's Ca.

In a case where, upon a special verdict, it was found that the prisoner

prisoner having employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the right temple, of which the child soon after died; and it was also found that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner when she threw it did not intend to kill the deceased: the matter was considered of great difficulty, and was referred to all the Judges; but no opinion was ever delivered, and a pardon was recommended. The doubt appears to have been principally on the question whether the instrument was such as would probably, at the given distance, occasion death or great bodily harm.||

1 Leach, 568.
Russell, 439.
(2d ed.)

2. *Where the Malice shall be said to be implied, or by Presumption of Law: And herein,*

1. Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.

Herein it is laid down, that when one voluntarily kills another, without any provocation, it is murder; for the law presumes it to be malicious, and that he is *hostis humani generis*; and therefore it is necessary for him who happens to kill another, to shew such a provocation as will take off the presumption of malice.

Hale's Hist.
P. C. 445.

He that wilfully gives poison to another, whether he had provoked him not, is guilty of wilful murder; because it is an act of deliberation odious in law, and presumes malice.

Hale's Hist.
P. C. 455.
||45 G. 3.
c. 58.||

If *A.* comes to *B.*, and demands a debt of him; or comes to serve him with a *subpœna ad respondendum*, or *ad testificandum*, and *B.* thereupon kills *A.*, this is murder; for herein there is no provocation.

Hale's Hist.
P. C. 445.

Watts came along by the shop of *Brains*, and distorted his mouth, and smiled at him: *Brains* kills him; it is murder; for it was no such provocation as would abate the presumption of malice in the party killing.

Cro. Eliz. 778.
Brain's case.
Hale's Hist.
P. C. 455.
cited.

If *A.* be passing the street, and *B.* meeting him, there being a convenient distance between *A.* and the wall, take the wall of *A.*, and thereupon *A.* kill him, this is murder. But if *B.* had justled *A.*, this justling had been a provocation, and would have made it manslaughter. And so it would be, if *A.* riding on the road, *B.* had whipped the horse of *A.* out of the track, and then *A.* had alighted, and killed *B.*, it had been manslaughter.

Hale's Hist.
P. C. 455,
456.

It seems agreed, that no affront by bare words or gestures, however slighting, or however false and malicious they may be, and aggravated by the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life. But if *A.* gives indecent language to *B.*, and *B.* thereupon strikes *A.*, but not mortally, and then *A.* strikes *B.* again, and then *B.* kills *A.*, this is but manslaughter; for the second stroke made a new provocation;

Hawk. P. C.
c. 31. § 35.

Hale's Hist.
P. C. 457.

tion; and so it was but a sudden falling out. And though *B.* give the first stroke, and, after a blow received from *A.*, *B.* gives him a mortal stroke; this is but manslaughter, according to the proverb, *The second blow makes the affray.*

Hale's Hist.
P. C. 457.

A. and *B.* are at some difference; *A.* bids *B.* take a pin out the sleeve of *A.*, intending thereby to take occasion to strike or wound *B.*, which *B.* doth accordingly, and then *A.* strikes *B.*, whereof he died; this was ruled murder; 1. Because it was no provocation, when he did it by the consent of *A.* 2. Because it appeared to be a malicious and deliberate artifice, thereby to take occasion to kill *B.*

Hale's Hist.
P. C. 457.

If there be chiding between husband and wife, and the husband strike his wife thereupon with a pestle, that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter.

Hawk. P. C.
c. 31. § 61.

It is said, that if a person happen to occasion the death of another unadvisedly, doing an idle wanton action, which cannot but be attended with the manifest danger of some other, as by riding with a horse, known to be used to kick, among a multitude of people, by which he means no more than to divert himself, by putting them into a fright; he is guilty of murder.

2. When done on an Officer or Minister of Justice.

9 Co. 68.
4 Co. 40.
Cromp. 25.
5 Inst. 52.
Savil. 67.
Keil. 66.
Hawk. P. C.
c. 31. § 48.
Hale's Hist.
P. C. 457.

It hath been adjudged, and hath frequently been agreed, that if a justice of peace, constable, watchman, &c. be killed in the execution of their offices, he, by whom any such person is killed, is guilty of murder; for herein the law implies malice; and the indictment need not be special, but general, *Ex malitiâ suâ præcogitatâ interfecit et murdravit*; because the malice in law maintains the indictment.

Keil. 66.
||1 East,
P. C. 518.||
Hawk. P. C.
c. 31. § 48.
(a) Killing the
assistant
of the con-
stable is as
well murder
as the killing
of the con-
stable himself;
so those who
come to the
constable's
assistance,
though not
specially
called there-
unto, are
under the
same protec-
tion, as they
that are
called to his
assistance
by name.
Hale's Hist.
P. C. 465.

So, if (a) a private person be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; and he cannot excuse himself by alleging, that what he did was in a sudden affray, in the heat of blood, and through the violence of passion. But, if such person do not give notice for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel, but to appease it; he who kills him, is guilty of manslaughter only.

Hawk. P. C.
c. 31. § 55.

Whoever kills a sheriff, or any of his officers, in the lawful execution of a civil process, as, on arresting a person, a *capias*, &c. is guilty of murder.

Hawk. P. C.
c. 31. § 56.
[(b) If the

Nor is it any excuse to such person, that the process was erroneous (b), (for it is not void by being so,) or that the arrest was in the night, or that the officer did not tell him for what cause he

he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance,) or that the officer did not shew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one.

process, be it by writ or warrant, be not defective in the frame of it, and issue in the

ordinary course of justice from a court or magistrate having jurisdiction in the case; though there may have been error or irregularity in the proceeding previous to the issuing of the process, yet, if the officer or other minister be killed in the execution of it, this will be murder. And therefore if a *capias ad satisfaciendum, fieri facias*, writ of assistance, or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without shewing the judgment or decree. So ruled by Lord *Hardwicke*, in the case of one *Rogers*, at the summer assizes in Cornwall in the year 1755. *Fost. Cr. L. 311.* — In the case of a warrant from a justice of the peace, in a matter wherein he hath jurisdiction, the person executing such warrant is under the special protection of the law; though such warrant may have been obtained by gross imposition on the magistrate, and by false information touching matters suggested in it. *Curtis's case, Fost. Cr. L. 135.* — An attachment issued out of the county court, and signed by the county clerk in his own cause, is legal process; and if the officer be resisted and killed in the execution of it, it will be murder. *Baker's case, Leach's Cases, 106.]*

But, where the warrant, by which he acts, gives him no authority to arrest the party; as (*a*), where a bailiff arrests *J. S.* baronet, who never was knighted, by force of a warrant to arrest *J. S.* knight, it is but manslaughter.

Hawk. P. C. c. 31. § 57.

(*a*) So, if the name of the bailiff, plaintiff,

or defendant be interlined, or inserted after the sealing thereof, by the bailiff himself, or any other; if such bailiff be killed it is but manslaughter. *Hal. Hist. P. C. 457.* — So, if the process be executed out of the jurisdiction of the court, the killing of the officer is only manslaughter. 1 *Hal. Hist. P. C. 458.* — The constable of the vill of *A.*, comes into the vill of *B.*, to suppress some disorder, and in the tumult the constable is killed in the vill of *B.*, this is only manslaughter, because he had no authority in *B.*, as constable. *Hal. Hist. P. C. 459.* — But it seems, that if the constable of the vill of *A.*, had a particular precept from a justice of peace directed to him by name, or by the name of the constable of *A.*, to suppress a riot in the vill of *B.*, or to apprehend a person in the vill of *B.* for some misdemeanor, and within the jurisdiction and consuance of the justice of peace, and, in pursuance of that warrant, he go to arrest the party in *B.*, and in execution of his warrant is killed in *B.*, this is murder; for though, in such case, the constable was not bound to execute the warrant out of his jurisdiction; neither could he do it singly, *virtute officii*, as constable of *A.*, yet he may do it as a bailiff or minister, by virtue of the warrant, and the killing of him is murder, as well as if he had been constable of the hundred wherein *A.* and *B.* lie; or sheriff of the county; for a justice of the peace may, for a matter within his jurisdiction, issue his warrant to a private person as servant, but then such person must shew his warrant, or signify the contents of it. *Hal. Hist. P. C. 459.* || Killing an officer will be murder, though he have no warrant, and was not present when the felony was committed, but takes the party upon a charge only, and though that charge does not in terms specify all the particulars necessary to constitute the felony. *Rex v. Ford, Russ. & Ry. 329. ||*

|| And so, if a bailiff attempting to execute a writ within a liberty (such writ not having a *non omittas* clause) be killed, it is not murder. *Rex v. Mead, 2 Stark. Ca. 205.*

And so also, if the warrant to arrest is made out in blank, and the names inserted after its delivery from the sheriff's office, such warrant is illegal; and the shooting of a party attempting to execute it has been held to be only manslaughter.

Stockley's ca. 1 East, P. C. 310, 311. Russell, 515. Housin v.

Barrow, 6 Term R. 122.

But, if the name of the officer be inserted before the warrant is sent out of the sheriff's office, it seems the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted. ||

Rex v. Harris, 1801. MS. Bayley J. Russell on

Cri. 513. As to the manner of executing process, notice, breaking doors, &c. see *Russell, B. iii. c. iii. § 4. (2d ed.)*

And

Hale's Hist.
P. C. 460.

And as to the point of notice, it is herein further laid down by my Lord *Hale*, that if he be a bailiff, constable, or watchman, *jurus et conus*, the killing of him is murder, though the party does not know him to be such; also it is not necessary for him to notify himself to be such by express words; but it shall be presumed that the offender knew him.

Hale's Hist.
P. C. 461.

But, if he be a private bailiff, either the party must know that he is so, or there must be some such notification thereof whereby the party may know it; as by saying, *I arrest you*, which is of itself sufficient notice; and it is at the peril of the party, if he kill him after these words, or words to that effect pronounced; for it is murder, if *de facto* it fall out that he were a bailiff, and had a warrant.

Hale's Hist.
P. C. 461.

A constable coming to appease a sudden affray in the day-time, in the village whereof he is constable, it seems every man, *ex officio*, is bound to take notice that he is the constable, because he is to be chosen and sworn in the leet, where all residents are to attend; but it is not so in the night-time, unless there be some notification that he is the constable.

Hale's Hist.
P. C. 461.
|| *Vide Gordon's case*,
1 East, P. C.
315.||

But whether it be in the day or night, it is sufficient notice, if he declare himself to be the constable, or command the peace in the king's name; and the like for any who come in his assistance, or for a watchman, &c., and therefore, if any of them are killed after such notification, it is murder in them that kill him.

Hale's Hist.
P. C. 465.
Hugget's
case, 25th
April 1666,
at Newgate,
Kel. 59. 137.

A press-master seized *B.* for a soldier, and with the assistance of *C.* laid hold on him; *D.* finding fault with the rudeness of *C.*, there grew a quarrel between them, and *D.* killed *C.* By the advice of all the judges, except very few, it was ruled, that this was but manslaughter.

Rex v. Philips,
Cowp. 830.

[Where an officer on the impress service, *fired in the usual manner* at the haulyards of a boat, in order to *bring her to*, and happened to kill a man, this was adjudged to be only manslaughter.

Broadfoot's
case, Fost.
Cr. L. 154.

A captain of a ship had a press-warrant, directing *that no person but a commissioned officer was to be intrusted with the execution of it*; and his name to be inserted on the back of it. The captain appointed his lieutenant to execute it, and sent his boat with some of the crew to press, but the lieutenant staid in the ship. The boat's crew some leagues off boarded a ship, and attempted to press, when one of them was killed. This was ruled to be only manslaughter, for they did not act according to the warrant.]

Hawk. P. C.
c. 51. § 58.
(a) This had
been murder
before the
statute, Hal.
Hist. P. C. 457.

If a legal warrant be executed in an unlawful manner; as, if a bailiff be killed in breaking open a door or window to arrest a man; or, perhaps, if he arrest one on a *Sunday* (a), since the statute 29 Car. 2. c. 7. by which all such arrests are made unlawful, and he be killed; this is but manslaughter.]

Mary Adey's
case, Leach's
Cases, 189.

[So, where a peace officer about to take a man to prison under a warrant, which turned out to be illegal, was killed in the attempt

attempt by a woman whom the man kept, this was adjudged to be only manslaughter.]

¶ So, where a serjeant had put a common soldier under arrest, who thereupon killed the serjeant with a sword; and upon trial no authority was shewn in the serjeant to make such arrest, the articles of war not being produced, nor any evidence given of the usage of the army, this was held only to be manslaughter.¶

Wither's case,
1 East, P. C.
233.

3. *When done by Persons in the Execution of some other unlawful Act.*

It seems agreed, that wherever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as, where a person, shooting at tame fowl with an intent to steal them, accidentally kills a man; this is murder.

Kelyng, 177.
Dalt. c. 95.
Moor, 87.
Plow. 101.

So, if *A.* come to rob *B.* in his house, or upon the highway, or otherwise, without any precedent intention of killing him; yet, if in the attempt, either without, or upon the resistance of *B.*, *A.* kill *B.*, this is murder.

3 Inst. 52.
Hal. Hist.
P. C. 465.

So, if men come to steal deer in a park or forest, or to rob a warren of conies, and the parker, forester, or warrener resists, and is killed, this is murder.

Hal. Hist.
P. C. 465.

¶ If a court martial order a man to be flogged where they have no jurisdiction, and the flogging kills the man, the members who concurred in that order are guilty of murder.

Per Heath J.
4 Taunt. 77.

If a ship's sentinel shoot a man, because he persists in approaching the ship when he has been ordered not to do so, it will be murder, unless such an act was necessary for the ship's safety. And it will be murder, though the sentinel had orders to prevent the approach of any boats, had ammunition given to him when he was put upon guard, and acted on the mistaken impression that it was his duty. The prisoner was sentinel on board the *Achille* when she was paying off. The orders to him from the preceding sentinel were to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed, upon which he called repeatedly to them to keep off; but one of them persisted, and came close under the ship, and he then fired at a man who was in the boat, and killed him. It was put to the jury to find whether the sentinel did not fire under the mistaken impression that it was his duty; and they found that he did. But a case being reserved, the judges were unanimous that it was murder. They thought it, however, a proper case for a pardon; and, further, they were of opinion, that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified.

Rex v.
Thomas, MS.
Bayley J.
Russ. on Cri.
510.

In a case where there had been mutual blows, and then, upon one of the parties being pushed down upon the ground, the other stamped upon his stomach and belly with great force, and thereby

Rex v. Ayes,
1810, MS.
Bayley J.; and
Russ. & Ry.
166.

thereby killed him, it was considered only to be manslaughter. The deceased, who was a *French* prisoner, had stolen a tobacco-box from one of the party of *French* prisoners who were gambling, and was chastised by some of the party for his conduct, and a clamour was raised against him. As he passed the prisoner, who was sitting at a table, and much intoxicated, the prisoner got up, and with much force pushed the deceased backwards upon the ground. The deceased got up again and struck the prisoner two or three blows with his double fist in the face, and one blow in the eye; upon which the prisoner pushed the deceased backwards again in the same manner, and gave him, as he lay upon his back on the ground, two or three stamps with great force with his right foot on the stomach and belly, and afterwards, when the deceased arose on his seat and was sitting, gave him a strong kick on the face; the blood came out of the mouth and nose of the deceased, and he fell backwards, and died on the next day. The stamps upon the stomach and belly were the cause of his death. The prisoner was convicted of murder, on the ground that the violence which caused the death was not excused by heat of blood: but the learned judge by whom the prisoner was tried, thinking that the case required further consideration, reserved it for that purpose, and the judges were of opinion that it was only a case of manslaughter.||

Plow. 473.
9 Co. 81.
Hawk. P. C.
c. 51. § 42.

And not only in such cases, where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also, where it any way occasionally causes such a misfortune, it makes him guilty of murder. And such was the case of the husband, who gave a poisoned apple to his wife, who ate not enough to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child, who died thereof. Such also was the case of the wife, who mixed ratsbane in a potion sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who to vindicate his reputation tasted it himself, having first stirred it about. Neither is it material in this case, that the stirring of the potion might make the operation of the poison more forcible than otherwise it would have been; for inasmuch as a murderous intention, which of itself perhaps, in strictness, might justly be punished with death, proves now, in the event the cause of the king's losing a subject, it shall be as severely punished as if it had had the intended effect, the missing whereof is not owing to any want of malice, but of power.

Tinckler's
case, 1 East,
P. C. 250.

|| So, where one gave medicine to a woman to procure abortion, and where a man put skewers into the womb of a woman for the same purpose; and the women died in both cases, these acts were held murder: for though the original intent was only a great misdemeanor, yet the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the women on whom they were practised.||

Hal. Hist.
P. C. 466.

So, if *A.*, by malice forethought, strikes at *B.*, and missing him strikes *C.*, whereof he dies; though he never bore any malice

malice to C., yet it is murder, and the law transfers the malice to the party slain.

If divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays; as, by committing a violent disseisin with great numbers of people, hunting in a park, &c. and in so doing happen to kill a man, they are all guilty of murder; for they must, at their peril, abide the event of their actions, who wilfully engage in such bold disturbances of the public peace in open opposition to, and defiance of, the justice of the nation.

Yet, where divers rioters, having forcibly got possession of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury; perhaps for this reason (says *Hawkins*), because the person slain was so much in fault himself.

But, if in such case, or any other quarrel, whether it were sudden or premeditated, a justice of peace, constable or watchman, or even a private person be slain in endeavouring to keep the peace, and suppress the affray, he who kills him is guilty of murder; for though it was not his primary intention to commit a felony, yet, inasmuch as he persists in a less offence with so much obstinacy, as to go on in it to the hazard of the lives of those, who no otherwise offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems to be in this respect equally criminal, as if his intention had been to commit a felony.

If A. throw a stone with an intent to kill the poultry or cattle of B., and the stone hit and kill a by-stander, it is manslaughter, because the act was unlawful; but not murder, because he did it not maliciously, or with an intent to hurt the by-stander.

And though by the statute 33 H. 8. c. 6. no person not having lands, &c. of the yearly value of 100*l.* per ann. may keep, or shoot a gun, upon pain of forfeiting 10*l.*, yet, if a person not qualified shoots with a gun at a bird or at crows, and by mischance it kills a by-stander, by the breaking of the gun, or some other accident that, in another case, would have amounted only to chance-medley; this will be no more than chance-medley in him; for though the statute prohibit him to keep or use a gun, yet the same was but *malum prohibitum*, and that only under a penalty, and will not enhance the effect beyond its nature.

¶ But where the prisoner killed his opponent in a boxing match it was holden manslaughter, though he had been challenged to fight by his adversary for a public trial of skill in boxing, and was urged to engage by taunts, and the occasion was sudden.¶

If a man, knowing that people are passing along the street, throws a stone, or shoots an arrow over the house or wall, with an intent to do hurt to people, and one is thereby slain, this is

Savil, 67.
Moor, 86.
Palm. 35.
Crom. 24.
Dyer, 128.
5 Mod. 289.
Hawk. P.C.
c. 51. § 46.

Crom. 28.
Hawk. P.C.
c. 51. § 47.

Hawk, P.C.
c. 51. § 48.

1 Hal. Hist.
P.C. 475.

1 Hal. Hist.
P.C. 475.

Ward's case,
1 East, P.C.
270.

Hal. Hist.
P.C. 475.

(a) This is upon supposition, that the house do not stand near an highway or place of resort, for then though he should cry out first, it is manslaughter. See Hull's case, 1664. Kel. 40.

Rex v. Smith,
1804. MS.
Bayley J. Russ.
on Cri. 459.

¶ It is no excuse for killing a man that he was out at night, as a ghost dressed in white for the purpose of alarming the neighbourhood, even though he could not otherwise be taken. The neighbourhood of *Hammersmith* had been alarmed by what was supposed to be a ghost: the prisoner went out with a loaded gun to take the ghost, and upon meeting with a person dressed in white, immediately shot him, *McDonald C. B., Rooke and Lawrence Js.*, were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor, and no one might kill him, though he could not otherwise be taken. The jury, however, brought in a verdict of manslaughter; but the court said they could not receive that verdict, and told the jury if they believed the evidence, they must find the prisoner guilty of murder, and that if they did not believe the evidence, they should acquit the prisoner. The jury then found the prisoner guilty, and sentence was pronounced; but the prisoner was afterwards reprieved.

Rex v. Walker,
1 Carr. & P.
320. And see
as to furious
driving 1 G. 4.
c. 4.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter; though he called to the deceased to get out of the way, and the deceased might have done so if he had not been drunk.¶

(D) Of Manslaughter: And herein, of Manslaughter exempt from Clergy by the Statute of 1 Jac. 1. c. 8.

Hal. Hist.
P. C. 466.

(b) By manslaughter is understood

such killing as happens either on a sudden quarrel, or in the commission of any unlawful act, without any deliberate intention of doing mischief. Hawk. P. C. c. 30. § 1.

Hal. Hist.
P. C. 466, 467.

[(c) The punishment of murder, and that of manslaughter, were originally one and the same; both having the benefit of clergy: So

MANSLAUGHTER, or simple homicide (b), is the voluntary killing of another without malice express or implied, and differs not, in substance of the fact, from murder, but only differs in these ensuing circumstances.

1. In the degree of the offence, murder being aggravated with malice presumed or implied, but manslaughter not; and therefore in manslaughter there can be no accessaries before. 2. In the form of the indictment, the former being always *felonice ex malitiâ præcogitatâ interfecit et murdravit*, the latter only *felonice interfecit*. 3. In the point of clergy (c), murder being by the statute of 23 H. 8. c. 1. exempt from the benefit of clergy, but not manslaughter. 4. In the form of the pardon of murder; for though at common law a pardon of all felonies had pardoned murder, yet, by the statute of 13 Rich. 2. c. 1. the pardon of murder must either be by the express word of *murder*, or it must be

be a pardon of *felonice interfectio*, with a special *non obstante* of that none but the statute of 13 Rich. 2. unlearned persons, who

least knew the guilt of it, were put to death for this enormous crime. But now, by several statutes, 23 H. 8. c. 1., 1 Edw. 6. c. 12., 4 & 5 P. & M. c. 4., the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. It is also enacted by stat. 25 G. 2. c. 37. that the judge, before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it, and shall, in passing sentence, direct him to be executed the next day but one, (unless the same shall be Sunday, and then on the Monday following,) and that his body be delivered to the surgeons to be dissected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in nowise to be buried without dissection. And during the short, but awful, interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge, upon good and sufficient cause, to respite the execution, and relax the other restraints of this act. 4 Bl. Comm. 200. Fost. 107. 141.] [By 7 Geo. 4. c. 28. §. 6. benefit of clergy is abolished altogether.]

But there is a particular kind of manslaughter from which the benefit of clergy is taken away by the (a) 1 Jac. 1. c. 8. "Where any person shall stab or thrust any person or persons, that hath not then any weapon drawn, or that hath not then first stricken the party that shall so stab or thrust, so as the person or persons, so stabbed or thrust, shall thereof die within the space of six months then next following; although it cannot be proved that the same was done of malice forethought, the offender is ousted of clergy, provided it shall not extend to him that kills *se defendendo*, or by misfortune, or in preserving the peace, or chastising his child or servant."

[This statute was made at a critical time, and, as tradition hath it, upon a very special occasion. It is supposed to have been principally intended to put an effectual stop to out-

rages then frequently committed by persons of inflammable spirits and deep resentment; who, wearing short daggers under their clothes, were too well prepared to do quick and effectual execution upon provocation extremely slight. Fost. Cr. Law, 2. 7.] (a) It is generally holden, that this statute is but declarative of the common law. Buls. 87. Kelyng, 55. Hawk. P. C. c. 50. § 5. ["Whether it was merely a declaratory law," saith Sir M. Foster, "I will not take upon me to determine. But certain it is, that though the words descriptive of the offence are very general, probably *in terrorem*, yet in the construction of the statute the circumstances which at common law will serve to justify, excuse, or alleviate in a charge of murder, have always had their due weight in prosecutions grounded on the statute." Fost. Cr. Law, 298.]

In the construction of this statute, the following opinions have been holden:—

That wherever a person, who happens to kill another, was struck by him in the quarrel before he gave the mortal wound, he is out of the statute, though he himself gave the first blow. Jon. 240. 3 Lev. 266. Hawk. P. C. c. 50. § 6.

That he only who actually gives the stroke, and not any of those who may be said to do it by construction of law, as being present and aiding and abetting the fact, are within the statute; from whence it follows, that if it cannot be proved by whom the stroke was given, none can be found guilty within the statute. But the indictment, though formed specially upon the statute, and concluding *contra formam stat.*, is yet a good indictment of manslaughter against them that were present aiding and abetting; and upon such a special indictment of manslaughter upon the statute, the prisoner may be convicted of simple manslaughter, and acquitted of manslaughter upon the statute, and the indictment serves for a common manslaughter, as well as a man upon an in-

Allen, 44. Salk. 542. pl. 2. Hawk. P. C. c. 50. § 7. Hal. Hist. P. C. 468.

dictment of murder may be acquitted of murder, and convicted of manslaughter.

That the killing of a man with a (a) hammer, or such like instrument, which cannot come properly under the words *thrust* or *stab*, is not a killing within the statute. But it seems that the discharging a (b) pistol, or throwing a pot, or other dangerous weapon at the party, is within the equity of the words *having a weapon drawn*; for penal statutes are construed strictly, and favourably, and equitably for the subject.

Jon. 432.
3 Lev. 266.
Hawk. P. C.
c. 30. § 7.
(a) If the
stabbing or
thrusting were
with a sword
or with a pike-staff, it is within the statute; but if by a shot of a pistol, blow with a sword or staff, *quære*. Hal. Hist. P. C. 470. (b) So, if the party slain had a cudgel in his hand, it is a weapon drawn within this statute; but this must be intended of such a cudgel as might probably do hurt, not a small riding rod or cane. Hal. Hist. P. C. 470.

Hal. Hist.
P. C. 463.

The indictment to oust the prisoner of his clergy must be specially formed pursuant to the statute, *viz.* that he did with a sword, &c. stab the party dead; he having no weapon drawn, nor having struck first; otherwise it will be but a common manslaughter, and the party will have his clergy.

Styl. 86.
Hal. Hist.
P. C. 468.

The indictment need not conclude *contra formam statuti*, no more than in burglary or robbery; for the statute doth not make the offence to be felony, but ousts the prisoner of his clergy, where the crime is so circumstanced as the statute expresseth.

Cro. Jac. 283.
Hal. Hist.
P. C. 468.

But yet it doth not vitiate the indictment, though it do conclude *et sic interfecit contra formam statuti*, and accordingly, for the most part, to this day the indictments upon this statute do conclude *contra formam statuti*. So, it is good with or without such conclusion; but it is best to follow the common usage, because every man doth not readily observe the reason of the omission of that conclusion.

Hal. Hist.
P. C. 468.

Also, the use hath been, in cases of this nature, to prefer two indictments against offenders in this kind, *viz.* one of murder, another upon this statute, and put the prisoner to plead to both; and to charge the jury first with the indictment of murder; and if they find it not to be murder, then to charge them to enquire upon the other bill; because, if convict upon either, the offender is ousted of clergy.

Hal. Hist.
P. C. 470.

In the year 1657, at *Newgate*, before *Glyn*, who then sat as Chief Justice, a man was indicted upon this statute, and a special verdict found, that a bailiff, having a warrant to arrest a man, pressed early into his chamber, with violence, but not mentioning his business. The man not knowing him to be a bailiff, or that he came to make an arrest, snatched down a sword that hung in his chamber, and stabbed the bailiff, whereof he presently died. There was some diversity of opinion among the judges, whether this were within the statute: but at length the prisoner was admitted to his clergy; for though this case was within the words of the statute, and not within the particular exceptions, yet it was held, that this case was never intended in the statute; for the prisoner did not know but that the party came in to rob or kill him, when he thus violently broke into his chamber, without declaring his business.

Upon

[Upon an outcry of thieves in the night-time, a person, who was concealed in the closet, but no thief, was, in the hurry and surprize the family was under, stabbed in the dark. This was holden to be an innocent mistake, and ruled chance-medley. Possibly, observes Sir *M. Foster*, it might have been better ruled manslaughter at common law, due circumspection not having been used; but it was not manslaughter within the statute.]

1 Hale, 42.
474. Cro.
Car. 538.
Sir Wm.
Jones, 429.
Fost. Cr.
Law, 299.

¶ By 3 Geo. 4. c. 38., it is enacted, "That any person convicted of manslaughter shall not be burned in the hand, but shall be liable to be transported for life, or for any term of years as the court shall adjudge; or to be imprisoned only, or imprisoned and kept to hard labour for any term not exceeding three years, or to a pecuniary fine in the discretion of the court; and that the punishment in pursuance of this act shall have the same effects and consequences as burning in the hand."

3 Geo. 4. c. 38.

(As to the law upon the statute 43 Geo. 3. c. 58., against shooting, stabbing, &c. with intent to maim, (now repealed, but, in substance, re-enacted by 9 Geo. 4. c. 31.,) see *ante*, tit. *Maihem*, p. 247, 248.)

(E) Of justifiable Homicide: And herein,

1. As it happens in the due Execution and Advancement of public Justice.

SUCH killing as happens in the due execution and advancement of public justice, is deemed justifiable homicide; the ministers of justice being under the special protection of the law; and therefore, if a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own (*a*) defence, or fly, so that *he cannot possibly be apprehended alive* by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them.

22 Ass. 55.
Bro. Coron.
87. 89.
Stamf. 13.
3 Inst. 221.
Dalt. c. 98.
Cromp. 30.
Fitz. Coron.
192. 258.
Hale's Hist.
P. C. 489.

Hawk. P. C. c. 28. § 11. ¶ *Vide* East, P. C. 305. ¶ (*a*) But, if the prisoner makes no resistance, but flies, and the officer, being fearful lest the prisoner should escape, strikes him, whereof he dies, this is murder. Hale's Hist. P. C. 481. For here was no assault first made by the prisoner, and so it cannot be *se defendendo* in the officer.

So, if an innocent person be indicted of felony, where, in truth, no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose; he may lawfully be killed by him, if he cannot otherwise be taken; for there is a charge against him on record, to which, at his peril, he is bound to answer.

Hawk. P. C.
c. 28. § 12.

So, if a prisoner, endeavouring to break the gaol, assault his gaoler, he may lawfully be killed by him in the affray.

9 Co. 68.
Hal. Hist.
P. C. 481.

¶ In 2 Bos. & Pull. 265. *Chambre J.* said, it was lawful for a private person to do any thing to prevent the perpetration of a felony.

So, if those who are engaged in a riot, or forcible entry, or detainer, stand in their defence, and continue the force, in opposition to the command of a justice of peace, &c., or resist such justice

Hawk. P. C.
c. 28. § 14.

Poph. 121.

justice endeavouring to arrest them, the killing of them may be justified; and so, perhaps, may the killing of dangerous rioters by any private person, who cannot otherwise suppress them, or defend himself from them; inasmuch as every private person seems to be authorized by the law to arm himself for the purposes aforesaid.

Anon.

1 East, P. C.

305.; *et vid*

1 Hale, 460.

¶ Sheriffs' officers having apprehended a man by virtue of a writ against him, a mob endeavoured to rescue the prisoner. In the course of the scuffle, one of the bailiffs having been violently assaulted, struck one of the assailants, a woman, and, as it was thought, had killed her; whereupon, and before her recovery was ascertained, the constable was sent for and charged with the custody of the bailiff who had struck the woman. The bailiffs gave the constable notice of their authority, and represented the violence which had been previously offered to them, notwithstanding which he proceeded to take them into custody upon the charge of murder, and offered to take care also of their prisoner; but the latter was soon rescued by the mob. The woman having recovered, the bailiffs were released by the constable the next morning. On an indictment for an assault and rescue, *Heath J.* was clearly of opinion that the constable and his assistants were guilty, and so directed the jury.¶

Crompt. 30.

Dyer, 326.

Hawk. P. C.

c. 28. § 15.

So, if trespassers in a forest, chase, park, or warren, or any enclosed ground, wherein deer are kept, will not render themselves to the keepers, upon an hue and cry made to stand to the king's peace, but fly from, or defend themselves against them; they may be slain, by force of the statute *de malefactoribus in parcis*, and 3 & 4 W. & M. c. 10.

Plow. 9. b.

Dalt. c. 98.

3 Inst. 221.

37 H. 6. 21. a.

If either of the parties fighting in a combat, allowed by law for the trial of some special cases, be slain, he who kills him is justified; and the death of the other is imputed to the just judgment of God, who is presumed to give the victory to him who fights in the maintenance of truth.

Roll. Rep. 189.

3 Inst. 56.

Crompt. 24

Dalt. c. 98

Hawk. P. C.

c. 28. § 17.

(a) Herein,
says my Lord

If a sheriff, being resisted by one whom he attempts lawfully to arrest in a civil action, or to retake after he has arrested him, unavoidably kill him in the affray, he may justify it; though he never gave back, but stood his ground, and attacked the party. But if a person barely fly from the execution of (a) civil process, the sheriff cannot justify killing him.

Hale, the difference is between civil actions and felonies; that if a man be in danger of arrest by a *capias* in debt or trespass, and he fly, and the bailiff kill him, it is murder; but if a felon fly, and he cannot be otherwise taken, if he be killed, it is no felony; and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods. *Hale's Hist. P. C.* 481; ¶ *sed vide Foster*, 271.¶

Homicide may be justified in the due execution of public justice; but herein those rules must be observed:—

10 Co. 76.

Dalt. c. 98.

22 E. 4. 35. a.

Hawk. P. C.

c. 28. § 4.

¶ *Vide* 8 Term R.
455.¶

1. That the judgment, by virtue whereof the party was put to death, be given by one who had jurisdiction in the cause; for otherwise both judge and officer may be guilty of felony; as, if the court of Common Pleas give judgment on an appeal of death, or justices of peace on an indictment of high treason, and award execution, which is executed. But if justices of peace condemn
a man

a man to death on an indictment of trespass, and he be executed, they only, and not the officers, are guilty of felony; because they had a jurisdiction over the offence, and therefore their proceedings are erroneous only, and not void.

A man hath the liberty of *Infangthef*, the steward of the court gives judgment of death against a prisoner against law: this was a cause of seizure of the liberty, but was not murder in the judge, *quia factum judicialiter licet ignorantè*, 2 R. 3. 10. a. The case of the steward of the liberty of the Abbot of *Crowland*. Hal. Hist. P. C. 454.

The judgment must be executed by the lawful officer; for those ancient opinions, that any one may kill a person attainted of felony, and that a man condemned in an appeal of death is to be executed by the relations of the deceased, are now obsolete: and at this day, even the judge who condemns a man, cannot execute his own sentence; neither can the proper officer do it, but by a lawful command, without being guilty of felony. Hawk. P. C. c. 28. § 7, 8, 9. Hal. Hist. P. C. 455.

The execution must pursue the judgment; therefore if the sheriff behead a man, where beheading is no part of the sentence, it is the general opinion that he is guilty of felony. Hawk. P. C. c. 28. § 10. Hal. Hist. P. C. 455. S. P.

Because an act of deliberate cruelty.

||If a court martial order a man to be flogged, where they have no jurisdiction, and the flogging kills the man, the members who concurred in the order are guilty of murder.|| *Per Heath J.* 4 Taunt. 77.

2. As it happens in the Defence of a Man's Person, House, or Goods.

It is clear, that the killing of a person in the defence of a man's person, house, or goods, is justifiable in the following instances:— As, where a man kills one who assaults him in the highway to rob or murder * him; or the owner of a house, or any of his servants, or lodgers, &c. kills one who attempts to burn it, or to commit in it murder, robbery, or other felony; or a woman kills one who attempts to ravish her; or a (a) servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately, and kills him; for he does it in the height of his surprise, and under just apprehensions of the like attempt upon himself. But in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him. Hawk. P. C. c. 28. § 21. and several authorities there cited. Hal. Hist. P. C. 484. (a) So, of a husband in defence of his wife, a child of his parent, *et c converso*; for the act of the assistant shall have the same construction, in such cases, as the act of the party assisted should have had, if it had been done by himself. Hal. Hist. P. C. 484.—* By 24 H. 8. c. 5. it is no forfeiture for killing a man attempting to commit murder or robbery.

But a man cannot justify the killing another in defence of his house or goods, or even of his person, for a bare private trespass; and therefore he who kills another, who claiming title to his house attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges, after he has forbidden, is guilty of manslaughter; and he, who in his own defence kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him

him only, is guilty of homicide *se defendendo*, for which he forfeits his goods, but is pardoned of course: yet it seems, that a private person, and *a fortiori*, an officer of justice, who happens unavoidably to kill another in endeavouring to defend himself from, or suppress, dangerous rioters, may justify the fact, inasmuch as he only does his duty, in aid of the public justice.

Hawk. P. C.
c. 28.

If a man be dangerously assaulted by another, as with a drawn sword, &c. without any previous affray, though in a town, or other place where help may be expected, and use the same caution to avoid fighting as would make the killing the assailant homicide *se defendendo* only, if there had been a previous affray, and then unavoidably kill the assailant, it seems reasonable that he may justify it.

Dalt. 28.

It seems also, that in some special cases, a man may justify even killing an innocent person; as, where in a shipwreck two persons get upon the same plank, which will not support them both, and one thrusts the other off.

. 438.
March, 5.
Vide supra.

So, if a man be awakened in the night with an alarm that thieves are in his house, and searching for them in the dark, with his sword drawn, happen to kill a person lying hid in part of the house, who in truth had no ill design, and was brought thither by a servant in order to assist in cleaning the house; it seems, he may justify the fact, inasmuch as it hath not the appearance of a fault.

Hawk. P. C.
c. 28. § 2.

But a man shall never justify himself under a necessity which he brought upon himself by his own fault; and therefore, if rioters, wrongfully detaining a house by force, kill the party ejected, or any of his assistants who attack it from without and endeavour to burn it, they are guilty of manslaughter.

Vailor's case,
Fost. Cr. Law,
278.

[The prisoner was indicted for the murder of his brother, and the case upon evidence appeared to be, that the prisoner on the night the fact was committed came home drunk. His father ordered him to go to bed, which he refused to do; whereupon a scuffle happened betwixt the father and son. The deceased, who was then in bed, hearing the disturbance got up, and fell upon the prisoner, threw him down, and beat him upon the ground, and there kept him down, so that he could not escape, nor avoid the blows; and as they were so striving together, the prisoner gave the deceased a wound with a penknife, of which wound he died. The Judges present doubted, whether this were manslaughter or *se defendendo*, and a special verdict was found to the effect here set forth. At a conference of all the Judges of England, it was unanimously holden to be manslaughter; for there did not appear to be any inevitable necessity so as to excuse the killing in this manner.]

Holt, Tracy,
and Bury.

Hawk. P. C.
c. 28. § 3.
(a) But herein
my Lord Hale
says, it is gene-
rally to be
observed, that
in case of any

It seems a reasonable opinion, and countenanced by the old books, that a fact amounting to *justifiable* homicide, being specially (a) pleaded, and proved to the court on an indictment or appeal of murder, the party shall be dismissed without being arraigned, &c. But it is certain, that a fact amounting to *excusable* homicide cannot be so pleaded; but the party must plead not guilty,

guilty, and give the special matter in evidence: also, it is certain, that where a fact amounting to *justifiable* homicide is found by a jury, the party is to be dismissed, without being obliged to purchase a pardon, &c.

indictment, or charge of felony, the prisoner cannot plead any thing by way of justification, as that he did it in his own defence, or *per infortunium*, but must plead not guilty; and, upon his trial, the special matter is to be found by the jury, and thereupon the court gives judgment. Hal. Hist. P. C. 478.

(F) Of excusable Homicide: And herein,

1. Of Homicide *per Infortunium*, or *Chance-medley*.

EXCUSABLE or involuntary homicide is of two kinds. 1st, When it is purely involuntary and casual; as the killing of a man *per infortunium*. 2dly, When it is partly involuntary, and partly voluntary, but occasioned by a necessity which the law allows, which is commonly called homicide *ex necessitate*; as killing a man in one's own defence. Hal. Hist. P. C. 471.

Homicide *per infortunium* is where a man is doing a lawful act, and without intention of bodily harm to any person, and by that act, death of another ensues; as, if a man be shooting at butts or pricks, and by casualty his hand shakes, and the arrow kills a by-stander. Hal. Hist. P. C. 472.

And though the killing of another *per infortunium* be not in truth felony, nor subject the party to a capital punishment; and therefore, in such cases the verdict usually conclude *quodd interfecit per infortunium et non per feloniam*; yet the party forfeits his goods; and though he ought to have, *quasi de jure*, a pardon of course, upon the certificate of the conviction, yet he is not to be discharged out of prison, but bailed to the next term or sessions, to sue out his pardon of course; for though it was not his crime, but his misfortune, yet, because the king hath lost a subject, and that men may be the more careful, he forfeits his goods; and is not presently absolutely discharged of his imprisonment, but bailed. Hal. Hist. P. C. 477.

Also, it is agreed, that no one can excuse the killing of another by setting forth in a special plea, that he did it by misadventure, or *se defendendo*, but that he must plead not guilty, and give the special matter in evidence. Hawk. P. C. c. 29. § 24.

As, where, without any intent of doing hurt, a person chanceth to kill another by the head of a hatchet flying off at work; this being proved in evidence, the party is guilty of homicide *per infortunium* only. Hal. Hist. P. C. 472.

So, where a person happens to kill another by a piece of timber flung down from a house standing out of any road, after loud warning to all persons to stand clear; or by a gun discharged at wild-fowl; or by an unlucky fall or kick at wrestling or football, or other such like sports; or in fighting at barriers; or tilting by the king's command; or by moderate correction of a child, scholar, or servant. But, if the correction be immoderate, the offence will be manslaughter at least; and if the instrument be such

such as apparently endangers life, as, an iron bar, &c. it will be murder.

Hawk. P. C.
c. 29.

So, if a man whip a horse on which another is riding, whereupon he springs out and runs over a child, and kills him, the rider is guilty of homicide *per infortunium*, the other of manslaughter.

Hal. Hist.
P. C. 473.
&c. Hawk.
P. C. c. 29.
[The prisoner came to town in a chaise, and before he got out of it, he fired his pistols, which by accident killed a woman. *King* C. J. ruled it to be manslaughter. *Rex v. Burton*, 1 Stra. 481.]

But, regularly, if the act which occasions the death of a man be a trespass, or cannot but be attended with the manifest danger of hurt to the person of some man, or be of such a nature, that it cannot be used without manifest hazard of life, and there were no deliberate intent of mischief, the killing is esteemed manslaughter; as, if a man kill another by shooting at deer in a third person's park; or by flinging down a piece of timber into a common street or highway, though in work, and after warning to stand clear; or by throwing stones at another wantonly at play; or by tilting without the king's command; or by parrying with naked swords covered with buttons at the points, or with swords in the scabbards.

Hawk. P. C.
c. 29.
Hal. Hist.
P. C. 475.

But, if a man in the execution of a deliberate purpose to commit a felony, or to do a personal hurt to another, or to do any unlawful act, which cannot but manifestly be attended with danger of great personal hurt to some other, happen to kill another, though it be not intended against any one in particular, he is guilty of murder; as, where a man kills another by maliciously beating or wounding him; or by shooting at tame fowl, with an intent to steal them; or by knowingly and deliberately discharging a gun; or throwing a great stone or piece of timber; or riding with a horse, used to strike, among a multitude, though he do it only with an intent to divert himself by frightening them; or by engaging in a riot; or robbing in a park, &c.

[By stat. 10 Geo. 2. c. 31., if any waterman between *Gravesend* and *Windsor* receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported as a felon.]

Fost. Cr.
Law, 261.

A man at the diversion of cock-throwing at *Shrovetide* missed his aim, and a child looking on received a blow from the staff, of which he soon died; this was ruled manslaughter.

2. Of Homicide *se Defendendo*.

Hawk. P. C.
c. 29. § 13.
(a) In homicide *se defendendo* there seems necessary some act to be done by the party killing; for if he be merely passive, this will make it only a killing *per infortunium*; and though it be not felony,

Homicide (a) *se defendendo* is where one is forced to fight on a sudden affray, retreats as far as he can without endangering his own life, and then, and not before, in order to save his life, or to defend his person from a battery, (especially if the assault were in his own house,) gives the other a mortal wound. It is said by some not to be material who struck first. But, if a man attack another upon malice, in such a manner as endangers his life, and then fly to the wall, and kill him, he is guilty of murder.

but though it be not felony,

felony, not being accompanied with a felonious intent, yet it subjects the party to a forfeiture of his goods and chattels. Hal. Hist. P. C. 478. &c.

Regularly, it is necessary that the person, who kills another in his own defence, fly as far as he may to avoid the violence of the assault, before he turn upon his assailant; for though, in cases of hostility between two nations, it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour; because the king and his laws are to be the *vindices injuriarum*; and private persons are not trusted to take capital revenge one of another. Hal. Hist. P. C. 481.

There is malice between *A.* and *B.*, they appoint a time and place to fight, and meet accordingly, *A.* gives the first onset, *B.* retreats as far as he can with safety, and then kills *A.*, who had otherwise killed him; this is murder; for they met by compact and design, and therefore neither shall have the advantage of what they themselves created. Hal. Hist. P. C. 479.

There is malice between *A.* and *B.*, they meet casually, *A.* assaults *B.* and drives him to the wall, *B.* in his own defence kills *A.*; this is *se defendendo*, and shall not be heightened by the former malice into murder; for it was not a killing upon the account of the former malice, but upon a necessity imposed upon him by the assault of *A.* Hal. Hist. P. C. 479.

In *Fleet-street* *A.* and *B.* were walking together, *B.* gave some provoking language to *A.*, *A.* thereupon gave *B.* a box on the ear, they closed, *B.* was thrown down and his arm broken, he runs to his brother's house presently, which was hard by, *C.* his brother, taking the alarm, came out with his sword drawn and made towards *A.* who retreated ten or twelve yards, *C.* pursued him, *A.* drew his sword and made a pass at *C.* and killed him; *A.* being indicted at *Newgate* sessions for murder, the court directed the jury upon the trial to find this manslaughter, not murder; because upon a sudden falling-out; not *se defendendo*, partly because *A.* made the first breach of the peace, by striking *B.* and partly because, unless he had fled as far as might be, it could not, by way of interpretation, be said to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger; and his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon *C.* than to avoid him. And accordingly at last it was found manslaughter, 1671, at *Newgate*. Hal. Hist. P. C. 483.

NONSUIT.

||See Tidd's Practice, 917, *et seq.* (8th ed.)||

- (A) Of the Nature thereof, and how it differs from a *Retraxit*.
 - (B) Who may be Nonsuit.
 - (C) In what Actions there may be a Nonsuit.
 - (D) At what Time a Nonsuit may be.
 - (E) How far the Nonsuit of one shall be the Nonsuit of another.
 - (F) How far a Nonsuit for Part of the Thing in Demand shall be a Nonsuit for the Whole.
 - (G) Of the Effect of a Nonsuit: And herein of its being a peremptory Bar.
-

- (A) Of the Nature thereof, and how it differs from a *Retraxit*.

Co. Lit.

139. a.

2 Lil. Reg.

230.

(a) For the form of the entry, *vide*

Cro. Jac. 213.

2 Leon. 177.

2 Salk. 456.

pl. 6.

(b) That where a plaintiff is nonsuit, if

he will again proceed in the same cause, he must put in a new declaration; for by his being nonsuit, it shall be intended that he had no such cause of suit as he declared in, and so that declaration is void, and he hath no day in court. 1 Lil. Reg. 231. — But a nonsuit by mistake may be set aside, and a *distringas de novo* awarded, for which *vide* Cro. Car. 205. Cro. Jac. 669. Godb. 328. Raym. 38. 75. 2 Salk. 455. — A motion to set aside a nonsuit occasioned by the judge's mistaking the law. Ca. Law and Eq. 515. — Nonsuit discharged, being entered on *nisi prius* without *habeas corpus*. Sid. 164. — * A plaintiff sometimes submits to be nonsuited where the opinion of the judge is against him, the judge giving him leave to move the court to set the nonsuit aside, without costs. — If the judge does not give such leave, but directs a nonsuit, the plaintiff, if he conceives the judge mistaken in the law, may move to set the nonsuit aside; and if the court is of opinion the judge was mistaken, will set same

same aside, and generally without costs: In some particular cases, however, there may be reasons sufficient to induce the court to refuse to set aside the nonsuit, unless the plaintiff will pay costs. ¶ And if an objection is taken by defendant at the trial, and the judge overrules it without reserving the point, and the court are afterwards of opinion that the objection was a good ground of nonsuit, they will only grant a *new trial*, and will not permit a nonsuit to be entered. *Minchin v. Clement*, 1 Barn. & A. 253. ¶ — If there are several defendants, and all found guilty, plaintiff may enter a *noli prosequi* against any one; therefore, if in trover against a defendant executor, and other defendants not executors, there is a verdict against these, and the executors found not guilty, judgment shall not be arrested, for plaintiff may enter *noli prosequi* as to him. *Dale v. Eyre*, T. 24 & 25 Geo. 2. 1 Wils. 306.

A *retraxit* is, when the plaintiff is present in court (as regularly he is ever by intendment of law, till a day be given over, unless it be when a verdict is given, and then he is but demandable); and this is either privative, when the entry is *quòd solemniter exactus non venit, sed a sectâ suâ in contemptum curiæ se retraxit*, &c. or positive, when the entry is *quòd fatetur se, seu cognoscit se ulterius noli prosequi*, &c. It is called a *retraxit*, because that is the effectual word used in the entry, and is (a) a bar to all actions of the like or inferior nature. Co. Lit. 139. a.

A *retraxit* is always of the part of the plaintiff or demandant, and cannot be, unless the plaintiff or demandant be in court in proper person. (b) (a) 8 Co. 58. 52. S. P. laid down as a rule. 4 Mod. 87. S. P. 9 Co. 58. Beecher's case, Cro. Jac. 211. S. C. Co. Lit. 138. b. S. P. (b) *Sed qu.* If plaintiff's counsel, with consent of the attorney, may not consent to a *retraxit*, though the plaintiff is not present in court? A juror is thus frequently withdrawn, when those concerned for the plaintiff clearly see it is for his benefit.

It is held, that a *retraxit* cannot be entered (c) before the plaintiff hath declared, and if entered before, it hath but the effect of nonsuit. Dals. 78. 3 Leon. 19. (c) Whether a *retraxit* may be entered after a general verdict. Cro. Eliz. 465. *dubitatur*.

Debt was brought upon a bond against *A.*, wherein *A.* and *B.* were jointly and severally bound, and after plea pleaded the plaintiff entered a *retraxit*, and in an action after brought against *B.* upon the same bond, whether this should be a bar, between (d) *Dennis and Paine*, Cro. Jac. 551. *dubitatur et adjournatur*. It was said, that a *retraxit* was in nature of a release, and a release to one joint obligor discharged the other; but on the other side it was said to be a bar only by way of estoppel between the parties, whereof no other should take advantage. (d) Jon. 451. S. C. and judgment given for the plaintiff, because of a defect in the plea. March, 95. S. C. *dubitatur*, but varies in the stating

it; for by this report, debt was brought both against *A.* and *B.*, and the plaintiff entered a *retraxit* against *A.*; and whether this was a discharge of *B.*, is made the question. *Vide Cro. Eliz. 762.* * None but the defendant can demand the plaintiff. If neither plaintiff nor defendant appear after cause called, and jury sworn, the only way is to discharge the jury. *Arnold v. Johnston*, Str. 267. *Smith v. Whistler*, Ca. temp. Hard. 305. S. P. If a cause is tried by proviso, there must be a rule given in the office, *fiat nisi prius per proviso si querens fecerit defaultam*; and if there is not, and plaintiff is nonsuited, the nonsuit shall be set aside. *Dodson v. Taylor*, Str. 1055. [*Proude v. Willimote*, 1 Barnard. B. R. 18. acc. But it is sufficient if the defendant obtain this rule any time before the trial. *King v. Pipphet*, 1 Term R. 695.] If it appears on the record, that no issue is joined, the jury must be dismissed. *Heath v. Walker*, Str. 1117. By stat. 14 Geo. 2. c. 17. if plaintiff neglects to bring the issue to trial according to the course of the court, the court, on motion, on notice, shall give judgment as in case of a nonsuit, unless they allow farther time, and defendant shall have costs as in case of a nonsuit. But if in action against two on a joint promise, there is judgment against one by default; and on plaintiff's neglecting to bring issue joined by the other on to trial, rule is obtained for judgment as in case of a nonsuit, yet costs cannot be taxed; for plaintiff could not have been nonsuited on a trial. *Weller v. Goyton*, 1 Bur. 358. A nonsuit at *nisi prius* must be recorded by

by the judge of *nisi prius*, and cannot afterwards be recorded in bank. Gardner v. Davis, 1 Wils. 301. If defendant has obtained a rule for costs for not proceeding to trial, he cannot afterwards move for judgment as in case of nonsuit. Barnes, 313. 314. 316. [Yet, where the plaintiff does not countermand notice of trial, but withdraws the record after the cause is called on, the court will make it a condition for discharging a rule for judgment as in case of a nonsuit, (on a peremptory undertaking to try,) that he shall pay the defendant the costs incurred by omitting to try. *Jordaine v. Sharpe*, 2 H. Bl. 280. ||1 East, 346.|| *Non pros.* for want of declaration, demanded in the country, shall be set aside. Barnes, 311. If a judge of assize directs nonsuit erroneously, there is no remedy. Barnes, 311. [It is now settled, that such nonsuit may be set aside. *Lady Windsor's case*, 4 Burr. 1984.] If plaintiff dies after nonsuit, and before day in bank, it is not helped by the statute, but is error. Barnes, 312. Rule to declare in *C. B.* must be in the office where plaintiff's attorney practises. Barnes, 312. On motion for judgment, as in case of a nonsuit, there is a rule for the plaintiff to enter issue; if he does not, defendant may have *non pros.*, if he enters it the roll must be produced, and defendant may move for a nonsuit; if the court admit cause, why the nonsuit should not, &c. they appoint day for trial; on such motion, there must be an affidavit that the cause is not tried. Barnes, 313. 316. Sickness of plaintiff—marriage of *feme* plaintiff—that the bankrupt did not attend assignees, plaintiffs—that material witnesses were ill—or that the record was offered to be entered, though a little out of time. Barnes, 313, 314, 315, 316. 464. [the insolvency of the defendant since the action brought, *Bailey v. Wilkinson*, Dougl. 671., or, that the cause was carried down and made a *remanet*, *Mewburn v. Langley*, 3 Term R. 1., are sufficient causes to prevent judgment as in case of a nonsuit. ||But where a cause has been made a *remanet* by consent, defendant may move for judgment, if plaintiff withdraw the record. *Gadd v. Bennett*, 2 Barn. & A. 709.|| Indeed, the court of Common Pleas have lately holden, that in all cases where an application is made for the first time for judgment as in case of a nonsuit, it is a sufficient answer to it, to undertake peremptorily to try, without alleging any reason for not having before tried the cause; and that whatever might have been formerly the practice, in future, it should be understood, that the first motion for judgment, as in case of a nonsuit, is only a mode of obtaining a peremptory undertaking to try. *Mallet v. Hilton*, 2. H. Bl. 119. It seems now, by the practice of the courts both of *B. R.* and *C. P.*, that the judgment as in case of a nonsuit cannot be moved for till the third term after that in which issue is joined. *Hall v. Buchanan*, 2 Term R. 734. *Da Costa v. Ledstone*, 2 H. Bl. 558. ||And though in the case of *Frampton v. Payne*, in *C. P.*, 1 H. Black. 64., it was held that the motion might be made the next term, where issue was joined in the six first days of the preceding term, yet that case seems now to be overruled. *Baker v. Newman*, 1 H. Black. 123. *Woulfe v. Sholls*, *ibid.* 282. *Munt v. Tremamondo*, 4 Term R. 557. *Tidd's Prac.* 806, 807. (7th edit.) But if notice of trial has been actually given in a *town* cause for a sitting in or after term, the defendant in *K. B.* and *C. P.* may move for judgment in the next term. *Hay v. Howell*, 2 N. R. 397. *Tidd's Pract. ubi sup.*; *et vide* 2 Saund. 336, b. c.|| Replevins and actions *qui tam* are within the statute. Barnes, 315. 317. ||And an affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge the rule in a *qui tam* action, as well as any other. *Stone v. Farey*, 1 East, 554., *et vide* 7 Term R. 178. Affidavit that plaintiff did not try, because his attorney heard that a material witness would not be found in time for trial, held sufficient. *Robinson v. Chapman*, MSS. M. 1827, K. B.|| [A replevin is not within the statute; for in replevin both parties are actors, and the defendant may carry down the record by proviso. *Jones v. Concannon*, 3 Term R. 661. *Shortridge v. Hiern*, 5 Term R. 400. Judgment as in case of a nonsuit may be given in a traverse of a return to a *mandamus*. *Rex v. Mayor, &c. of Stafford*, 4 Term R. 689.]] So also in a writ of right, *Almgill v. Pierson*, 1 Bos. & P. 103.|| If plaintiff was ready, but the cause did not come on, because the view was not returned by six jurors, judgment shall not be signed. Barnes, 498. If defendant has obtained a rule for judgment *nisi*, the court will not give plaintiff leave to amend his declaration by striking out allegation, but judgment shall be absolute. Barnes, 318. Judgment as in case of a nonsuit, may be moved for without term's notice, though no proceedings in a year. Barnes, 308. ||5 Term R. 634.|| In replevin, if plaintiff does not appear at the trial, but defendant brings down record, nonsuit shall be entered, and not verdict for defendant; if it is, it shall be so amended at defendant's cost. Barnes, 458. [Where a plaintiff has once proceeded to trial, judgment as in case of a nonsuit cannot be entered for not proceeding to a new trial. *Porzelius v. Maddocks*, 1 H. Bl. 101.]] If plaintiff defers proceeding, in order to await a decision of a similar question in another cause, he will not be relieved against a rule for judgment, as in case of nonsuit, unless he shew to the court what is the point to be decided, and in what cause. *Wynn v. Bellman*, 6 Taunt. 122. But if plaintiff oppose the rule, on ground that documentary evidence could not be procured in time, he need not state what the evidence is. *Greenhill v. Michell*, 6 Taunt. 150. The court will not entertain the motion pending a demurrer. *Butcher v. Kiernan*, 2 Marsh. 364. But after judgment for defendant, on demurrer to special pleas, there may be judgment of nonsuit against plaintiff for not proceeding to trial on other issues. *Paxton v. Popham*, 10 East, 366.||

(B) Who

(B) Who may be Nonsuit.

IT is every where agreed that the king, being in supposition of law always present in court, cannot be nonsuit in any information or action wherein he himself is the sole plaintiff. But it is held, that any informer *qui tam*, or plaintiff in a popular action, may be nonsuit, and thereby wholly (a) determine the suit, as well in respect of the king as of himself.

on the merits, and if such plaintiff, by collusion with the defendant, does not proceed, whether the king may not proceed for his share of the penalty? — In a *qui tam* action, judgment as in case of a nonsuit may be entered on a rule to shew cause. *Watson v. Johnson*, P. 25 G. 2. 1 Wils. 325.

If an infant bring an assize by guardian, although that the infant disavow the suit in proper person, yet no nonsuit shall be awarded.

Where an executor need not name himself executor, he shall pay costs upon a nonsuit, and the naming himself executor shall not exempt him from it.

If an attorney of Common Pleas is sued in an action there, he shall not be demanded, because he is supposed always present aiding the court.

(C) In what Actions there may be a Nonsuit.

A PERSON may be nonsuit in a writ of error.

A person may be nonsuit in a writ of false judgment.

One cannot be nonsuit in any action in which he is not an actor or demandant; and though he afterwards become an actor, yet, not being originally so, he cannot be nonsuit as an avowant. So, of garnishees who become actors, but were not so originally.

So, if a person outlawed hath a charter of pardon, and sues a *scire facias* against the party, though hereby he is an actor, yet he cannot be nonsuit.

So, if a man traverse an office he cannot be nonsuit, although he is actor, for he hath no original pending against the king.

But in a petition of right against the king the plaintiff may be nonsuit.

So, in an *audita querela* to avoid a statute, the plaintiff may be nonsuit, for he is plaintiff in this action.

If to two *nihils* returned on a *scire facias* on a charter of pardon, the plaintiff does not appear, he shall be nonsuit; for the statute ordains, that upon his appearing he ought to count against the defendant.

¶ In ejectment if the defendant do not appear at the trial, and confess lease entry, and ouster, according to the consent rule, the

Bro. Nonsuit, 68.

Co. Lit.

139. b.

Roll. Abr. 151.

(a) But *qu.* if this does not mean a nonsuit

choose to pro-

ceed, whether the king may not proceed for his share of the penalty? — In a *qui tam* action,

judgment as in case of a nonsuit may be entered on a rule to shew cause. *Watson v. Johnson*,

P. 25 G. 2. 1 Wils. 325.

39 Ass. pl. 1.

2 Roll. Abr.

130. S. C.

6 Mod. 181.

20 H. 6. 44.

b. Roll. Ab.

581. S. C.

2 Roll. Abr.

130. S. C.

22 E. 4. 10.

2 Roll. Abr.

130.

11 H. 4. 52.

2 Roll. Abr

130.

47 E. 3. 5. b.

45 E. 3. 16.

¶ See 1 Camp.

484.¶

Tidd's Prac.

918. (8th edit.)

the

the practice is to call the defendant, and on his non-appearance or refusal to comply with this rule, to call the plaintiff and nonsuit him, and then at the plaintiff's instance the cause of nonsuit is indorsed upon the *postea*, which entitles the plaintiff to judgment against the casual ejector when the *postea* is returned into court. If there be several defendants and some of them refuse to appear, and confess, it is the practice to proceed against those who do appear, and enter a verdict for those who do not, indorsing upon the *postea* that such verdict is entered for them because they do not appear and confess; and the plaintiff's lessor will then be entitled to his costs against such defendants, and to judgment against the casual ejector for the lands in their possession.

1 G. 4. c. 87.
Tidd's Prac.
918. (8th ed.)

But in ejectment by landlord against tenant on the statute 1 Geo. 4. c. 87. § 2., whenever it shall appear upon the trial, that such tenant or his attorney has been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of confession of lease, entry, and ouster; but the production of the consent rule, and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry, and ouster; and the Judge before whom such cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein, and the jury on the trial, finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits. Provided always, that nothing therein contained shall be construed to bar any such landlord from bringing an action of trespass for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment.||

(D) At what Time a Nonsuit may be.

Co. Lit. 139. b.
That at common law if the did not like he damages given

AT the common law, upon every continuance, or day given over before judgment, the plaintiff was demandable, and upon his non-appearance might have been nonsuit.

But now by the 2 H. 4. c. 7. it is enacted in the words following:—"Whereas, upon verdict found before any justice in assise of *novel disseisin*, *mort d'ancestor*, or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law, upon the matter so found; it is ordained and established, that if the verdict pass against the plaintiff, that the plaintiff shall not be nonsuited."

But

But notwithstanding this statute it hath been held, that the plaintiff may be nonsuited after a special verdict, or after a demurrer and (a) argument thereupon.

3 Leon. 28.; *et vide* 2 Hawk. P. C. c. 23. § 95. (a) In debt upon an obligation, upon demurrer, the case being argued, the opinion of the court was against the plaintiff, and rule given, that judgment should be entered for the defendant; and the plaintiff prayed that he might be nonsuited; and because he had the same term appeared, and argued by his counsel, and had prayed judgment, he could not be nonsuited the same term. Cro. Jac. 55.

If there be judgment to account, and auditors assigned, and thereupon a *capias ad computandum*, the plaintiff cannot be nonsuited on the original, because the original is determined by the judgment to account.

If the defendant wages his law, and a day is given him over to another term to make his law, if the plaintiff does not appear that day he will be nonsuited: otherwise, if he wages his law immediately, or, as some hold, on a day in the same term.

¶ After a plea of tender it is said plaintiff cannot be nonsuited (b); but it is the practice to nonsuit him if he cannot make out his case after paying money into court. (c)

Where a cause is undefended at *nisi prius*, and the judge directs a nonsuit, with liberty to the plaintiff to move to enter a verdict, the court may order a verdict to be entered accordingly for the plaintiff.

When a cause is carried down by proviso, and the plaintiff does not appear at the trial, he should be nonsuited: but where a verdict in such case was taken for the defendants by mistake, instead of a nonsuit, the court, though this was irregular, would not permit the plaintiff to set it aside, unless he would consent to a nonsuit being entered.]]

(E) How far the Nonsuit of one shall be the Nonsuit of another.

IN real or mixt actions, the nonsuit of one demandant is not the nonsuit of both; but he that makes default shall be summoned and severed: but regularly, in personal actions, the nonsuit of the one is the nonsuit of both.

But in personal actions, brought by executors, there shall be summons and service, because the best shall be taken for the benefit of the dead; and so it is in action of trespass by them, as executors, for goods taken out of their own possession. Like law in account by them, as executors, by the receipt of their own hands.

In an (*d*) *audita querela* concerning the personalty, the nonsuit of the one is not the nonsuit of the other; because it goeth by way of discharge, and freeing themselves, and therefore the default of the one shall not hurt the other.

nonsuit of one shall not prejudice the other. 6 Co. 26.

Co. Lit. 159. a. In a *quid juris clamat* the nonsuit of the one is the nonsuit of both, because the tenant cannot attorn according to the grant.

Co. Lit. 139.
a. b. 2 Roll.
Abr. 153.
(a) But where
a plaintiff may
enter a *nolle
prosequi*
against one,

Some actions follow the nature of those actions whereupon they are grounded; as, the writs of error, attain, *scire facias*, and the like. If a real action be brought by several *præcipes* against two or more, if the demandant be nonsuit against one, he is nonsuit against (a) all; for, as to the demandant, it is but one writ under one *teste*.

and have judgment against the rest, *vide* 2 Roll. Abr. 101. Cro. Car. 259. 243. Hob. 70. 180. Carth. 19. 3 Mod. 101.

Cro. Eliz.
460. pl. 6.
Dyer, 120.
2 Roll.
Abr. 153.
Sid. 587.

In an appeal against divers, whether they plead the same or several issues, it hath been adjudged, that a nonsuit against one, at the trial of any one of the issues, is a nonsuit as to all, because such a nonsuit operates in nature of a release to the whole.

2 Salk. 455.
pl. 1.
Comyns, 74.
(b) There is
a nonsuit
before ap-
pearance at
the return

A *latitat* was sued out against four defendants in trespass, the plaintiff was nonsuit for (b) want of a declaration, and the defendant's attorney entered four nonsuits against him; and it was held to be irregular, because the trespass is joint; and though the plaintiff may count severally against the defendants, yet it remains joint till it is severed by the count.

of the writ, or after appearance at some day of continuance. Co. Lit. 138. b.

Harris v.
Butterley,
Cowp. 483.

[In trespass against several, if any of them suffer judgment by default, the plaintiff cannot be nonsuited.]

Hannay v.
Smith, 5 Term R. 662.

|| And the rule is the same in *assumpsit*. ||

(F) How far a Nonsuit for Part of the Thing in Demand shall be a Nonsuit for the Whole.

2 Leon. 177.
Hob. 180.
|| *Vide* 10 East,
366. acc. ||

IT is laid down as a general rule, that a nonsuit for part is a nonsuit for the whole. But it hath been held, that if a defendant plead to one part, and thereupon issue be joined, and demur to the other, the plaintiff may be nonsuit as to one part, and proceed for the other.

2 Roll. Abr.
154.

If in debt the defendant acknowledges the action as to part, and joins issue as to the residue, and the plaintiff hath judgment for that which is so confessed, but there is a *cessat executio*, by reason of the damages to be assessed by the jury; if the plaintiff be nonsuited in this issue, this shall not be a nonsuit for the damages to be given, because that he had judgment.

2 Leon. 177.
Sir John Sands
v. Packsal
Brocas.

If in trover for divers goods the defendant pleads, that as to some of the goods they were fixed to his freehold, as to others that he had them of the gift of the plaintiff, and as to the rest not guilty; and as to the first, the plaintiff enters *non vult ulterius prosequi*; this amounts only to a *retrahit*, and is no nonsuit, so as to bar the plaintiff from proceeding on the other parts of the plea, on the rule, that a nonsuit for part is a nonsuit for the whole.

(G) Of

(G) Of the Effect of a Nonsuit: And herein of its being a peremptory Bar.

A NONSUIT, as hath been observed, is regularly no peremptory bar; but the plaintiff may, notwithstanding, commence any new action of the same or like nature. But this general rule hath the following exceptions:—

1. It is peremptory in a *quare impedit*; and in that action a discontinuance is also peremptory; and the reason is, for that the defendant had, by judgment of the court, a writ to the bishop; and the incumbent, that cometh in by that writ, shall never be removed; which is a flat bar to that presentation. Co. Lit. 159. a.

2. Nonsuit in an appeal of murder, rape, robbery, &c. after (a) appearance, is peremptory, and this *in favorem mitæ*. (b) But the nonsuit of the plaintiff in an appeal is not such an acquittal, on which the defendant shall recover damages against the abettors, by West. 2. c. 12., unless after the nonsuit he were arraigned at the king's suit upon the appeal, and acquitted. Co. Lit. 159. a.
(a) But the bare taking out of a writ of appeal, and causing it to be delivered of record to the

sheriff, and a nonsuit upon it, is no bar of a second appeal; because it doth not appear of record, but that it might be done by a stranger; and therefore the nonsuit must be after an appearance in proper person of record. 2 Hawk. P. C. c. 25. § 181. (b) 2 Inst. 585.

3. So, if the plaintiff, in an appeal of mayhem, be nonsuit after appearance, it is peremptory; for the words therein are *felonice mayhemavit*. Co. Lit. 159. a.

4. A nonsuit after appearance is also peremptory in a *nativo habendo*, and the nonsuit of one plaintiff in that action nonsuits both *in favorem libertatis*. But in a *libertate probandâ* such nonsuit is not peremptory; neither is the nonsuit of one plaintiff the nonsuit of both. Co. Lit. 159. a.
Cro. Eliz. 881.

5. Such nonsuit is also peremptory in an attaint, but a discontinuance in an attaint is not, because there is a judgment given upon the nonsuit, but not upon the discontinuance. Co. Lit. 159. a.

NUISANCES.

A COMMON nuisance is an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires. 2 Roll. Abr. 85.
Hawk. P. C. c. 75.

Under which description we shall consider,

(A) What shall be said a Nuisance: ||And herein of unlicensed Players, and illegal Joint Stock Companies.||

- (B) How far the Indictment must charge it to be an Annoyance to all the King's Subjects.
- (C) How a Nuisance is to be removed or abated.
- (D) How the Offence is punishable.

For Nuisances relating to the Highways, *vide* title "HIGHWAYS."

For those relating to Bridges, tit. "BRIDGES."

For those relating to Public-houses, tit. "INNS AND INN-KEEPERS."

||*Vide* also tit. "ACTION ON THE CASE."||

- (A) What shall be said a Nuisance: ||And herein of unlicensed Players, and illegal Joint Stock Companies.||

5 Inst. 205.
Kitchen, 11.
Hawk. P. C.
c. 75. § 6.
2 Burr. Rep.
1232.

Salk. 548.
pl. 55.
The Queen v.
Williams.

Hawk. P. C.
c. 75. § 6.
||*Vide* tit.
Gaming.||

(a) Trin.
2 G. 1. The
King v. Dixon.

Mod. 76.
2 Keb. 846.
3 Keb. 464.
Vent. 169.
5 Mod. 142.
Hawk. P. C.
c. 75. § 6.

IT is clearly agreed, that keeping a bawdy-house is a common nuisance, as it endangers the public peace, by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness.

Also it hath been adjudged, that this is such an offence of which a feme covert may be guilty as well as if she were sole; and that she, together with her husband, may be indicted and condemned to the pillory for keeping a bawdy-house; for the keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband; and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex.

It is clearly agreed, that all common gaming-houses are nuisances in the bye of the law, being detrimental to the public, as they promote cheating and other corrupt practices, and incite to idleness, and avaricious ways of gaining property, great numbers, whose time might otherwise be employed for the general good of the community. Also, it hath been (a) adjudged, that this is such an offence for which a feme covert may be indicted; for as, in the preceding case, the wife may be concerned in acts of bawdry, so here she may be active in promoting gaming, and furnishing the guests with all conveniencies for that purpose.

It seems to be the better opinion, that all common stages for rope-dancers, &c. are nuisances, not only because they are great temptations to idleness, but also because they are apt to draw together numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood.

But

But it seems the better opinion, that playhouses, having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident: as, where they draw together such numbers of coaches or people, &c. as prove generally inconvenient to the places adjacent; or, when they pervert their original institution, by recommending vicious and loose characters under beautiful colours to the imitation of the people, and make a jest of things commendable, serious, and useful.

And now for the better regulation of players and playhouses, by the 10 G. 2. c. 28. it is enacted, "That every person who shall for hire, gain, or reward, act, represent, or perform, or cause to be acted (*a*), represented, or performed, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, in case such person shall not have any legal settlement in the place where the same shall be acted, represented, or performed, without authority by virtue of letters patent from his majesty, his heirs, successors, or predecessors, or without licence from the lord chamberlain of his majesty's household for the time being, shall be deemed to be a rogue and a vagabond, within the intent and meaning of the 12 Ann. stat. 2. c. 23. and shall be liable and subject to all such penalties and punishments, and by such methods of conviction, as as are inflicted on, or appointed by the said act for the punishment of rogues and vagabonds who shall be found wandering, begging, and mis-ordering themselves, within the intent and meaning of the said act."

And by § 2. it is further enacted, "That if any person, having or not having a legal settlement as aforesaid, shall, without such authority or licence as aforesaid, act, represent, or perform, or cause to be acted, represented, or performed, for hire, gain, or reward, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, every such person shall, for every such offence, forfeit the sum of 50*l*.; and in case the said sum of 50*l*. shall be paid, levied, or recovered, such offender shall not, for the same offence, suffer any of the pains or penalties inflicted by the said recited act."

And by § 3. it is further enacted, "That no person shall for hire, gain, or reward, act, perform, represent, or cause to be acted, performed, or represented, any new interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any new prologue or epilogue, unless the copy thereof be sent to the lord chamberlain of the king's household for the time being, fourteen days at least before the acting, representing, or performing thereof, together with an account of the playhouse or other place where the same shall be, and the time when the same is intended to be first acted, represented, or performed, signed by the master or manager,

Rushworth's Coll. part ii. vol. i. fol. 220. 247. Roll. R. 109. 5 Mod. 142. Skia. 625. pl. 21.

And see 25 G. 2. c. 56. made perpetual by 28 G. 2. c. 19. for preventing thefts and robberies, regulating places of public entertainment, and punishing persons keeping disorderly houses. And note: these sort of players are within the description of the vagrant act 17 G. 2. c. 5. ¶ But this is repealed by 5 G. 4. c. 85., so that players are no longer within the penalties of the vagrant acts; and see Burn. Just. 659. (25th ed.)] * By 25 G. 2. c. 56. § 2. houses and gardens of entertainment in London and Westminster, or within twenty miles thereof, are not to be kept without licence. — By 30 G. 2. c. 24. § 14. penalties are inflicted on publicans permitting journeymen

to game in
their houses.

||(a) See Rex
v. Glossop,
4 Barn. & A.
616.||

“ or one of the masters or managers of such playhouse, or place,
“ or company of actors therein.”

And it is further enacted by § 4. “ That it shall and may be
“ lawful to and for the said lord chamberlain for the time being,
“ from time to time, and when and as often as he shall think fit,
“ to prohibit the acting, performing, or representing any inter-
“ lude, tragedy, comedy, opera, play, farce, or other entertain-
“ ment of the stage, or any act, scene, or part thereof, or any
“ prologue or epilogue; and in case any person or persons shall
“ for hire, gain, or reward, act, perform, or represent, or cause
“ to be acted, performed, or represented, any new interlude,
“ tragedy, comedy, opera, play, farce, or other entertainment of
“ the stage, or any act, scene, or part thereof, or any new pro-
“ logue or epilogue, before a copy thereof shall be sent as afore-
“ said, with such account as aforesaid; or shall for hire, gain,
“ or reward, act, perform, or represent, or cause to be acted,
“ performed, or represented, any interlude, tragedy, comedy,
“ opera, play, farce, or other entertainment of the stage, or any
“ act, scene, or part thereof, or any prologue or epilogue, con-
“ trary to such prohibition as aforesaid; every person so offend-
“ ing shall, for every such offence, forfeit the sum of 50*l.*; and
“ every grant, licence, and authority (in case there be any such),
“ by or under which the said master or masters, manager or
“ managers, set up, formed, or continued such playhouse, or
“ such company of actors, shall cease, determine, and become
“ absolutely void, to all intents and purposes whatsoever.”

Provided, § 5. “ That no person or persons shall be authorized,
“ by virtue of any letters patent from his majesty, his heirs, suc-
“ cessors, or predecessors, or by the licence of the lord cham-
“ berlain of his majesty’s household for the time being, to act,
“ represent, or perform for hire, gain, or reward, any interlude,
“ tragedy, comedy, opera, play, farce, or other entertainment
“ of the stage, or any part or parts therein, in any part of *Great*
“ *Britain*, except in the city of *Westminster*, and within the liber-
“ ties thereof, and in such places where his majesty, his heirs or
“ successors, shall in their royal persons reside, and during such
“ residence only.”

And it is further enacted by § 6. “ That all the pecuniary
“ penalties inflicted by this act, for offences committed within
“ that part of *Great Britain* called *England*, *Wales*, and town of
“ *Berwick upon Tweed*, shall be recovered by bill, plaint, or in-
“ formation in any of his majesty’s courts of record at *Westmin-*
“ *ster*, in which no essoin, protection, or wager of law shall be
“ allowed; and for offences committed in that part of *Great*
“ *Britain* called *Scotland*, by action or summary complaint
“ before the court of sessions or justiciary there; or for offences
“ committed in any part of *Great Britain*, in a summary way,
“ before two justices of the peace for any county, stewartry,
“ riding, division, or liberty, where any such offence shall be
“ committed, by the oath or oaths of one or more credible wit-
“ ness or witnesses, or by the confession of the offender, the same
“ to

“ to be levied by distress and sale of the offender’s goods and chattels, rendering the overplus to such offender, if any there be, above the penalty and charge of distress ; and for want of sufficient distress, the offender shall be committed to any house of correction in any such county, stewardry, riding, or liberty, for any time not exceeding six months, there to be kept to hard labour, or to the common gaol of any such county, stewardry, riding, or liberty for any time not exceeding six months, there to remain without bail or mainprise ; and if any person or persons shall think him, her, or themselves aggrieved by the order or orders of such justices of the peace, it shall and may be lawful for such person or persons to appeal therefrom to the next general quarter sessions, to be held for the said county, stewardry, riding, or liberty, whose order therein shall be final and conclusive ; and the said penalties against this act shall belong, one moiety thereof to the informer, or person suing or prosecuting for the same, the other moiety to the poor of the parish where such offence shall be committed.”

And it is further enacted by § 7. “ That if any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any act, scene, or part thereof, shall be acted, represented, or performed, in any house or place where wine, ale, beer, or other liquors shall be sold or retailed, the same shall be deemed to be acted, represented, and performed for gain, hire, and reward.

“ Provided that every prosecution, for any offence within this act, shall be commenced within six calendar months after the offence is committed.”

[Tumbling is not an entertainment of the stage within the meaning of the above act.]

Rex v. Hand-
y 6 Term
R. 286.

It was formerly held, that the erecting of a dovehouse on a man’s own frank-tenement was a nuisance, because the pigeons (a) and doves were to be accounted tame animals, inasmuch as they had *animum revertendi* ; and that therefore whoever erected such houses, were answerable for the damages done by them ; and because they were not liable to every man’s action, to avoid multiplicity of suits, it was thought a matter indictable in the leet. But the contrary opinion has prevailed ; because it was allowed the lord of the manor might erect, or permit by his licence any person to erect, a dovehouse, which he could not do if it were a nuisance, every nuisance being *malum in se*. Besides, these animals are rather to be accounted *feræ naturæ* ; and by consequence, the only remedy any person had, for the damage sustained by the birds feeding on his ground, was to kill them and take them to himself, which was the proper relief according to the common law ; inasmuch as the birds were accounted no man’s property. But it is said, that a dovecote newly erected in a manor, without the lord’s licence, is a good ground for an action on the case, at the suit of the lord.

2 Roll. Abr. 138.
Poph. 148.
Cro. Jac. 382.
Godb. 259.
Cro. Eliz. 548.
Roll. Rep. 156.
200. 2 Roll.
Rep. 3, 4. 34.
5 Co. 104.
Moor, 238.
(a) As to
pigeons see
1 Jac. 1. c. 27.,
amended by
2 G. 2. c. 29.

It is clearly agreed to be a nuisance to dig a ditch, or make a hedge overthwart a highway, or to erect a new gate, or to lay logs

*Vide tit. High-
ways, letter (E).*
Jon. 221.

Cro. Car. 104.
Bulst. 203.
2 Roll. Abr. 137.

logs of timber in it; or generally to do any other act which will render it less commodious. But it seems that a gate, which has continued time out of mind, is no nuisance; but that the same may be justified by prescription, being at first intended to have been set up by consent, on a composition with the owner of the land, on the laying out the road; in which case, the people had never any right to a freer passage than what they still enjoy.

Noy, 103.
3 Kcb. 640.
759.

And as navigable rivers are deemed highways, it is a nuisance to divert part of the river, whereby the current of it is weakened, and made unable to carry vessels of the same burden as it could before. Also, the laying of timber in a common river, though the soil belong to the party, is equally a nuisance as if the soil was not his, if thereby the passage of boats, &c. is obstructed. And hence also it seems to follow, that private stairs from those houses that stand by the *Thames* into it are common nuisances. But it seems, that where there are cuts made in the banks, that are not annoyances to the river, the timber lying there is no nuisance.

Rex v. Lord
Grosvenor and
others, 2 Stark.
511.

|| A wharf erected on the *Thames* between high and low water mark, and which occupied the place of a former recess, was held to be a public nuisance, since it deprived the public of the convenience of refuge in this recess in case of storm, and also of an eddy which was convenient to the navigation. And although the defendant claimed the wharf as lessee under the conservators of the river, it was held he had no right to make the erection.

Rex v. Russell,
6 Barn. & C.
566.

Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there for loading ships with coals, the jury were directed by the learned judge to acquit the defendants if they thought that the abridgment of the right of passage occasioned by those erections was for a public purpose, and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and he pointed out to the jury, that by means of the staiths coals were supplied at a cheaper rate, and in better condition than they otherwise could be, which was a public benefit. Held by *Holroyd* and *Bayley* Js. that this direction to the jury was proper; Lord *Tenterden* C. J. *dissent.* on the ground that the benefit arising from the staiths to the public ought not to be considered by the jury.||

2 Roll. Abr.
159. pl. 3.

It hath been holden to be a common nuisance, to divide a house in a town for poor people to inhabit in; by reason whereof it will be more dangerous in the time of infection of the plague.

Rex v. Sutton,
4 Burr. 2116.

Rex v. Vantandillo,
4 Maul. & S. 73.

|| So, an inoculating house for the small-pox seems to be indictable as a nuisance; and it is an indictable nuisance to carry a person infected with a contagious disorder along a public highway where persons are passing.

Rex v. Burnett, *ibid.* 272.
Rex v. Dixon,
3 Maul. & S. 11.

And mixing alum with bread to such an extent that crude lumps of alum were found in the bread, was held an indictable offence.||

6 Mod. 145.
The Queen
v. Leich.

Bringing a great ship of 300 tons into *Billingsgate-dock*, though a common dock, yet being only so for small ships coming with provision

provision to the markets of *London*, is a nuisance; in the same manner, as a man using with his cart a common pack and horse way, so as to plough it up, and thereby render it less convenient to riders, is a nuisance indictable.

It seems the better opinion, that a brewhouse, glasshouse, chandler's shop, sty for swine, set up in such inconvenient parts of a town, that they cannot but greatly incommode the neighbourhood, are common nuisances.

2 Roll. Abr.
159. Cro.
Car. 510.
Hut. 156.
Palm. 556.

Vent. 26. Keb. 500. 2 Salk. 458. pl. 5. 760. pl. 7. 2 Ld. Raym. 1163.

[Buildings for making acid spirit of sulphur, whereby the air was impregnated with noisome and offensive stinks in a parish, near the king's highway, and near several dwelling-houses, were declared a nuisance.

1 Burr. 553.
&c., in the
case of the
late Doctor
Ward's erec-
tions at Twickenham.

||And it is not necessary that the smell should be *unwholesome*; it is enough if it renders the enjoyment of life and property *uncomfortable*.

1 Burr. 537.

So an indictment for erecting a mill for steeping sheep-skins in water, near to and adjoining the highway and several dwelling-houses, by which the air was corrupted, was held good.

Rex v.
Pappineau,
1 Stra. 686.;
et vide 2 Stark.
Ca. 458.

But where the indictment was for a nuisance in erecting furnaces and ovens for burning coke, the judge directed an acquittal, although it appeared that the sulphureous smoke was very offensive to the inhabitants of the adjoining houses; that the furniture was spoiled, and that flakes of fire often came from the flue of the furnace; but the houses were all inhabited, and not diminished in value; and the judge said, that to constitute a nuisance, it must appear that the grievance was either destructive to the general health of the inhabitants, or rendered their dwellings uncomfortable or untenantable.

Rex v. Davey,
5 Espin. 217.

And where the defendant was indicted for erecting a noisome melting-house in a neighbourhood where other noxious manufactories had been carried on for many years, Lord *Kenyon* left it to the jury to consider whether the nuisance was much increased by this addition of the defendant, and the defendant was acquitted.

Rex v.
B. Neville,
Peake's Ca.
90.; and see
Rex v. Watts,
1 Moo. &
Malk. 281.

So, where it appeared that the offensive manufacture had been carried on near fifty years, Lord *Kenyon* directed a verdict of not guilty; but in a subsequent case, Lord *Ellenborough* C. J. said, it was immaterial how long a practice had prevailed, for no length of time would legitimate a nuisance; and his lordship added, "The stell fishery across the river at *Carlisle* had been established for a vast number of years, but Mr. Justice *Buller* held that it continued unlawful, and gave judgment that it should be abated."

Rex v.
S. Neville,
Peake, Ca. 92.

Rex v. Cross,
3 Camp.
227.; *et vide*
7 East, 199.
4 Esp. 111.

It seems that erecting gunpowder-mills, or keeping gunpowder-magazines near a town, is a nuisance by the common law, for which an indictment or information will lie; and the making, keeping, or carrying of too large a quantity of gunpowder at one time, or in one place or vehicle, is prohibited by the statute

Vide Russell
on Crimes,
v. 1. p. 451.

Williams v.
E. I. Comp.
3 East, 192.
201.

12 Geo. 3. c. 61. And it appears that persons putting on board a ship an article of combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, will be guilty of a misdemeanor.||

It is enacted by 9 & 10 W. 3. c. 7. "That it shall not be lawful for any person to make or cause to be made, or to sell or utter, or offer or expose to sale, any fire-works, or any cases, moulds, or implements for making the same, on pain of 5*l*. on conviction before one magistrate on the oath of two witnesses: or, for any person to permit fire-works to be cast, thrown, or fired from, out of, or in his house, lodging, or habitation, or from, out of, or in any part or place thereto belonging or adjoining, into any public street, highway, road, or passage, on pain of 20*s*. on conviction as aforesaid: or for any person to cast, throw, or fire, or to be aiding or assisting therein, on pain of 20*s*., and that every such offence is and shall be adjudged a common nuisance."

See too
17 G. 2. c. 5.
27 G. 3. c. 1.

||Vide the

lottery acts, collected, Burn's Just. Gaming, III.||

||Now repealed.
See p. 795.||

By 10 & 11 W. 3. c. 17. all mischievous games, called lotteries, and all other lotteries, are declared to be public and common nuisances.

By 6 G. 1. c. 18. § 19. "All undertakings, attempts, and projects by public subscriptions, for adventuring on certain schemes of commerce, tending to the common grievance of his majesty's subjects, or a great number of them, and the receiving and paying of any money upon such subscriptions, &c. and more particularly the presuming to act as a body corporate, or to raise transferable funds, or pretending to act under any charter formerly granted from the crown for any particular or special purpose therein expressed, by persons making or endeavouring to make use of such charter, for any such other purpose not thereby intended, and also acting or pretending to act under any such obsolete charter, &c. shall be deemed a public nuisance."]

Rex v.
Caywood,
1 Stra. 472.

||The first conviction on this statute was for an unlawful undertaking to carry on trade to the North Seas, whereby many persons were defrauded of great sums of money, and the defendant was fined and imprisoned during the king's pleasure. No subsequent prosecution appears to have taken place upon it till about eighty-seven years afterwards, when a motion was made for a criminal information for attempting to establish a paper manufactory and a distillery company, and to raise joint stocks of 50,000*l*. and 100,000*l*., by transferable shares of 50*l*. each. The court were of opinion that the projects were mischievous and illegal within the meaning of the act, and particularly in holding out the delusion that no person was to be accountable beyond the amount of the share for which he should subscribe; but considering the length of time during which the statute had been dormant, and that the proceeding was by a relator who did not appear to have been deluded himself, they refused the criminal information.

Rex v. Dodd,
9 East, 516.

But

But in the case of the "*Birmingham Flour and Bread Company*," the object of which was to buy corn and make bread, and deal in and distribute bread and flour among the members of the company, 20,000 in number, and the shares were only transferable to such persons as should enter into all the covenants of the original partnership-deed, and, amongst others, to buy weekly portions of bread and flour; the court seemed to be of opinion, that the mere raising transferable stock was not *per se* an offence within the act, unless it had relation to some undertaking *tending to the common grievance, prejudice, or inconvenience* of his majesty's subjects; and that considering the *qualified* extent to which the shares were transferable, there was not in that case *such* a raising of transferable stock as fell within the scope of the act.

Rex v. Webb
& others,
14 East, 406.

So, a bond for payment of monthly subscriptions to a building society was held not to be void under this statute, the object of the society being to build houses, and the shares being only transferable in case the purchaser should be approved by the society, and should become party to the original articles.

Pratt v.
Hutchinson,
15 East, 511.

But where the plaintiff sought to recover, as money had and received, an excessive payment to the defendant, for the purchase of shares in the "*British Ale Brewery*," and it was objected that the parties were *in pari delicto*, the company being a nuisance within the statute, Sir *James Mansfield* nonsuited the plaintiff.

Buck v. Buck,
1 Camp. 547.;
sed vide
4 Taunt. 587.

And Lord *Ellenborough* held that an indictment would not lie for a conspiracy to deprive a man of the office of secretary to the "*Philanthropic Annuity Society*," by reason of the illegality of the society; and that collecting subscriptions for the society came so near to obtaining money on false pretences, that a man prosecuted for so doing could not be considered as prosecuted without reasonable or probable cause.

Rex v.
Stratton,
1 Camp. 549.
note; *et vide*
3 Maule & S.
488.

So, where an action was brought for work and labour, &c. done in purchasing for defendant shares in a concern called "*The Equitable Loan Bank Company*," and the objects of the company did not appear, but it appeared that they professed to have a capital of two millions in shares of 50*l.* each, that a deposit of 1*l.* per share was required on delivery of certificates of shares to holders, that the shares were to be transferable without restriction, and the holders to be subject to such regulations as might be contained in any act of parliament passed for the government of the society, and in the mean time to such regulations as might be made by a committee of management; it was held that this company was illegal, and that the plaintiff could not recover compensation for purchasing shares in it.

Josephs v.
Pebrer,
5 Barn. & C.
659.
See Lord
Eldon's re-
marks on these
companies,
1 Russell's
R. 458. A bill
in equity lies
to recover de-
posits paid by
a shareholder
in a company,
where the

scheme is a mere bubble. Green v. Barrett, 1 Sim. R. 50.

By the 6 Geo. 4. c. 91., the section above set out and also the 18th and 20th sections of 6 Geo. 1. c. 18. are repealed; provided that no action or suit then depending should be affected; and by § 2. it is enacted, that in any future charter for the incorporation of any company, it shall be lawful to provide that the members of the corporation shall be individually liable for the debts, contracts, and engagements of the corporation, to such extent, and subject to such regulations, as his majesty may deem fit.||

6 G. 4. c. 91.

(B) How

(B) How far the Indictment must charge it to be an Annoyance to all the King's Subjects.

2 Roll.
Abr. 83.
Hawk. P. C.
c. 75. § 5.

Hawk. P. C.
ubi supra,
and several
authorities
there cited.

Rex v. Lloyd,
4 Esp. 200.

Vent. 26.
2 Keb. 500.

Mod. 107.
5 Keb. 284.

2 Leon. 183,
184.
9 Co. 115.
Vent. 208.
5 Keb. 28.

2 Roll. Abr.
83, 84.
Hawk. P. C.
c. 75. § 4.

6 Mod. 11.
178. 215.
239. 311.
2 Str. 999.
1246.
Hawk. P. C.
c. 75. § 5.
Moor, 847.
2 Keb. 410.
Keb. 161.
Roll. Rep. 201.
(a) *Viz.*
Cro. Eliz. 148.
2 Keb. 461.
2 Roll. Abr. 85.

EVERY nuisance, punishable by a public prosecution, must be charged to be *ad commune nocumentum*, or to the general annoyance of all the king's subjects; for if they are only injuries to particular persons, they are left to be redressed by the private actions of the parties aggrieved by them.

And therefore an indictment for surcharging such a common, or inclosing such a piece of ground, or disturbing such a water-course, or doing any other act not apparently of a public nature, to the nuisance of the inhabitants of such a town, or of *J. S.* and his tenants, is not good.

¶ So, upon an indictment against a tinman for the noise made in carrying on his trade, it appearing that the noise only affected the inhabitants of three numbers in *Clifford's Inn*, and that by shutting the windows the noise was in a great measure prevented; it was ruled by Lord *Ellenborough* that the indictment could not be sustained, and that the grievance, if any thing, was a private nuisance.¶

So, an indictment in a court-leet for keeping a glasshouse *ad maximum nocumentum* was quashed, because it was not a nuisance unless it had been *ad commune nocumentum*.

So, an indictment for stopping a water-course was quashed, being only laid *ad nocumentum omnium prope inhabitantium*, without saying *et transeuntium*.

But it hath been held, that an indictment for not repairing a bridge, *per quod ligei domini regis transire non possunt*, &c. *ad nocumentum eorundem*, is sufficient; for by the king's liege people shall be understood all his liege people.

Also, an indictment for doing a thing which plainly appears immediately to tend to the prejudice of religion, or of the king; as for breaking the walls of a church, or embezzling the king's treasure, &c. is good, without expressly laying it as a common grievance.

So, an indictment of a common scold, by the words *communis rixatrix*, hath been held good, though it concluded, *ad commune nocumentum diversorum* instead of *omnium*; because, says *Hawkins*, from the nature of the thing, it cannot but be a common nuisance. And for the same reason, says he, an indictment with such a conclusion, for a nuisance to a river, plainly appearing to be a public and navigable river, or to a way, plainly appearing to be a highway, is sufficient. And perhaps, says he, the (a) authorities, which seem to contradict this opinion, might go upon this reason, that in the body of the indictment it did not appear with sufficient certainty, whether the way wherein the nuisance was alleged were a highway or only a private way; and therefore it shall be intended from the conclusion of the indictment that it was a private way.

(C) How a Nuisance is to be removed or abated.

HEREIN it is laid down by *Hawkins*, that any one may pull down or otherwise destroy a common nuisance; as, a new gate or even a new house erected in a highway, &c.: for if one whose estate is or may be prejudiced by a private nuisance actually erected, as, a house hanging over his ground, or stopping his lights, &c. may justify the entering into another's ground, and pulling down and destroying such a nuisance (*a*), whether it were erected before or since he came to the estate; surely, it cannot but follow *à fortiori* that any one may lawfully destroy a common nuisance. And as the law is now holden, it seems, that in a plea, justifying the removal of a nuisance, the party need not show that he did as little damage as need be.

chimneys on a house close to a highway, was, by reason of a fire, in immediate danger of falling, held that firemen were justified in removing them. *Dewey v. White*, 1 Moo. & Malk. Ca. 56.||

Hawk. P. C. c. 75. § 12. for which are cited 2 Roll. Abr. 144, 145. Cro. Car. 184. Jon. 221. Yelv. 142. 5 Co. 101. 9 Co. 54. Salk. 458. pl. 3. ||(*a*) Where a stack of

If a river be stopped to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns who have a common passage and easement therein, may be compelled to do it.

3 Ass. 10. 2 Roll. Abr. 137. Hawk. P. C. c. 75. § 15. said to have been adjudged.

It seems to be the better opinion, that the Court of King's Bench may, by a (*b*) mandatory writ, prohibit a nuisance, and order that the same shall be abated; and that if the party disobeys the writ he subjects an attachment. But upon such attachment, for proceeding after the writ of prohibition, there ought to be a declaration setting forth the nature of the offence, and that the same is a nuisance, and that, notwithstanding the writ of prohibition, the defendant proceeded in or continued it; to which, if the defendant can in pleading set forth a sufficient justification, his proceeding *post prohibitionem regiam* will be good in law, and himself discharged of all contempt and costs against the complainant.

tion restraining Jacob Hall, a rope-dancer, who had erected a stage at Charing-cross. *Vent.* 169. 2 Keb. 846. Mod. 76.; *et vide* *Skin.* 625. pl. 21. 5 Mod. 142.

(*b*) A writ to prohibit a bowling-alley erected near St. Dunstan's church, said by *Hale* to have been granted, 8 Car. 1. on Noy's motion. Mod. 76.— So, a prohibi-

||The indictment should state the nuisances to be *continuing*, otherwise the court will not give judgment to abate it.

Rex v. Stead, 8 Term R. 142. Rex v. Incledon, 13 East, 164.

The statute 1 & 2 Geo. 4. c. 41., after reciting that injury is sustained from the improper construction, as well as from the negligent use, of furnaces employed in the working of engines by steam, and that every such nuisance being of a public nature is abateable by indictment, enacts, "That if it shall appear to the court by which judgment ought to be pronounced, in case of conviction on any such indictment, that the grievance may be remedied by altering the construction of the furnace so employed in the working of engines by steam, it shall be lawful to the court, without the consent of the prosecutor, to make such

1 & 2 G. 4. c. 41.

“such order touching the premises as shall be by the said court thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant or defendants so convicted.”

By the third section it is provided, “That this act shall not be construed to extend to the owners or proprietors, or occupiers of any furnaces or steam-engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in manufacturing the produce of such ores or minerals, on or immediately adjoining the premises where they are raised.”

(D) How the Offence is punishable.

2 Roll. Abr.
34. Hawk.
P. C. c. 75.
§ 14.
6 Mod. 11.
178. 215.
Salk. 382.
pl. 51.

ALL common nuisances to the public are regularly punishable by fine and imprisonment, at the discretion of the judges; but in some cases corporal punishment may be inflicted, as in the case of a common scold, who is said to be properly punishable by being put into the ducking-stool. Also the offence of keeping a bawdy-house is punishable, not only with fine and imprisonment, but also with such infamous punishment as to the court in discretion shall seem proper.

2 Roll. Abr.
84. Hawk.
P. C.
ubi suprâ.

Also a person convicted of a nuisance done to the king's highway, may be commanded by the judgment to remove the nuisance at his own costs; and per *Hawkins*, it is but reasonable that those who are convicted of any other common nuisance should also have the like judgment.

Co. Lit. 56. a.
Roll. Abr.
88. 110.
2 Roll. Abr.
140, 141.
Moor, 180.
4 Co. 18.

But it is clearly agreed, that common nuisances against the public are only punishable by a public prosecution; and that no action on the case will lie at the suit of the party injured; as this would create a multiplicity of actions, one man being as well entitled to bring an action as another; and therefore, in those cases, the remedy must be by indictment at the suit of the king.

9 Co. 115. 2 Brownl. 147. Vaugh. 341. Cro. Eliz. 664. 3 Mod. 294. Carth. 191. Salk. 15. pl. 7.

Co. Lit. 56.
Cro. Jac. 446.
Keb. 847.
2 Jon. 157.

But if by such a nuisance the party suffer a (*a*) particular damage, as if, by stopping up a highway with logs, &c. his horse throws him, by which he is wounded or hurt, an action lies. (*b*)

Salk. 15. pl. 15. (*a*) But if a highway is stopped, that a man is delayed in his journey a little while, and by reason thereof he is damaged, or some important affair neglected; this is not such a special damage, for which an action on the case will lie; but a particular damage, to maintain this action, ought to be direct, and not consequential; as, for instance, the loss of his horse, or some corporal hurt, in falling into a trench in the highway, &c. Carth. 194. [(*b*) But this does not extend to entitle one, who has received detriment by a county bridge being out of repair, to bring an action against the inhabitants of that county, there being no ground to consider them, for this purpose, as a corporation, and in that capacity liable to be sued. 2 Term R. 667.]

Salk. 10. pl. 3.
Carth. 455.
Ld. Raym. 370.

Also an action lies for continuing a nuisance; as where, for erecting a nuisance 2 *die Febr.*, the defendant pleaded a prior action, brought for erecting a nuisance 20 *die Martii*, and a recovery thereupon, and averred these to be the same nuisance and erection; and on demurrer the plaintiff had judgment; for though he cannot have a new action for the same erection, yet he may for the continuing the same nuisance.

OBLIGATIONS.

- (A) Of the Nature of the Security called a Bond or Obligation : ||And herein of its Assignment, its Forfeiture, and their Effects.||
- (B) What Words create such a Security.
- (C) Of the Ceremonies requisite to a Bond or Obligation : And herein of Signing, Sealing, Date, and Delivery.
- (D) Of the Parties to the Obligation : And herein,
1. *Who may bind themselves, or be Obligors.*
 2. *Who may take such Security, or be Obligees.*
 3. *Who shall be said the Obligee ; and herein of making several Obligees.*
 4. *Where there are several Co-obligors or Sureties ; and herein where they shall be said to be jointly and severally bound, and of the Obligee's Remedy against all or any of them.*
 5. *Of their Remedies against each other.*
- (E) Of the Condition and Consideration of the Obligation.
- (F) How the Breach of the Condition must be assigned and set forth, and the Manner of pleading Performance, and in Bar.

- (A) Of the Nature of the Security called a Bond or Obligation : ||And herein of its Assignment, its Forfeiture, and their Effects.||

OBLIGATION, says my Lord *Coke*, is a word in its own nature of a large extent, but is usually taken in the common law for a bond, containing a penalty with condition for payment of money, or to do or suffer some act or thing, &c.; and a bill, says he, is most commonly taken for a single bond without condition. Co.Lit. 172. a.

This security is also called a specialty ; the debt being therein particularly specified in (a) writing. And the party's seal, acknowledging the debt or duty, and confirming the contract, renders it a security of a (b) higher nature than those entered into without the solemnity of a seal ; and therefore bonds or specialties shall

(a) An obligation may be made upon parchment or paper, and in loose

parchment or paper, or in a piece of parchment or paper sewed in a book, and either way it is good; but if it be made on a tally, piece of wood, or any other thing but paper or parchment (although it be sealed and delivered), it is void. Bro. Oblig. 50. 67.— Because these are least subject to alteration or corruption. Co. Lit. 229. a.— May be in a letter, or other writing, so it be sealed. Comb. 87. 3 Mod. 154.— But note, that by the late statutes it must be on stamped paper or parchment. (b) Therefore if a man accepts an obligation for a debt due by simple contract, this extinguishes the simple contract debt. Roll. Abr. 604. 2 Leon. 110.— So if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinct, and it is become a mere duty at common law. Yelv. 38. [But the bond of a surety will not extinguish the simple contract debt of the principal. White v. Cuyler, 6 Term Rep. 176.]— Also, from its being of a higher nature than a simple contract, the defendant cannot plead *nil debet*, but must plead *solvit ad diem*, or *non est factum*; for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*. 2 Inst. 651. Hard. 218. (c) For this *vide* head of *Executors and Administrators*. (d) And therefore it is held, that if the obligor in a bond, without any new consideration, as forbearance, &c. promises to pay the money, an *assumpsit* will not lie, but the obligee must still pursue his remedy by action of debt. Roll. Abr. 8. Hut. 54. Cro. Eliz. 240.

Cro. Eliz. 773. A bond or obligation is a debt or duty which adheres to the obligor or debtor, let it be contracted where it will, and let the debtor fly to what place he pleases; and being chargeable every where, it need not be dated from any particular place, and therefore usually begins with *Noverint universi*: but yet the plaintiff in his declaration must lay a place where it was made, that it may receive trial if it be denied.

should set it out as made at the true place, and introduce the place of trial under a *videlicet*. 1 Str. 612. Therefore, where the plaintiff declared, "that the defendant by his bond *apud* " *London concessit*," &c. and on oyer, the bond appeared to be dated at *Port St. David* in the *East Indies*, which was not mentioned in the declaration, the variance was pronounced to be fatal. Roberts v. Harnage, 2 Salk. 659.] || But there seems no more reason for stating the real date of a bond than of a foreign bill or note, in which cases it is not necessary, though usual. Bayley on Bills, 175. Houriet v. Morris, 3 Camp. 304.]

Co. Lit. 232. A bond is (a) a *chose in action*, which cannot be assigned over, (a) That being so as to enable the assignee to sue in his (b) own name; yet he given to a feme sole, who has by the assignment such a title to the paper and wax, that he afterwards may keep or cancel it.

marries, and the husband dies, it shall survive to her, being a *chose in action*, which the husband might have reduced into possession.— So, if the wife, who is the obligee, dies, her husband is no otherwise entitled to it than as administrator to his wife. Noy, 149. Style, 205. For this *vide* tit. *Baron and Feme*. (b) And by the modern practice, he may sue for it in the name of the obligee, as his attorney; but *quare*, Whether this can be done without an express authority? || A power for this purpose is usually contained in the assignment, and ought always to be so.]

2 Vern. 595. Also, in equity, a bond is assignable for a valuable (c) consideration paid, and the assignee alone becomes entitled to the money; so that if the obligor, after notice of the assignment, pays the money to the obligee, he will be compelled to pay it over again.

(c) 2 Vern. 540. But payment to the obligee, without notice of the assignment, is good. Chan. Ca. 232.

Legh v. Legh, 1 Bos. & Pull. 447.; and see || And if the obligor, after notice of an assignment, take a release from the obligee, and plead it to an action by the assignee, in

in the name of the obligee, the court will set aside the plea, and will not, under such circumstances, allow the obligor to plead payment.]||

4 Maul. & S.
425. Jones
v. Herbert,
7 Taunt. 421.

Innell v. Newman, 4 Barn. & A. 419.

The assignee must take it, subject to the same equity that it was in the hands of the obligee; as if, on a marriage-treaty, the intended husband enters into a marriage-brokerage bond, which is afterwards assigned to creditors, yet it still remains liable to the same equity, and is not to be carried into execution against the obligor.

2 Vern. 428.
692. 764.

||So a bond, assigned as a security for money paid to the use of one who has committed a secret act of bankruptcy, cannot be retained against his assignees.

Hammersley
v. Purling,
3 Ves. 757.

A bond given for a general purpose of raising money, and deposited by the obligee as a security, shall be liable to the obligee's debt. *Secus* if given for a special purpose, for then it is unassignable.

Cator v.
Burke, 1 Bro.
Ca. Ch. 434.

When a bond is assigned by the obligee towards satisfaction of a debt owing from him to another, the assignee is chargeable with any loss incurred by a forbearance shewn to the obligor; for if he indulge the obligor, without the concurrence of the obligee, he must stand the consequences.

Ex parte
Mure,
2 Cox, 63.

But though it is true that in general an assignee of a chose in action takes it subject to all equity, yet time and circumstances may vary that rule.||

Hill v.
Caillovel,
1 Ves. 122.

Bonds are to be considered as securities for the performance of contracts, and are usually entered into with (a) penalties, which are to be considered as (b) compensations for the breach of the contract; as, that a man shall pay 200*l.* if he omits to pay 100*l.* within such a time, that he shall pay so much if he does not perform such and such covenants, do or omit such and such acts; and in those he may *cedere suo jure*, provided the thing be not unlawful in itself, or injurious to the public, &c.

Yelv. 192.
2 Mod. 201.
Sand. 66.
(a) That the
reservation
of a greater
sum than is
allowed by the
statute for
interest, for

the nonpayment of the principal at the end of the year, is not usurious within the statute, because it is in the power of the borrower to avoid the payment of the money so reserved, by paying the principal at the day appointed. 5 Co. 69. Cro. Jac. 509. (b) A contract or covenant to give bond for the payment of a certain sum of money, without shewing of what sum the obligation shall be, is good, and shall be intended of double the sum. 5 Co. 77. b. 78. a. Lev. 88. — So, where there was an agreement to enter into certain covenants, and to enter into a bond for the performance of the covenants; and upon an action, breach was laid that he did not enter into bond, &c., and a verdict for the plaintiff; in arrest of judgment it was moved, that this part of the agreement was uncertain and void, because it was not expressed of what sum the bond should be, and here was no certainty to guide it, as in the above case: but *per Windham J.*, the sum in the bond must be to the value of the agreement; *et per cur.* — You should have entered into bond, though the sum were never so small, and why did you not tender such a one? Sid. 270. Keb. 776.

||Where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered in equity as the principal intent of the deed, and the penalty is only accessional, and only operates to secure the damage really incurred: and the court will relieve by injunction, until the actual damage sustained shall be ascertained by an issue.||

Sloman v.
Walter,
1 Bro. Ch.
Ca. 418.
Hardy v. Mar-
tin, 1 Cox, 26.
Errington v.
Aynsley,
Agreement, (B).

2 Bro. Ch. Ca. 541. 1 Brown, 418.; *et vide tit.*

Cro. Car. 490. If a man enter into a bond of such a sum, on condition to be void on payment of a less sum; or, if a man bind himself in the penalty of 100*l.* that he will pay 50*l.* by such a day; after the day of payment is past, the penalty or sum of 100*l.* is the legal debt; and for so much it hath been (a) resolved, that an executor of an obligor of such forfeited bond may cover the assets of his testator.

2 Stra. 1028. 2 Barnard. K. B. 185. S. C. Cas. temp. Hardw. 219. S. C. 4 Bro. P. C. 287. S. C. [It is more correct to plead the sum really due; and indeed, if the bond be not forfeited, such sum only can be pleaded. 5 Term R. 509. However, if the penalty be pleaded, the plaintiff may reply the sum really due for principal and interest, which he may aver the obligee is ready to receive, and that the bond is kept on foot by fraud.]

Show. Par. And as the penalty, by the bond being forfeited, becomes the legal debt; so there was no remedy against such penalty, but by application to a court of equity, which relieves in those cases, on payment of principal, interest, and costs. Also, though at law (b) there can be no remedy beyond the penalty, because in that the obligee seems to have taken up his security; yet, as it is on the foundation of doing equal justice to both parties that equity proceeds, it will, on any application for a favour from the obligor, compel him to pay the principal, interest, and costs, though exceeding the penalty. (c)

on a bond, damages may be recovered beyond the amount of the penalty. Lord Lonsdale v. Church, 2 Term R. 588; *sed vide* Wilde v. Clarkson, 6 Term R. 503. *contr.*; and see Shutt v. Procter, 2 Marsh. 226. But in an action on a judgment recovered upon a bond, interest may be recovered as damages beyond the penalty; and this although it be a foreign judgment; for *transit in rem judicatam*, and the nature of the demand is altered. M'Clure v. Dunkin, 1 East, 456., and Blackmore v. Flemyng, 7 Term R. 446.; and see Bodily v. Bellamy, 2 Burr. 1094. Collins v. Collins, 2 Burr. 826. Hilhouse v. Davis, 1 Maul. & S. 169. Moore v. M'Namara, 1 Ball & B. 311. And so also where the penalty is the same sum as the principal in the bond, and the condition is to pay with lawful interest. Francis v. Wilson, Ry. & Moo. 105. And more than the penalty of bonds has been decreed in equity where they were given only as a collateral security for the performance of a trust, and the demand was not grounded upon the bonds. Kirwane v. Blake, 2 Bro. P. C. 355—342. So, where a bond was given as a collateral security, with a mortgage for the same debt. Clarke v. Lord Abingdon, 17 Ves. 106. And where advantage has been made of the money, interest may be carried beyond the penalty. Dunsany v. Plunkett, 2 Bro. P. C. 251. So where a party is by injunction prevented from recovering his debt at law, or where an *elegit* creditor is brought into equity for an account. Atkinson v. Atkinson, 1 Ball & B. 238. (c) In general, however, the rule of equity is not to compute any thing beyond the penalty of the bond. Tew v. Earl of Winton, 3 Br. Ch. Rep. 492. [Knight v. Maclean, 3 Bro. Ch. Rep. 495. Sharpe v. Scarborough, 3 Ves. 557. Mackworth v. Thomas, 5 Ves. 329. Clarke v. Seton, 6 Ves. 416.] Thus, where there was a devise for payment of debts, it was holden, that simple contract debts, even for seventy years' standing, were renewed by it, and were ordered to be paid with full interest; but the bond debts were only allowed interest to the amount of the penalty. Ketilby v. Ketilby, before Lord Bathurst, cited in 2 Anstr. 527. So, though the principal and interest on a mortgage bond exceed the penalty, yet the obligee, on a bill to redeem, can claim only to the extent of the penalty. Lloyd v. Hatchett, *Id.* 525;] [*et vide* 6 Ves. 92. 152. 416.]

And this rule of compelling the party to do equity who seeks equity, seems to be the reason why an obligee shall have interest after he has entered up judgment; for though in strictness it may be accounted his own fault why he did not take out execution, and therefore he is not entitled to interest, yet, as by the judgment he is entitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him principal, and the interest, which accrued as well before as after the entering up of the judgment.

Also,

Also, by the 4 & 5 Ann. c. 16. it is enacted, "That where any action of debt shall be brought on any single bill, or where an action of debt, or *scire facias*, shall be brought upon any judgment, if the defendant hath paid the money due on such bill or judgment, such payment shall and may be pleaded in bar of such action or suit; and where an action of debt is brought upon any bond, which hath a condition or defeasance to make void the same, upon payment of a less sum at a day or place certain; if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not strictly made according to the condition or defeasance, yet it shall and may be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded."

And it is further enacted by the said statute, § 14. "That if at any time pending an action upon any such bond with a penalty, the defendant shall bring into court, where the action is (a) pending, all principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond; the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the court shall and may give judgment to discharge every such defendant of and from the same accordingly." (b)

—(b) Stealing a bond made felony, by 2 G. 2. c. 25. § 5. || repealed by 7 & 8 G. 4. c. 27., and re-enacted with additions, 7 & 8 G. 4. c. 29. § 5.||

|| Where the bond was conditioned in a penal sum for payment of a less sum generally, without naming a day, and no interest was reserved in terms, it was objected, that it was not within the statute, as not being payable at a certain day; but the court held it was payable on the day of the date, and referred it to the Master to compute principal and interest.

If the obligor omits to pay the interest at the day, whereby the bond is forfeited, the obligee may sue him for the penalty, though the principal is not yet due, and the court will not stay proceedings on payment of the interest only, although the non-payment was a mere slip. It seems, however, they will restrain execution to the interest and costs.

The Court of Exchequer will not make reference to the Master to compute principal and interest after verdict for the plaintiff on the bond.

A *post obit* bond seems to be within the statute.||

Stair, 2 Barn. & C. 82.; and see Doug. 519. *Sed vide* 1 Atk. 118.

(a) One cannot move to stay proceedings upon a bond upon payment of principal, interest, and costs, till bail be put in; for till then the parties are not in court.
6 Mod. 11.

Farquhar v. Morris,
7 T. R. 124.

Van Sandau v. —,
1 Barn. & A. 214. Tighe v. Crafter,
2 Taunt. 287.

Eastmond v. Hole,
3 Price, 219.

Murray v.

(B) What Words create such a Security.

HEREIN we must observe, that the law does not seem to require any particular set form of words, as essentially necessary to create an obligation, but that any words, which declare

Yelv. 195.
2 Roll. Abr. 146, 147.

the intention of the party, and denote his being bound, will be sufficient; because such obligation is only in nature of a contract, or a security for the performance of a contract, which ought to be construed according to the intention of the parties.

Dyer, 22. b.

Therefore, if a man useth this form of words, *viz. This bill witnesseth that I A. B. have borrowed 10l. of C. D.*; or this form, *Memorandum, quod talis debet to B. ten pounds*; or thus, *Memorandum, all things reckoned and accounted between A. and B. A. cognovit se debere to B. ten pounds*; all these forms are good, and shall as effectually bind the party, and his executors, as if the most formal words were made use of, provided the writing be sealed and delivered.

Leon. 25.

So, a writing in this form, *Memorandum, I A. B. have agreed to pay J. S. 20l.*, though this be in the præterperfect tense, yet if it hath all other ceremonies essential, it shall amount to an obligation.

Cro. Eliz. 729.

So, in this form, *This bill witnesseth, that I R. S. have received of T. B. 40l. to the use of R. and J. S., children of, &c. equally to be divided between them; which sum I confess to have received to the uses aforesaid, and the same to repay at such time as shall be thought best for the profits of the said R. and J. S.*, this was resolved to be a good obligation.

Cro. Eliz.; and
vide Cro. Eliz.
758.

So, a writing in this form, *Memorandum, that I bind myself to J. M. to pay him as much money as my brother owes him*; and in the end of the bill is written the sum of 40l., which is said to be the debt due from the brother: this is a good obligation.

Cro. Eliz. 886.

Memorandum, that I owe and promise to pay to A. 10l. at any time after the Feast, &c. when thereto required, for the payment whereof I bind myself to J. H. by these presents; this is a good bill to A. by the first words, and the latter being surplusage are void, and to be rejected.

Moor, 537.

Parry v.
Woodward,
adjudged.
And that the
words, "to-
gether with 6l.
which I owe by
bills," &c. are only an explanation of the precedent debt. Cro. Eliz. 537.

It is held in *Moor* and *Cro. Eliz.* that a bill in this form, *Be it known, &c. that I owe to B. 14l. to be paid at the Feasts, &c. together with 6l. which I owe him upon bills and reckonings subscribed with my hand, amounts only to a bill for 14l.*; but (a) *Dyer* holds it a good obligation for the whole debt of 20l.

S. C. adjudged, and that that which comes after the *solvendum* is void, as that which comes after an *habendum*. (a) *Dyer*, 22. b. in margin.

Vent. 238.

Watson v.
Sneed.

In debt for 20l. the plaintiff declared, that the defendant *concessit se teneri per scriptum suum obligatorium, &c.* and the words of the deed were, *I do acknowledge to Edward Watson by me twenty pounds upon demand, for doing the work in my garden*; and upon demurrer to the declaration, it was adjudged a good bond.

5 Leon. 119.
2 Roll. Abr.
146. S. P.

These words, *I am content to give to W. 10l. at Mich. and 10l. at our Lady-day*, amount to an obligation, and an express engagement to pay, &c.

But for this
vide 10 Co.
153. a. Yelv.
96. 195. 206.
Hob. 119.
Cro. Jac. 290.

It hath been held in variety of cases, that a seeming *Latin* word, not properly expressing the quantity of the sum in which the party intended to be bound, should, notwithstanding, be so construed as to answer the intention of the parties, rather than that the obligation should be void; as *quingquagessimis libris*, for *quingquaginta libris*,

libris, has been held good; so, *trigintate* for *triginta*, *sexingenta* for *sexaginta*; and it is said in general, that in most cases where the *gent* or *gint*, or the *sex* or *sept* are right, the obligation has been held well.

309. 355. 603.
607. Cro.
Car. 147.
Brownl. 62.
2 Roll. Abr.

146. 5 Mod. 154. 2 Jon. 58. Comb. 60. 86. 187. 477. Ld. Raym. 535. 5 Mod. 287. 2 Salk. 462. pl. 2. [By statute 4 G. 2. c. 26. bonds must be in the *English* language, and not in *Latin* or *French*, or any other language whatsoever.]

A bond *in viginti nobilis* has been held a good bond for 6*l.* 8*s.*; for though *nobilis* be not a *Latin* word, yet it being a term signifying 6*s.* and 8*d.* it may properly be made use of.

Cro. Jac. 205.
2 Roll. Abr.
146. Burchin
v. Vaughan.

Debt brought upon a bond for 60*l.*, the bond was in *Italian*, and the sum therein expressed was in these words, *viz. in cessanti libris*, and adjudged to be good.

Cro. Jac. 208.
Parker v.
Rennaday.

In debt upon a bill obligatory, demanding thirty-two pounds four shillings and seven pence; the defendant demanded oyer of the bill, and it was threty-two ponds four shillings and seven pence, so threty for thirty, and ponds for pounds; and on demurrer for this cause, it was adjudged for the plaintiff.

Cro. Jac. 607.
Hulbert v.
Long.

So a bill, in which the party bound himself in the sum of *sewene pounds*, has been held a good obligation for 17*l.* in order to answer the intention of the parties.

10 Co. 133. a.
in Osborn's
case. 2 Roll.
Abr. 147. S. P. cited.

¶ Where the obligatory part of the bond omitted the word "pounds," and stated that the obligor became bound in 7700, the word "pounds" was supplied, since it was manifestly intended.

Coles v.
Hulme,
8 Barn. & C.
568.; and see
1 Marsh. R. 214.

And where a man was bound in an obligation, and it was not said to whom, the name was supplied.¶

Langdon v.
Goole,
3 Lev. 21.;

and see 2 P. Wms. 151. 1 Cox, 200. 2 Ves. sen. 100. 371. *Id.* 194. 2 Jac. & Walk. 1.

(C) Of the Ceremonies requisite to a Bond or Obligation: And herein of Signing, Sealing, Date, and Delivery.

IT is said, that there are only three things essentially necessary to the making a good obligation, *viz.* writing in paper or parchment, sealing, and delivery; but it hath been (*a*) adjudged not to be necessary, that the obligor should sign or subscribe his name; and that therefore if in the obligation the obligor be named *Erlin*, and he signs his name *Erlwin*, that this variation is not material, because subscribing is no essential part of the deed, sealing being sufficient.

2 Co. 5. a.
Goddard's
case. Noy,
21. 85.
Moor, 28.
Styl. 97.
(a) 2 Salk.
462. pl. 2.
Ld. Raym.
335.

5 Mod. 281. *Vide tit. Misnomer and Addition.*

And though the seal be necessary, and the usual way of declaring on a bond is, that the defendant *per scriptum suum obligatorium sigillo suo sigillatum* acknowledged, &c. yet, if the word *sigillat.* be wanting, it is cured by verdict and pleading over; for when he saith *per scriptum suum obligatorium*, &c. all necessary circumstances shall be intended; and if it were not sealed, it could not be his deed or obligation.

Dyer, 19. a.
Cro. Eliz.
571. 737.
Cro. Jac. 420.
2 Co. 5.
Vent. 70.
3 Lev. 548.

2 Co. 5. a.
(a) So, an obligation is good though it want
in cujus rei testimonium. Moor, 5. Leon. 25. 2 Co. 5. a.

2 Co. 5.
Goddard's case. Noy, 21. 85, 86.
Hob. 249.
Styl. 97.
Cro. Jac. 156. 264.
Yelv. 193.
Salk. 76. (b) A difference has been taken between *gerens dat.* and *cujus dat.*, that the first refers to the express date, but that *cujus dat.* is always intended of the real date, which is the delivery. 5 Mod. 285. Comb. 477. 2 Salk. 463. Ld. Raym. 355.

Cro. Eliz. 775.
3 Lev. 348.
Salk. 141.
pl. 7.
If a man declare on a bond, bearing date such a day, but do not say when delivered, this is good; for every deed is supposed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply, that it was *primo deliberat.* at another day; for this would be a departure.

Brownl. 104.
Lev. 196.
But, if a bond bear date such a day, but was really delivered at a day after, the obligee may declare on a bond of such a date, but *primo deliberat.* at a day after; and if the obligee declare on a bond of such a date generally, the obligor may plead it was *primo deliberat.* on such a day after; but then he must traverse that it was delivered on the day of the date.

2 Co. 4. 6.
3 Keb. 332.
If the bond was delivered before the date, on issue, *non est factum*, joined on such a deed, the jury are not estopped to find the truth, *viz.* that it was delivered before the date, and it is a good deed from the delivery.

Vent. 9. 110.
Salk. 274.
pl. 1.
2 Ld. Raym. 803.
Hob. 246.
Vent. 9.
In debt on an obligation, the defendant pleads that he delivered it as an escrow, *et hoc paratus est verificare*: this is ill, for he ought to shew to whom he delivered it, and conclude *issint nient son fait; et de hoc ponit se, &c.*

So, pleading that he delivered it to the obligee as an escrow, to be his deed on certain conditions, is ill; for, by the delivery of it to the obligee, it is become his deed absolutely.

Graham v. Graham, 1 Ves. jun. 274., citing Perryman's case. 5 R. 84. b., and Froset v. Walshe, Bridg. R. 51. S. P.
|| But a bond left with a third person to be delivered to the obligee when he should agree to accept it, upon the terms on which it was made, is considered as an escrow to be delivered to the obligee upon performance of the condition, and then takes effect from the original sealing and delivery; and although the obligor and obligee are both dead before the condition performed, yet upon performance of it the bond is good to charge assets.

Ward v. Lant, Prec. Ch. 182.
But a voluntary bond, made only for a special purpose, without any condition, never delivered, but found amongst a man's papers after his decease, was set aside in equity.

So where *B.*, on the marriage of his daughter, agreed by parol to make up her fortune to a certain sum, part of which he paid, and afterwards prepared a bond conditioned for payment of the residue, which, together with his will, he shewed to the daughter and her husband, but never delivered it, and kept it in his own custody till his death; this was held void against creditors.||

Loeffes v. Lewen and others,
Prec. Ch. 370.

A bond or deed may be delivered by words, without any act of delivery; as, where the obligor says to the obligee, go and take the said writing, or take it as my deed, &c. so an actual tradition, without speaking any words, is sufficient; otherwise, a man that is mute could not deliver a deed. But (*a*) where, on an issue of *non est factum*, the jury found that the defendant signed and sealed the obligation, and laid it on a table, and that the plaintiff came and took it up, this was held not to be the defendant's deed, without other (*b*) circumstances found by the jury.

Co. Lit. 36. a.
Cro. Eliz. 855.
[That circumstances may amount to delivery, see *Goodright v. Strahan,*
Cowp. 204.]
(*a*) *Leon. 195.*
Cro. Eliz. 122.

(*b*) On an issue *non est factum*, the evidence was, that the obligation was written in a book, and that in the same leaf the defendant put his hand and seal thereto; and this was held to be sufficient evidence for the jury to find it his deed, which they having accordingly done, it was held good without question. *Cro. Eliz. 615.* *Fox v. Wright.*

|| Where the evidence was that the obligor had signed her name opposite to the seal, but the witness swore that she had neither sealed or delivered the bond in his presence; this was held evidence of a sealing and delivery to go to the jury.

Talbot v. Hodson,
7 *Taunt. 251.*
S. C.
2 *Marsh, 527.*

And where the attesting witness to a bond, called to prove the execution, stated that he was not present when it was executed, other evidence was held admissible for that purpose.||

Ibid.; and
Fitzgerald v. Elsee,
2 *Camp. 634.,*
which overrule *Phipps v. Parker,* 1 *Camp. 412.*

If an obligation be delivered to another to the use of the obligee, and the same be tendered, and he refuse, the delivery has lost its force.

5 *Co. 119. b.*

[If *A.* and *B.* enter into a bond, and set but one seal to it, and *A.* execute it for himself and *B.* with the authority and in the presence of *B.*, it is obligatory on both.]

Lord Love-lace's case,
Sir Wm. Jones, 268.

Ball v. Dunsterville, 4 *Term R. 515.*

|| And where a man agreed to be bound together with another in a bond, and sealed and signed it accordingly, but by the neglect of the clerk his name was not inserted, that defect was relieved against in equity.||

Crosby v. Middleton,
Prec. Ch. 257.

(D) Of the Parties to the Obligation: And herein,

1. Who may bind themselves, or be Obligors.

ALL persons who are enabled to contract, and whom the law supposes to have sufficient freedom and understanding for that purpose, may bind themselves in bonds and obligations.

5 *Co. 119.*
4 *Co. 124.*
Roll. Abr. 340.

But, if a person is illegally restrained of his liberty, by being confined in a common gaol or elsewhere, and during such restraint enters into a bond to the person who causes the restraint, the same may be avoided for duress of imprisonment.

Co. Lit. 253.
2 *Inst. 482.*
Vide tit. Duress.

Bac. Reg. 22.

[If a man menace me unless I make him a bond for 40*l.*, and I tell him I will not do it, but will give him a bond for 20*l.*, the court will not expound this bond to be a voluntary one; for *non videtur consensum retinuisse, qui ex præscripto minantis aliquid mutavit.*]

Vide tit. Baron and Feme,
(M.), Vol. I.

So, in respect of that power and authority which a husband has over his wife, the bond of a feme covert is *ipso facto* void, and shall neither bind her nor her husband.

Doctor and
Student, 113.
Co. Lit. 172.
Cro. Jac. 494.
560. Sid.

So, though an infant shall be liable for his necessities, such as meat, drink, clothes, physic, schooling, &c., yet if he bind himself in an obligation, with a (a) penalty for payment of any of these, the obligation is void.

112. (a) For this incapacity of an infant arises from his being incapable of contracting for any thing but for his benefit; but it can never be for his benefit to enter into a penalty. Cro. Eliz. 920. ||And although he confirm it after twenty-one, still it is invalid unless the confirmation be of as high authority as the bond itself. Baylis v. Dineley, 3 Maul. & S. 477. || *Vide head of Infancy and Age.*

4 Co. 124.

Beverly's case.
Vide head of
Idiots and
Lunatics.

[Modern cases
consider the
bond of a lu-
natic as abso-

Also, though a person *non compos mentis* shall not be allowed to avoid his bond, by reason of insanity and distraction, because no man can be allowed to stultify himself, because of the ill consequences that might attend counterfeit madness, yet may a privy in blood, as the heir; and privies in representation, as the executor and administrator, avoid such bonds. Also, if a lunatic, after office found, enters into a bond, it is merely void.

lutely void; and the obligor himself may, on *non est factum*, give lunacy in evidence. Yates v. Boen, 2 Stra. 1104. A bond may be avoided in like manner by reason of excessive drunkenness at the time of executing it. Cole v. Robins, Bull. N. P. 172.] ||But a court of equity will not assist a person who wishes to get rid of a deed merely on the ground of his having been intoxicated at the time, unless an unfair advantage were made of his situation, or unless there were some contrivance or management to draw him in to drink. Cooke v. Clayworth, 18 Ves. 15. Cory v. Cory, 1 Ves. 19.; and see 3 P. Wms. 130. note (a).||

Roll. Rep. 41.

||*(b)* A feme
covert having
given a bond
for payment
by her execu-

But if an infant, feme covert (*b*), monk, &c. who are disabled by law to contract and to bind themselves in bonds, enter together with a stranger, who is under none of these disabilities, into an obligation, it shall bind the stranger, though it be void as to the infant, &c.

tors, of money advanced on security of her bond, to her son-in-law, promised after her husband's death that her executors should pay the bond; held, that her executors might be sued in *assumpsit* on such promise. Lee v. Mugeridge, 5 Taunt. 36. ||

Yelv. 137.

Talbot v.
Godbolt.

If a servant make a bill in this form, *Memorandum, that I have received of Ed. Talbot, to the use of my master, Serjeant Gaudy, the sum of 40*l.* to be paid at Michaelmas following*, and thereto set his seal, this is a good obligation to bind himself; for though in the beginning of the deed the receipt is said to be to the use of his master, yet the repayment is general, and must necessarily bind him who sealed; and the rather, because otherwise the obligee would lose his debt, he having no remedy against Serjeant Gaudy.

2. Who may take such Security, or be Obligees.

5 Co. 119. b.
Co. Lit. 5. a.

Infants, idiots, as also a feme covert, may be obligees. And as to this the husband is supposed to assent, being for his advantage :

vantage: but if he disagrees, the obligation has lost its force; so that after the obligor may plead *non est factum*. But if he neither agrees nor disagrees, the bond is good, for his conduct shall be esteemed a tacit consent, since it is a turn to his advantage.

But a feme covert can neither be obligor nor obligee to her husband, nor *vice versâ*, being but one person in law. Also, by the better opinion, a bond entered into, to a feme sole, by the person whom she afterwards marries, is, by the marriage, at law (a) extinguished.

But for this vide tit. *Baron and Feme*, letter (E). [(a) A bond given by the

husband to the intended wife prior to marriage, conditioned for payment of money to her after the obligor's death, is not extinguished by the coverture; and such a bond may be enforced at law against the heirs of the husband. *Milbourn v. Ewart*, 5 Term R. 381. *Cage v. Acton*, 1 Ld. Raym. 515.]

An alien may be an obligee; for since he is allowed to trade and traffick with us, it is but reasonable to give him all that security which is necessary in his contracts, and which will the better enable him to carry on his commerce and dealings amongst us.

Co. Lit. 129. b. Moor, 431. Cro. Eliz. 142. 685. Cro. Car. 9. Salk. 46. pl. 1.

Ld. Raym. 282. Vide head of *Alien*.

Sole corporations, such as bishops, prebendaries, parsons, vicars, &c. cannot be obligees, and therefore a bond made to any of these shall enure to them in their natural capacities; for no sole body politic can take a chattel in succession, unless it be by (b) custom. But a corporation aggregate may take any chattel, as bonds, leases, &c. in its political capacity, which shall go in succession, because it is always in being.

Cro. Eliz. 464. Dyer, 48. a. Co. Lit. 9. a. 46. b. Hob. 64. Roll. Abr. 515. (b) As, the Chamberlain of Lon-

don, whose successor, by custom, may have execution of a bond or recognizance acknowledged to his predecessor for orphanage money. 4 Co. 65. Cro. Eliz. 664. 682.

3. *Who shall be said the Obligee; and therein of making several Obligees.*

If *A.*, by his bill obligatory, acknowledges himself to be indebted to *B.* in the sum of 10*l.* to be paid at a day to come, and binds himself and his heirs in the same bill in 20*l.*, but does not mention to whom he is bound, yet is the obligation good, and he shall be intended to be bound to *B.* to whom he acknowledged before the 10*l.* is due.

2 Roll. Abr. 148. *Franklin v. Turner*. [The *solventum* will shew to whom bound, though the obligee's

name be omitted in the preceding part of the instrument. *Langdon v. Goole*, 5 Lev. 21. *Lambert v. Branthwaite*, 2 Str. 945.]

If *A.* enters into an obligation to *B.* which he delivers to *C.* to the use of *B.*, though this immediately, upon the execution and delivery to *C.*, becomes the deed of *A.*, yet if, after it is presented to *B.*, he (as he may) disagrees to it *in pais*, by such refusal the obligation (c) loses its force.

Dyer, 167. a. Taw's case. N. Bendl. 75. Co. Ent. 145. Roll. Abr. 148. and Salk. 301. S. C. cited.

(c) In 5 Co. 26. b. where my Lord *Coke* cites this case, he says, that peradventure in an action brought on the bond, *A.* cannot plead *non est factum*, because that it was once his deed. — But in 5 Co. 119. b. he says, that in such case the obligor may plead *non est factum*, in regard the obligation, by the refusal of the obligee, loses its force.

Though

Dyer, 350. a. Though there may be several obligees, yet a person cannot be
 pl. 20. (a) bound to several persons severally; and therefore an obli-
 Hob. 172. gation of 200*l.* to two, *solvend.* the one hundred pounds to the
 2 Brownl. 207. one, and the other to the other, is a void *solvend.*
 Yelv. 177. (a) But a man may covenant with two severally, for that sounds only in damages. March, 103.

Cro. Jac. 251. A bond was worded in the words following: *Be it known, that*
 Foxall v. I A. do acknowledge myself to owe and be indebted to B. and C. in
 Sands. the sum of 91*l.* 12*s.* 8*d.*, for which payment to be made I bind my-
 self to B. in 100*l.*; and whether B. alone should bring the action
 for the 100*l.*, or both should join in an action for the 91*l.* 12*s.* 8*d.*,
dubitatur et adjournatur.

Yelv. 177. If an obligation be made to three to pay money to one of them,
 they must all join in the suit, for they are but as one obligee;
 and if he to whom the money is to be paid dies, the others must
 sue, although they have no interest in the sum contained in the
 condition.

Sid. 258. 420. So, if an obligation be made to three, and two bring their ac-
 Vent. 34. tion, they ought to shew the third is dead.

Queen Mother If A. bind himself in a sum to B., *solvendum* to C., who is a
 v. Challoner, stranger, to the use of B., a payment to C. is a payment to B.,
 Sid. 295. and in an action upon it the count must be upon a bond *solvendum*
 2 Keb. 81. to B.
 [In this case

the court only inclined to the opinion here stated: there was no determination: the matter
 was adjourned. — As courts of law now take notice of trusts, the defendant may plead, that the
 nominal obligee in the bond is not the real owner of it, but merely a trustee for another, and
 so entitle himself to set-off a debt due from the *cestui que* trust to him. *Rudge v. Birch*, Mich.
 25 G. 3. *B. R.* *Bottomley v. Brook*, Mich. 22 G. 3. C. B. 1 Term R. 621, 622. [But Lord
Ellenborough said, he was inclined to restrain, rather than extend, this doctrine; and accord-
 ingly the court of King's Bench held, that a defendant could not set-off against the plaintiff's
 demand a bond given by plaintiff to A. B., and assigned by him to defendant. *Wake v.*
Tinkler, 16 East, 36.; and see 7 East, 153.]

6 Mod. 228. In debt the declaration was, that the defendant became bound
 Robert v. in a bond of ——— for the payment of ——— to him, his attor-
 Harnage. ney or assigns, and on oyer of the bond it appeared, that the
 Lord Raym. *solvendum* was to the plaintiff's attorney or assigns, without men-
 1043. 2 Salk. tion of himself; and on demurrer for this variance it was held
 659. pl. 5. good; and that the declaration must not be according to the
 letter of the obligation, but according to the operation of the law
 thereupon.

6 Mod. 228. So, if A. make a bond to B., *solvendum* to such person as he
 [Vide tit. shall appoint; if B. does appoint one, payment to him is a pay-
 Condition, ment to B., and if B. appoint none, it shall be paid to B. himself.
 (P) 2.]

4. Where there are several Co-obligors or Sureties; and herein,
 where they shall be said to be jointly and severally bound, and
 of the Obligee's Remedy against all or any of them.

2 Roll. Abr. It is clearly agreed, that two or more may bind themselves
 148. Dyer, jointly in an obligation, or they may bind themselves jointly and
 19. 310. severally; in which last case the obligee may sue them all jointly,
 5 Co. 19. or he may sue any one of them, at his election; but if they are
 Dalis. 85. jointly, and not severally bound, the obligee must sue them
 pl. 42. jointly.

jointly. Also, in such case, if one of them dies (a), his executor is totally discharged, and the survivor and survivors only chargeable.

Salk. 393. pl. 2.
Carth. 61.
Lutw. 696.

(a) If two are

bound jointly, and one dies, the survivor only is liable in equity; but it is otherwise, if they were bound jointly and severally. 2 Vern. 99.

[But this is true only of the remedy at law, and not of that in equity. It is true, that from the form of the contract, the remedy at law is gone; but in equity both are considered as having undertaken to pay, and if the obligee cannot recover against the one, he shall against the other. This will appear from the following cases.

1 Br. Ch. R. 29.

Nutt and *Baker*, partners in trade, borrowed on their joint bond: *Nutt* died: *Baker*, the surviving partner, became bankrupt: the plaintiff, as executor of the bond-creditor, proved his debt, received satisfaction, in part, and brought a bill against *Vaughan*, as executor of *Nutt*, to have the deficiency supplied out of his assets. Lord *Hardwicke* held, that it was a sum lent to both, of which both had the advantage: and a debt arose against both from the nature of the transaction: it was no lien on the partnership in particular, because the plaintiff might have had it against either of them. There was farther in this case reasonable evidence of fraud or mistake, for *Baker* filled up the bond.

Simpson v.
Vaughan,
1740, cited in
2 Ves. 101.

Owen and *Church*, partners in trade, borrowed from *Bishop*, at two different times, two sums of 1000*l.* each; for which they gave two bonds, binding themselves, and their heirs, executors, and administrators, with condition, that if they or either of them, their or either of their heirs, executors, or administrators, &c. *Church* broke off the partnership, and died in 1740. *Bishop* died in 1747; and his representatives, *Owen* becoming bankrupt, brought a bill against the representatives of *Church* for a satisfaction of this debt out of the real and personal assets. Lord *Hardwicke* set up the bond both against the personal representatives and the heir of *Church*. His lordship said, the bond is considered as an agreement in writing; and therefore though the obligation and penalty are gone by the legal demand being gone, yet the condition, taking it altogether, is considered as an agreement in this court to pay the money, and as an agreement under hand and seal: therefore the court will set it up against executor and heir.

Bishop v.
Church, 2 Ves.
100. 371.

If an obligee in a bond make any variation in the original contract with the principal without the privity of the surety, as, if he change the nature of the security, or agree to postpone the day of payment, he thereby discharges the surety. It is the clearest and most evident equity not to carry on any transaction without the privity of him, who must necessarily have a concern in every transaction with the principal debtor.]

Ship v. Huey,
3 Atk. 91.
Nisbet v.
Smith, 2 Br.
Ch. R. 579.
Rees v. Bar-
rington,
2 Ves. jun.
540. || Boul-

bee v. Stubbs, 18 Ves. 20. Eyre v. Barthrop, 3 Madd. 221. Burke's Ca., cited 2 Bos. & Pul. 62. Bank of Ireland v. Beresford, 6 Dow P. C. 253. and vide Law v. East India Company, 4 Ves. 824. ||

|| But the sureties in a bond conditioned for the principal obligor's accounting and paying over, from time to time, all such tolls as he should collect for the obligees, were held not discharged

The Trent
Navigation
Company v.
Harley, 10 East,

R. 54.; and see
14 East, R. 510.
4 Moore, 153.

charged *at law* by the *lashes* of the obligees, in not properly examining the principal accounts for eight or nine years, and not calling upon him for payment so soon as they might have done, for their conduct did not amount to an *estoppel at law*, whatever remedy there might be in equity.

Davey and
others v.
Prendergrass,
5 Barn. & A.
187.

Nor is it any defence *at law* to an action upon a bond against a surety, that, by parol agreement, time has been given to the principal, for the bond, being a specialty, cannot at law be discharged by such *parol* agreement.

Bank of
England v.
Beresford,
6 Dow. P. C.
258. Samuel
v. Howarth,
5 Meriv. 272.

If the creditor enters into a *binding contract* with the principal debtor, to give him further time to pay, without concurrence of the surety, the surety is discharged, because the creditor (*a*) has put it out of his own power to enforce immediate payment when the surety would have a right to require him to do so.||

Orme v. Young, Holt, Ca. 84. (*a*) This is equally the doctrine of courts of law and of equity. Where the security is by *simple contract*, there is no objection to the surety setting up the indulgence given to the principal, as a defence to an action in a court of law; as is done in the case of actions against drawers and indorsers of bills of exchange, where time has been given, without their assent, to the acceptor. But where the surety is bound by a security of so high a nature that *at law* it cannot be discharged by a mere parol agreement to give time (as in the case of bail who are bound by recognizance, sureties in replevin bonds, and all other specialty contracts), in those cases it becomes necessary for the surety to apply by motion to the equitable jurisdiction of the common law court (as in the case of bail or replevin sureties), or to a court of equity in the case of other specialties, in order to have the benefit of a doctrine which, in those cases, cannot be enforced by the ordinary forms of pleading. See Davey v. Prendergrass, *ubi sup.*||

Dyer, 19. b.
pl. 114.

If three enter into an obligation, and bind themselves in the words following, *Obligamus nos et utrumque nostrum per se pro toto et in solido*; these make the obligation joint and several.

Cro. Jac. 322.
Hawkinson v.
Sandilans.

So, where two bound themselves, *or any of them, their heirs, executors, or either of their heirs*, &c. and the obligation was sealed and delivered by both of them jointly; this was held to be a joint and several, and not a joint bond only; and that the word *vel* should be understood the same as *et*; and that therefore the joint delivery and acceptance could not make that joint only, which by the words was joint or several, at the election of the obligee.

Thomas v.
Frazer,
3 Ves. 399.

|| So where *A.* and *B.*, partners, became jointly bound to *C.*, conditioned that if *A.* and *B.*, their heirs, executors, or administrators, or any of them, should well and truly pay, &c. the bond was held joint and several.||

8 H. 6. 31.
2 Roll. Abr.
149.

If two jointly and severally bind themselves in an obligation, which they severally deliver at different times and places, yet is the obligation joint or several, at the election of the obligee.

Moor, 260.
pl. 407.
3 Leon. 206.
Wigmore v.
Wells. [Spencer v. Durant,
1 Show. 8.
S. P. (*b*) But
if one is sued,

If three are bound in a bond by these words, *Obligamus nos et quemlibet nostrum conjunctim*; this is a joint obligation, and one of them alone cannot be sued (*b*); for the word *conjunctim* makes the obligation joint, which the word *quemlibet* cannot make several; being inserted for no other purpose but to express more strongly that they should be all bound, not that they were to be severally bound.

he must take advantage of it by pleading in abatement; for if he demands oyer, and demurs, the plaintiff shall have judgment; for the court will presume, that the other never sealed it. Gilbert v. Bath, 1 Stra. 503. They will presume the like, unless the plea state that the other actually did seal it. Hollingworth v. Ascue, Cro. Eliz. 355.]

|| But

|| But a joint bond was held joint and several against creditors in the administration of assets where the intention of the parties was admitted, and was decreed to be paid as a specialty debt, out of the estate of one of the obligors.

Burn v. Burn,
3 Ves. 573.
Ex parte
Symonds,
1 Cox, 275.

Davis executed a bond as the joint and several bond of himself and *Marsh*, and signed it *Davis* and *Marsh*, having no authority from *Marsh* so to do: it was held good as the *several* bond of *Davis*: for the sealing and delivery is sufficient alone without signature; and if it had been necessary, the court would have held *Davis* to have described himself "*Davis* and *Marsh*," and to be estopped from shewing that his name was *Davis* only.||

Elliot v. *Davis*,
2 Bos. & Pul.
338.

If by indenture between three on the one part, and two of the other, the two covenant jointly and severally to perform a certain act, and the three likewise covenant jointly and severally with the said two, that, after the performance of the said act, they will pay the said two a certain sum of money, &c., and then follow these words, viz. *Pro vera et reali performance omnium articulo- rum et agreamentorum prædictorum alternatim una partium prædictarum obligavit se, hæredes, executores, administratores, et assignatos suos, in et subter penalitatem sexaginta librarum sterlingarum*; an action of debt for the 60*l.* on this last clause cannot be brought against one of the three only, being only joint, and not joint and several, like the precedent covenant.

2 Roll. Abr.
149. adjudged
by three judges
against *Rolle*,
who held it to
be joint and
several; and
of that opinion,
he says, were
divers of the
judges and
serjeants, at
the table in
Serjeants' Inn.
in *Fleet Street*,

on its being proposed to them.

Although two or more may bind themselves jointly, or jointly and severally, in which case the obligee may sue them all jointly or severally, at his election; yet, if three or more bind themselves jointly and severally, the obligee cannot sue two of them (a) only jointly.

10 H. 7. 16.
Yelv. 26.
Sid. 238.
(a) Unless it
appear to the
court that the

other persons are dead. Hard. 198. Cro. Eliz. 494. Sand. 291. Sid. 238. 420. Allen, 21. 41. Lutw. 696. Cro. Jac. 152. Keb. 840. 956.

Also, if two be bound in a bond jointly, and one be sued alone, though he may plead this matter in abatement of the writ, yet he cannot plead *non est factum*; for it is his deed, though not his sole deed.

Co. Lit. 283. a.
5 Co. 119.
Whelpdale's
case. Doct.
Pl. 198.

Cro. Jac. 152. Vent. 34. Poph. 161. 9 Co. 110.

And therefore in debt against one, on an obligation wherein two are jointly bound, after imparlance and oyer, the defendant cannot plead that the other sealed and delivered; for as that must come on the defendant's side, and it is too late to plead it after imparlance, it shall be taken, that the other did not seal, &c. nor will the oyer help it, for it does not appear by it, without special averment. But of (b) records oyer is sufficient, without averment.

Vent. 76. 135.
2 Keb. 795.
(b) And there-
fore in a *seire*
facias brought
against three
bailees or
sureties, upon
a recognizance
acknowledged

by them and the principal jointly and severally; on demurrer the writ abated, because, this being founded upon a record, the plaintiff ought to set forth the cause of the variance from the record; as, that one was dead. But, if an action be brought upon bond in the like case, there the defendants ought to shew that it was made by them and others in full life not named in the writ; because the court shall not intend that the bond was sealed and delivered by all that are named in it; and therefore the defendants cannot demur upon it, though it be entered in *hæc verba*. Allen, 21. Blackwell v. Ashton.

So,

Saund. 291.
Sid. 420.
Cabel v.
Vaughan.

So, in debt against one, on a bond wherein two are jointly bound, after oyer the defendant demurred, and the plaintiff had judgment; for though another be named in the bond, yet it does not appear, without averment, that he sealed, and then the bond is single; but it ought to have been pleaded in abatement.

9 Co. 119, a.
in Whelpdale's
case.

Also, if two or more be jointly bound, though, regularly, one of them alone cannot be sued, yet, if process be taken out against all, and one of them only appear, but the other stand out to an outlawry, he who appeared shall be charged with the whole debt.

Hob. 59.
Cro. Eliz. 648.
2 Sid. 12.
Mod. 2. Roll.
Abr. 888, 889.

If two are jointly bound, and there is judgment against both, execution likewise must be taken out against both, and must be of the same nature: also, if two are jointly and severally bound, and there is judgment in a joint action against both, the execution must be joint against both, and of the same nature; so that you cannot take out a *capias* against one, and an *elegit*, &c. against the other; for though the plaintiff might have sued them severally, yet by suing them jointly he has made his election, and the execution must ensue the nature of the judgment; and though they be several persons, yet they make but one debtor, when *J. S.* sues them jointly. But if the obligee sues them severally, he may sever them in their kinds of execution; for though the obligation be but one, yet the originals, suits, pleadings, judgments, and executions are as different as if they were upon several obligations.

Raym. 26.
Lev. 50.
Keb. 92. 123.
S. C. Edsat v.
Smart. (a) So
adjudged
1 E. 3. 13.
pl. 41. 3 E. 5.
pl. 37.; et vide
29 Ass. pl. 37.
29 E. 3. 29.
(b) For the dif-
ference be-
tween a real
and personal
execution, and
that a personal

But, if there be a joint judgment against two, and one die, a *scire facias* lies against the other alone, reciting the death; and he cannot plead, that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at (a) common law, the charge upon a judgment being (b) personal survived; and the statute of Westm. 2. 13 Ed. stat. 1. c. 45. that gives the *elegit*, does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his execution which way he pleases; for the words of the statute are, *sit in electione*. But, if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by (c) suggestion, or by *audita querela*.

execution will survive, though a real will not, vide 3 Co. 14. Yelv. 202. Raym. 153. 2 Keb. 5. 351. 4 Mod. 315. 5 Keb. 295. Salk. 319. pl. 3. Ld. Raym. 44. Comb. 441. 5 Mod. 338. Carth. 320. 404. Show. 402. (c) For this vide F.N.B. 166. 44 E. 3. 10.

Hob. 2.
Cro. Jac. 338.
2 Bulst. 97. &c.
Godb. 257.
Roll. Rep. 8, 9.
S. C. adjudged
between
Crawley and
Lidgeat.
(d) But if, after

If two are bound in an obligation jointly and severally, and judgment given against each in two several actions, one *in Banco*, the other *in Banco Regis*, and after one is taken in execution *in Banco Regis*, and after an execution is taken *in Banco* against the other by *elegit*, and lands and goods (d) delivered in execution thereupon; he, that is in execution by his body *in Banco Regis*, shall be delivered upon an *audita querela*, because the execution upon an *elegit* is a satisfaction.

execution of *elegit*, the judgment *in Banco* is reversed, perhaps the other shall not have an *audita querela*; per Croke, contra Doddridge. 2 Bulst. 100.—And my Lord Coke says, that if upon an *audita*

audita querela the other be once discharged, although afterwards the judgment in *Banco* be reversed, yet he shall not be taken in execution again. Roll. Rep. 10. 2 Bulst. 101.

If *A.* and *B.* are bound in an obligation jointly and severally, and judgment given against each upon several actions brought, and both taken in execution, and after *A.* escapes, yet *B.* shall not be delivered upon an *audita querela*; for though the obligee may have an action against the sheriff for the escape, yet, till he is actually satisfied, the other shall not have an *audita querela*, nor the obligee be compelled, whether he will or no, to take his remedy against the sheriff, who may die or be insolvent.

5 Co. 86. Cro. Eliz. 478, 479. 555. Co. Ent. 85. *vide* tit. *Escape*.

If several obligors are bound jointly and severally, and the obligee make one of them his executor, it is (*a*) a release of the debt, and the executor cannot sue the other obligor.

8 Co. 156. Salk. 300.; *et vide* Jon. 345. *¶ acc.*

1 Bos. & P. 650. *¶* [(*a*) But though it be a release in law, in regard it is the proper act of the obligee, yet the debt by this is not absolutely discharged, but it remains assets in his hands, to pay both debts and legacies. Cro. Car. 573. Yelv. 160. *et vide* tit. *Evidence*, letter (G).]

A. and *B.* were jointly bound to *J. S.*, who made the wife of *A.* executrix, and died; *A.* and his wife brought debt against *B.*, who pleaded this matter in abatement: it was argued by Serjeant *Turner*, for the defendant, that by making the wife of one of the obligors executrix, the other obligor is discharged. Hob. 10. *Fryer v. Gildridge*, 21 E. 4. 81. b. Bro. Exec. 118. And that it would be so, if they were bound jointly and severally. Plow. 38. a. *Platt's case*. Keilw. 63. 8 Ed. 4. 3 Bro. Debt. 156. The reason is, because a debt, or personal thing, once suspended is gone for ever; and here the plaintiff, one of the obligors, is discharged, for he and his wife cannot sue himself; and of that the other shall take advantage. Dyer, 140. Co. Lit. 264. b. It is a release in law, of which his companion shall take advantage, notwithstanding the opinion 21 H. 7. 37. But if it was but suspended for the time of the executorship, yet it is for the defendant, having pleaded in abatement. 11 H. 7. 4. b. 1 Roll. Abr. tit. *Extinguishment*, 940. Moor, 855. pl. 1174. 1 Cro. *Dorchester v. Webb*, 272. Yelv. 160. *Flud v. Ramsey*, 8 Co. 136. *Per cur.* — The plea being pleaded in abatement, it is for the defendant; for during the coverture and executorship there is a suspension of the debt. But it was agreed, that this debt due by the baron was assets in his hands, and liable to the creditors, though it should be adjudged an extinguishment; for as *North* said, this is a release, but it is but by will; and therefore in nature of a legacy, which shall not be preferred to a debt. But it was doubted, if it had been pleaded in bar, if it should be for the defendant; and *North*, *Ellis*, and *Windham* thought not; but that, after the death of the baron, it might be sued for; for the suspension is but during the coverture, and the baron is executor only in right of his wife: but of this *Atkyns* doubted. But in the principal case there was judgment for the defendant.

Hammond *et ux. v. Bendish*, Pasch. 26 Car. 2. Rot. 712.

If a feme sole obligee take one of the obligors to husband, this is said to be a release in law of the debt, being her own act.

2 Co. 156. a. March, 128.

If one obligor makes the executor of the obligee his executor, and leaves assets, the debt is deemed satisfied; for he has power,

Hob. 10.

by

by way of retainer, to satisfy the debt; and neither he nor the administrator *de bonis non*, &c. of the obligee can ever sue the surviving obligor.

2 Lev. 75.

But, if two are bound jointly and severally to *A.*, and the executor of one of them makes the obligee his executor, yet the obligee may sue the other obligor.

Co. Lit. 232.a.

[26 H. 6.

T. Barr. 37.

If two are jointly and severally bound in an obligation, and the obligee releases to one of them, both are discharged.

Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards: the other obligor pleads this in bar, and it was adjudged a good plea in bar. *Nota*, each was bound in the entirety, therefore it was joint and several. 34 H. 6. So, in the case of the king, if he releases to one of the obligors, the other shall take advantage. 5 Rep. 56. *contra*. — And as a release in deed to one obligor discharges the other, so of a release in law, as 8 Rep. 156. Needham's case. A woman obligee marries the obligor, that is another sort of discharge. But in 17 Car. 2. *B.R.* two were bound jointly and severally. The plaintiff sued both, and afterwards entered a *retraxit* against one: whether that discharged the other was the question? *Berkley* said it was, for it amounts to a release in law, as the plaintiff confesses thereby that he had not cause of action, and therefore he cannot have judgment, as in *Hickmot's* case, 9 Rep. and *retraxit* is a bar to an action; and the plaintiff by his own act has altered the deed from joint to several, and therefore the other shall have advantage of it. Co. Inst. *contra*; for a *retraxit* is only in nature of an estoppel, and therefore the other shall not have advantage; neither is it a release, though it be in the nature of a release; and if the obligee sues both, and then covenants with one not to sue farther, that is in the nature of a release, but the other shall not take advantage of it; and in 21 H. 6. it is said, that there must be an actual release to one obligor to discharge the other. See *March's R.* 165. — *Pasch.* 18 Car. *Hannam v. Roll*. The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay, and in an action on the case the matter was found specially; and *Rolle* argued, that the debt was not absolutely discharged, but only *sub modo*, viz. if the other can have the release to plead, and because the forbearance was a good consideration. But the court was of opinion, that the debt was absolutely discharged, and therefore the consideration was insufficient. See *Hob.* 70. *Parker v. Sir John Lawrence*. In trespass against three, they divided on the pleading. Judgment against one. Then he entered a *nolle prosequi* against the two others; it was held to be no discharge to him against whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not subject to the damages recovered against him; but a *nolle prosequi*, or nonsuit before judgment against one, would discharge it. *Lord Nott. MS. Co. Lit. 232. a. note (i), last edit.]*

Dean v.

Newhall,

8 Term R. 168.

Hutton

v. Eyre,

6 Taunt. 239.

1 Ld. Raym.

690.

12 Mod. 551.;

et vide

Solly v.

Forbes, 2 Brod. & B. 58.

|| But the release must be express, and not merely a constructive release. Therefore a covenant not to sue one of the obligors, and that, if sued, the covenant shall be an effectual release, and may be pleaded in bar, does not release the other obligor; for although a covenant not to sue a sole obligor operates as a constructive release, yet that is only in order to prevent circuity of action, and not because the covenant is to all effects the same as an express release. Therefore it has not the same effect as to another obligor to whom the covenant does not apply. ||

2 Lev. 220.

Seaton v.

Henson,

2 Show. 28.

pl. 20. S. C.

adjudged *nisi*.

(a) Where

several mer-

chants cove-

nanted *separatim*,

and the seal of one of them was torn off, it was held, that this should avoid the covenant as to him whose seal was torn off only, but not as to the others. 5 Co. 25.

Matthew-

Three were bound jointly and severally in an obligation, and an action was brought against one of them, who pleads, that the seal of one of the others was torn off, and the obligation cancelled, and therefore void against all. Upon demurrer it was adjudged, that the obligation, by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were (a) severally bound.

Matthewson's case. March, 126. S.C. cited, and a difference there taken between a bond and a covenant.

So, where three were bound in a bond jointly and severally, March, 125. and the seals of two were eaten by the rats, the court inclined, Bayly v. that the bond was void against all. Garford. 2 Show. 29.

S.C. cited, as adjudged to have been void.

But, where two were bound jointly and severally, and it was found by special verdict, that after issue joined, and before the *nisi prius*, the seal of one of the obligors was taken off the bond; it was held, that this being after issue joined, the bond was good. Owen, 8. Michael's case. Dyer, 59. pl. 12, 13. S.C. and S. P. where the jury

were directed to try, whether it was his bond at the time of the plea pleaded.

If *A.* be bound in a bond for payment of money, and *B.* be bound with him, as his surety only, and the bond happen to be lost; equity will set up the bond, as well against the (*a*) surety as against the principal, because the bond was once a legal charge against both. Abr. Eq. 95. Sheffield v. Lord Castle- ton. (*a*) Especially, if the money

was lent principally upon the surety's credit. Chan. Ca. 77.; *et vide* 2 Chan. Ca. 22. Vern. 196.

In equity, a bond creditor shall have the benefit of all counter-bonds or collateral securities given by the principal to the surety; as, if *A.* owes *B.* money, and he and *C.* are bound for it, and *A.* gives *C.* a mortgage or bond to indemnify him, *B.* shall have the benefit of it to recover his debt. Abr. Eq. 95. Maure v. Harrison.

A bond made to secure a just debt, payable with lawful interest, shall not be avoided by reason of usury, or any corrupt agreement between the obligors, to which the obligee was no way privy; as, where *A.* being indebted to *B.* in 100*l.*, agrees to give him 30*l.* for the forbearance of that 100*l.* for a year, and gives him a bond of 60*l.* for payment of the 30*l.*, and for the payment of the 100*l.* enters into a bond of 200*l.* together with *B.* for the payment of a true debt of 100*l.* due from *B.* to *C.* And. 121. Moor, 752. pl. 1035. Cro. Jac. 59, 55. Yelv. 47.

5. *Of their Remedies against each other.*

If one of the sureties pays all the bond, yet the obligee is not compellable by law to assign the bond to him, but the surety's remedy must be in (*b*) Chancery. (*b*) Or perhaps he may have remedy by writ *De plegiis*

acquietandis. Lev. 72. [Qu. Whether not in an action for money paid to the other's use?] *||* It is clear that such an action lies. *Vide* page 818. *||*

And on this foundation, that there is a remedy in equity, it hath been adjudged, that if *A.* together with *B.* is bound to *C.* for the proper debt of *B.*, &c. and *A.* pays the money, and *B.* dies, and makes *D.* his executor, and *D.*, in consideration that *A.* will forbear to sue him till such a time, assumes and promises to repay him; this consideration is good, though *D.* was liable in equity only. (*c*) Sid. 89. Lev. 71. Scot and Stevens. Roll. Rep. 27. S. P. *per* Croke. (*c*) Why was not *D.* liable at law as executor, for money paid by plaintiff, for the use of testator? *||* It is now clear law that he would be so liable. It was formerly doubted whether *indebitatus assumpsit* would lie by a surety against his co-obligor, the principal debtor. Woffington v. Sparks, 2 Ves. 570. Yet, in that case, an assignment

assignment of the bond to the surety was refused, on the ground that, *having no counter-bond*, he might have paid the bond, and maintained a special action upon the case against the principal for the money: and it is now clear, that where one person is surety for another, and is called upon to pay, it is *money paid to the use of the principal debtor*, and may be recovered as such in an action against him. *Exall v. Partridge*, 8 Term R. 310. Provided the surety have taken no security from the debtor. *Toussaint v. Martinnaut*, 2 Term R. 105. *Cowley v. Dunlop*, 7 Term R. 568.; and see *Maxwell v. Jameson*, 2 Barn. & A. 51. The point appears to have been first decided by Lord *Mansfield*, in *Decker v. Pope*, 1 Selw. N. P. 74. n. 27. This was an action brought by an administrator *de bonis non* of a surety, who, at defendant's request, had joined with another friend of defendant's in giving a bond for the price of some goods sold to defendant; and the surety having been obliged to pay the money, the administrator declared against defendant for so much money paid to his use: Lord *Mansfield* directed the jury to find for the plaintiff; observing, that when a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, he had conferred with most of the judges upon it, and they agreed in that opinion.||

Chan. Ca. 246. Also, it is held clearly in equity, that one surety may compel
Chan. R. 54. another to contribute towards payment of a debt, for which they
120. 150. were jointly bound.

2 Bos. & Pul. || And whether jointly or jointly and severally bound, or whe-
275. ther severally bound by the same or by different instruments,
sureties have a common interest and a common burden.

Where bound by different instruments for the same principal,
they are as effectually bound, *quoad* contribution, as if bound in
one, with this difference only, that the sums in each instrument
ascertain the proportions, whereas if they were all joined in the
same instrument they must contribute equally.

Deering v. Where
Earl of Win- a surety joins with his principal in a bond, and no other security is executed, and the surety
chelsea, pays the bond, he is only a simple contract creditor of the principal. *Copis v. Middleton*,
2 Bos. & Pul. 1 Turner, R. 224.
270. 1 Cox,
318.

Lawson v. And on a bill by a surety against his co-surety *and the principal*,
Wright, for a contribution in respect of money actually paid by plaintiff
1 Cox, 276.; for the principal, it is not necessary to prove the insolvency of the
and see *Ibid.* principal; but it is otherwise where the principal is not a party.
322.

Cowell v. So, one of several co-sureties in a bond may recover against
Edwards, any one of the others *his aliquot proportion* of the money paid
2 Bos. & Pul. by him, regard being had to the number of the co-sureties; and
269.; but see this, *perhaps*, although neither the insolvency of the principal nor
1 Cox, 318. of any of the co-sureties were proved.

2 Bos. & Pul. But it seems no more than an *aliquot part* of the whole can be
269. 274. recovered *at law*, though if the insolvency of all the other parties
were made out, a larger proportion might be recovered in equity.

Dunn v. Slee, And a surety in an indemnity bond may bring an action for
1 Moo. 2. contribution against his co-surety, although he has given a sub-
sequent security to the obligees, under which he has paid the sum
conditioned in the bond, without the knowledge or consent of
such co-surety.||

2 Vent. 348. It hath been held, that if the obligee sue in Chancery the exe-
cutor of one obligor to discover assets, he must make all the
obligors parties, that the charge may be equal. But it is made a
quære, whether he may not sue the principal, and leave out them
which are bound only as sureties.

[There were three obligors in a bond, and the obligee filed
his bill against the principal, and the representatives of one
of

of the sureties, stating that *A.* the third obligor was dead insolvent. An objection was made for want of parties, because the representatives of the third obligor were not before the court. But by Lord *Hardwicke*,—The general rule of the court, to be sure, is, where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are entitled to the assistance of each other in taking the account. (a) Another reason is, that the debtors are entitled to a contribution, where one pays more than his share of the debt. A further reason is, if there are different funds, as, where the debt is a specialty, and the plaintiff may sue at law either the heir or executor for satisfaction, he must make both parties, as he may come in the last place against the real assets. But there are exceptions to this, and the exception out of the first rule is, that if some of the obligors are only sureties, there is no pretence for the principal in the bond to say, that the creditor ought to bring the surety before the court, unless he had paid the debt. The exception out of the second rule is, that if there are no personal assets at all, and this fact appears plainly in the cause, there is no reason to bring the representative of that co-obligor before the court. But this is a special excepted case, and therefore not within the rule. But suppose it was a common case, and the bill had been brought by the representatives of *B.*, one of the sureties in the bond, whether it is necessary to make the representative of *A.* a party. As to the taking of the account, it is quite out of the case by the admission of the defendants that the bond is not paid, nor any part of the principal and interest, so that here is no ground to make the representative of *A.* a party in order to assist him in taking the account. The other pretence is, in order for a contribution. It is admitted by all the answers, that *A.* is dead insolvent; and therefore this differs from the case of *Ashhurst v. Eyre*, (2 Atk. 51. 3 Atk. 341.) determined before me upon a plea: for though there was an admission of insolvency in that case, yet it did not appear whether the principal and interest might not have been paid by the co-obligor, who was not before the court, and that was the reason of allowing the plea. His Lordship therefore over-ruled the objection for want of parties.]

¶ Where the obligors are all principals, it is clear they must all be made parties in equity.¶

(a) *Sed vide*
Collins v.
Griffith,
2 P. Wms.
313.; ¶ but see
Angerstein
v. Clarke,
2 Dick. 738.
Madox v.
Johnson,
5 Atk. 406.¶

Cockburn
v. Thompson,
16 Ves. 326. Bland v. Winter, 1 Sim. & Stu. 246.

But it is held, that if a judgment be had at law against one obligor, you may sue the executor of him alone, to discover assets, because the bond is drowned in the judgment. 2 Vent. 348.

¶ As the creditor is entitled to the benefit of all the securities the principal has given to his surety, so the surety has as full an equity to the benefit of all the securities the principal gives the creditor.¶

Wright v.
Morley,
Morley v.
St. Alban,
11 Ves. 22.
2 Vern. 608.
Parson v.
Priddock.

Thus, if the principal in a bond, being arrested, gives bail, and judgment is had against the bail, and the sureties are afterwards sued on the original bond, and are obliged to pay the money,

the sureties shall have the judgment against the bail assigned to them, in order to reimburse them what they had paid, with interest and costs; and the sureties in the original bond are not to be contributory, for the bail stands in the place of the principal.

||(E) Of the Condition and Consideration of the Obligation.

(a) Mitchell v. Reynolds, 1 P. Wms. 181. See Lord Macclesfield's elaborate judgment.

A BOND conditioned for any matter contrary to law, or given for an illegal consideration, is void; as, if it be conditioned not to exercise a certain trade anywhere in the kingdom, this is an injurious and illegal restraint of trade, and the condition is void. (a) But it is otherwise if the condition be only not to trade within certain reasonable limits. (b)

(b) *Ibid.* Chesman v. Nainby, 2 Stra. 739. 3 Bro. P. C. 349. Clerk v. Comer, Ca. temp. Hard. 53. 7 Mod. 250. (oct. ed.) Davis v. Mason, 5 Term R. 118. Bunn v. Guy, 4 East, 190.; and see Gale v. Reed, 8 East, 80.

Collins v. Blanter, 2 Wils. 347.; and see 8 Term R. 390.

So, where a bond was conditioned to indemnify the plaintiff against a note for 350*l.*, given by him to the prosecutor of an indictment for perjury against some of the obligors, on a corrupt agreement, that the prosecutor should not appear to give evidence; the bond was held void, and the obligee could not recover, since it was an agreement to stifle a prosecution for corrupt perjury.

Pole v. Harrobin, 9 East, 416. n.

So, also, a bond given for payment of a sum of money to plaintiff, to induce him to discharge a person in his custody as an impressed sailor.

Paxton v. Popham, 9 East, 406.

So, also, a bond given to cover the price of goods sold by the obligees to the obligor for the purpose of an illegal traffic from the *East Indies* (the obligees assisting in preparing the goods for such illegal voyage).

Norton v. Syms, Moor, 856.; see *vide* Yale v. Rex, Bunb. 58.

Where the consideration on which a bond is given is illegal by any statute, the defendant may avoid the bond by pleading; or if the condition be illegal on the face of it, he may demur; and if the bond contain several conditions, although only one of them be void by statute, yet the whole bond is void.

2 Bro. P. C. 381. 2 Bl. R. 1108. Where the bond is void as to part at *common law*, still it may be good as to the residue. Newman v. Newman, 4 Maul. & S. 71.; and see Dacosta v. Davis, 1 Bos. & Pul. 242. As to bonds and securities void under the gaming act, 9 Ann. c. 14., see tit. *Gaming*; under the statutes against sale of offices, see tit. *Offices and Officers*; under the statutes against simony, see tit. *Simony*; under the statutes against usury, see tit. *Usury*; as to marriage-brokerage bonds, see tit. *Marriage*; and as to bonds given to secure differences on illegal stock-jobbing transactions, see Cannan v. Bryce, 3 Barn. & A. 179. Amory v. Meryweather, 2 Barn. & C. 573.

(c) Walker v. Perkins, Burr. 1568. Turner v. Vaughan, 2 Wils. 339.

A bond given on an immoral consideration is void; as, if given by a man to a woman as a premium *pudicitiae*, in consideration of future cohabitation. (c) But it is otherwise if given in consideration of *past* cohabitation; and this notwithstanding the obligor be a married man during the whole period of cohabitation. (d)

Lady Cox's Case, 3 P. Wms. 339. Franco v. Bolton, 3 Ves. 572. (d) Nye v. Mosely, 6 Barn. & C. 133. S. C. 2 Sim. & Stu. 269.

A bond

A bond given by a debtor *some time after* a general composition of 6s. 8d. in the pound with his creditors, conditioned to pay to one of them the residue of his debt, is good, though given without the knowledge of the other creditors; but if given before, or at, the time of the composition, it would be void, as being a fraud upon the other creditors.

Butler v. Rhodes, 1 Esp. 236. *Ex parte* Sadler, 15 Ves. 52. Brady v. Shiel,

A bond given to persons who would be prejudiced by the passing of a private act of parliament, in consideration of their withdrawing their opposition to it, is not illegal. It cannot be considered a fraud upon the legislature. ||

See further, on the subject of conditions of bonds, Vol. II. tit. "CONDITIONS," (K) (L), &c. || and *Addenda* to that title. ||

(F) How the Breach of the Condition must be assigned and set forth, and the Manner of pleading Performance, and in Bar.

THE usual way of declaring and setting forth the breach on a bond is, that the defendant *per scriptum suum obligatorium sigillo suo sigillatum* acknowledged, &c. and therein to lay a place where it was made, that it may receive trial, in case it be denied. Also, it is usual to say, that the bond was sealed and delivered; but this has been held not to be of necessity, and to be cured by pleading over, the calling it *scriptum suum obligatorium* implying so much. But it hath been held, not to be sufficient for the plaintiff to declare *quod reddat ei* so much, without adding *quas ei debet et injuste detinet*.

[The bond being the sole foundation of the action, the court must see that it is properly executed; and therefore it is matter of substance, that *profert* be made of it. And the defendant being entitled to it by law, the court can in no case dispense with it.

But where a bond is lost, it is now holden, that the plaintiff may declare specially, "that it is lost by time and accident," and without a *profert*. And where he has made a *profert*, and the deed is lost, he may move that the production of a copy shall be oyer, or if he have no copy, to amend his declaration, and plead as above.]

Matison v. Atkinson, 5 Term R. 153. n. And see Whitfield v. Fausset, 1 Ves. 392.

|| Although the courts of law now dispense with the *profert* of a deed where it is alleged to have been lost by time or accident, or to be in the possession of the defendant, the courts of equity have still concurrent jurisdiction in these cases. (a) But in bills framed for relief, as well as discovery, they require an affidavit to be annexed to the bill, that the deed alleged to be lost is not in the possession or power of the plaintiff. This precaution prevents an obligee in a bond from enforcing the obligation without

Took v. Tuck,
4 Bing. 224.
9 Barn. & C.
437. S. C.;
and see
Cockshot v.
Bennett,
2 Term R. 765.
1 Camp. 146.

Vauxhall
Bridge Com-
pany v. Earl
Spencer,
Jac. R. 64.
2 Madd. 356.

Cro. Jac. 420.
Cro. Eliz. 773.
3 Lev. 548.
6 Mod. 306.
Ld. Raym.
336. 765.
2 Ld. Raym.
1045.

Soresby v.
Sparrow,
2 Stra. 1186.
1 Wils. 16.
S. C.

Read v. Brook-
man, 3 Term
R. 151. Totty
v. Nesbitt, *Id.*
153. n. || Bol-
ton v. Carlisle,
2 H. Bl. 259. ||
1 Cr. Pr. 141.

(a) Atkinson v.
Leonard,
3 Bro. Ch. Ca.
218. Toulmin
v. Price, 5 Ves.
238. *Ex parte*
Greenway,
6 Ves. 815.
East India
Company v.

Boddam, 9 Ves. 464. risk of being affected by what might appear against him were it produced. (a) ||
(a) Fon-
blaque on Equity, (5th edit.) 17. n.

(b) Cro. Jac. In an action of debt for part of a debt upon contract or obligation, the plaintiff must acknowledge satisfaction of the residue; 409. Cro. Car. for there must be no variance from the specialty. (b) But in debt 436. Allen, 57. upon two bonds, the plaintiff in his declaration may acknowledge 2 Vern. 129. the payment of 10*l.* in part, without shewing upon which bond 244. Roll. R. it was paid; for it is immaterial, and can no way prejudice the 423. (d) How- defendant. (c) Besides, the money might have been paid generally, ever, in such without any application to either bond. (d) case, the plain-
tiff has his elec-
tion to which bond to apply the money.

Bloss v. Cutting, 2 Str. 1194.] ||The rules of our law as to the application of payments, where several debts are due, have been derived generally from the civil law, though the text of that law does not appear to have been consulted in the decision of our cases till Clayton's case, in Devaynes v. Noble, 1 Meriv. 572., determined by Sir W. Grant M.R.; a circumstance which will, perhaps, account for our decisions on the subject being, in some respects, at variance with the principles of the civil law, and not always reconcilable with any general rule, or with each other. The general principle is, that where there are two distinct debts, the debtor, in paying a sum, may direct to which debt it is to be applied; and the application may be made, not only by an express direction, but may be inferred from the circumstances attending the payment. Peters v. Anderson, 5 Taunt. 596. Newmarch v. Clay, 14 East, 259. Shaw v. Picton, 4 Barn. & C. 715. The mere entry, however, by the debtor, in his own books, of the account on which he pays, will not be evidence of an appropriation by him (2 Vern. 606.); and it is the same as to such an entry made by the receiver, uncommunicated to the payer. 2 Barn. & C. 65. If the payer makes no express application, and no inference of his intention can be arrived at, then the right of appropriating the payment to one debt or the other devolves on the receiver. According to the civil law, the election was to be made at the *time of payment*, as well in the case of the creditor, as in that of the debtor. "Permittitur ergo creditor constituere in quod velit solutum; sed constituere in re præsentis, hoc est, statim atque solutum est; cæterum postea non permittitur." Dig. lib. 46. tit. iii. q. 1. 3. But our cases determine that the creditor is not bound to make such election immediately, but may make it at any time. Wilkinson v. Sterne, 9 Mod. (Leach) 427. Peters v. Anderson, 5 Taunt. 596. Simson v. Ingham, 2 Barn. & C. 65. Many decisions of our courts seem to establish that the creditor's right of election is perfectly absolute, and that he is not bound to regard either the priority in time of the two debts, or the circumstance of one of them being more burdensome than the other to the debtor. Thus in Wilkinson v. Sterne, *ubi sup.* Lord Hardwicke held, that a creditor by mortgage, and also by bond with penalty, might apply a general payment to the interest of the mortgage, and was not bound to place it to the discharge of the bond. So in Peters v. Anderson, *ubi sup.*, where the plaintiff had first served the defendant under a deed of covenant, and earned wages, and then had earned further wages on a common agreement, and payments were made generally by defendant, which if placed to the first debt on the covenant, would extinguish it, it was held, that the plaintiff was not bound to apply them to the first debt on the deed, but that he might sue in covenant for the balance due under the deed, and in *assumpsit* for that accrued subsequently. So in Plomer v. Long, 1 Stark. 153. Lord Ellenborough held, that a creditor was not bound to apply a general payment to a specialty debt *with surety*, in preference to a simple-contract debt without; and see Hall v. Wood, 14 East, 243. n. (a). In one case, indeed, where a debtor owed money on specialty carrying interest, and also on simple contract not carrying it, it was held that a general payment was to be applied to extinguish the specialty debt, that being prior *in point of time*. Manning v. Western, 2 Vern. 606. (3d edit.) The principle of the civil law was, that an unappropriated payment might be applied by the creditor at his own election, if the election was made *at the time of payment*; that if not then made, the law presumed that the payment was made on account of the debt most burdensome to the debtor; and if both debts were equal in this respect, then that it was made on account of the demand prior in point of time. "Si autem, nulla causa prægravet (id est, "si omnia nomina similia fuerint), constat quoties indistincte quid solvitur, in antiquiorem "causam videri solutum." Dig. lib. 46. tit. iii. 5. Though this doctrine has never been distinctly adopted as a principle of decision in our courts, and though the above cases are certainly irreconcilable with it, yet in some other cases it appears, to a certain extent, to have been recognized. Thus in Heyward v. Lomax, 1 Vern. 23. (3d edit.), where a debtor owing money on mortgage, carrying interest, and also on simple contract, paid
a sum

a sum generally, it was taken to be paid towards discharge of the mortgage, "because it was natural to suppose that a man would rather elect to pay off the money for which interest was to be paid, than the money for which no interest was to be paid." And in *Meggott v. Mills*, Lord Raym. 287., *Holt C. J.* laid it down, with the assent of the other judges, that if *A.* while in trade become indebted to *B.* in 100*l.*, and then after leaving trade contracted a further debt of 100*l.* and then paid 100*l.* generally, *B.* must apply this payment to the first debt, and could not apply it to the second, and sue out a commission of bankrupt on the first; which was also expressly decided by Lord *Kenyon* in *Dawe v. Holdsworth*, Peake Ca. 64. And in a case where *A.* deposited a note of *B.* with his bankers as security for money owing to them, and *A.* contracted a further debt to the bankers without any security, and then paid them money on account, Lord *Kenyon* held that the bankers were bound to apply the payment in discharge of the debt for which the note was security. *Hammersley v. Knowlys*, 2 Esp. Ca. 66. The two cases of *Meggott v. Mills*, and *Dawe v. Holdsworth*, have been considered to rest on the peculiar and special ground of bankruptcy, and on the presumption that the debtor must have intended to apply the payment to extinguish that debt which subjected him to the criminality (as it was then considered) of being a bankrupt; and the same kind of presumption appears to have been the ground of the late decision, where it was held, that where one of the debts was illegal, and the other legal, a general payment must be applied by the receiver to the legal debt. *Wright v. Laing*, 5 Barn. & C. 165. The case of *Hammersley v. Knowlys* may, perhaps, be deemed irreconcilable with Lord *Ellenborough's* decision in *Plover v. Long*. In the cases of *Meggott v. Mills*, *Dawe v. Holdsworth*, *Hammersley v. Knowlys*, and *Wright v. Laing*, the payment, it is to be observed, was held applicable to the debt oldest in point of time; but that circumstance does not appear to have operated as a ground of decision. Those cases decidedly establish that certain limits are to be placed upon the creditors' right of applying general payments, which in many of our cases, and *dicta* of our judges, has been treated as an unqualified right, to be exercised purely according to the creditors' discretion. But if the principle of these cases is admitted, it seems difficult not to extend it to the length to which it is carried by the civil law. If the circumstance of one debt exposing the debtor to bankruptcy, (as in *Meggott v. Mills*, and *Dawe v. Holdsworth*,) is to be considered a ground for presuming an intention to discharge that in preference to another debt unattended with such serious consequences, it seems difficult to deny that the same presumption arises, to a certain extent, from the fact of one debt being, in any degree, more onerous to the debtor than the other (as in case of its carrying interest, or being with a penalty, or being a specialty, or with a surety): and the rule of the civil law, that the general payment shall be taken to be paid "in graviorem causam," surely appears both more equitable and more certain than admitting the general right of the creditor to make the application, and, at the same time, subjecting it to the sort of undefined qualification put upon it by the four cases above referred to. See Sir *W. Grant's* luminous judgment, 1 Meriv. 604., and *Perris v. Roberts*, 1 Vern. 54. It is now clear that the creditor's right to apply an indefinite payment arises only in the case of distinct and insulated debts, not in the case of several items composing one general account: in the latter case it is settled, "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account." The debt which arises first, in these cases, is that to which the payment is first applicable. *Clayton's Ca.* 1 Meriv. 608. *Bodenham v. Purchas*, 2 Barn. & A. 39. *Hammersley v. Knowlys*, 2 Esp. Ca. 667. *Bosanquet v. Wray*, 6 Taunt. 597.; and this is conformable to the rule of the civil law. ||

In debt on a bond with condition, the plaintiff may declare generally, and it is on the defendant's part to shew the condition, which goes by way of defeasance; and if he demand oyer, and demur, the plaintiff shall have judgment. (a)

Lev. 88.
Salk. 326.
[(a) Not if the condition be illegal upon 26]

the face of it, for in that case the demurrer is proper. 2 Bl. R. 1108. 11 Co. 2.]

Error upon a judgment in debt, upon an obligation of 600*l.*: the error assigned was, that there was not a sufficient breach alleged; for the condition being that he should enjoy such lands without eviction, the breach was assigned in the recovery by verdict in ejectment, upon a lease made by one *E.*, and does not shew what title *E.* had to make the lease, but avers that *E.* had a good title; and it might have been, that he had title from the plaintiff himself after the obligation made; and therefore he ought to have shewed a good and eigne title before the lease made. *Et*

Cro. Jac. 315.
Kirby v. Hansaker.
Mod. 294. S.C.
cited, and allowed to be law; and so in 3 Mod. 155.
Vent. 84.
2 Lev. 57., but 3 Lev. 325.

Mod. 66. seems *per cur.* — The replication is ill; for it ought to (a) comprehend *contra*; and there said by a full and manifest breach, otherwise it is not good.
Jones, that, since this case, the statute 21 Jac. 1. c. 15. and 16 & 17 Car. 2. c. 8. have greatly strengthened verdicts. (a) That in debt upon a bond to perform covenants, the replication must shew a certain breach; but in covenant, it is sufficient to assign a general breach. *Salk.* 139. pl. 5. *Ld. Raym.* 478.

2 *Saund.* 181. || But the plaintiff is under no necessity of setting out the title
 n. 10. (5th of the person who entered upon him, because he is a stranger to
 ed.) 1 *Show.* it, it being considered sufficient to allege generally, that he *had*
 70. See *ante*, a *lawful* title before, or at the time of the conveyance to the
 tit. *Covenant*, plaintiff.
 (I). 4 Term

R. 617. 8 Term R. 278. *Post*, tit. *Pleas and Pleading*, (B) 3.

1 Term R. 671. Where the eviction is by a stranger, it must be shewn to be a
Nash v. Palmer, lawful eviction, and not a mere wrongful act; but where a cove-
 5 *Maule & S.* nant, or condition of a bond, is special against the acts of a par-
 374. *Fowle v.* ticular person, it extends to all his acts, whether rightful or
Welsh, wrongful: and therefore it is sufficient in such a case, to allege
 1 *Barn. & C.* 29. wrongful generally that the party entered. However, some particular act
 2 *Saund. R.* must be shewn by which the plaintiff is interrupted, for otherwise
 181. n. 10. the breach of a covenant or condition for quiet enjoyment is not
 Com. R. 228. well assigned. ||

Salk. 140. pl. 6. If the condition of an obligation be to deliver, before the 5th
Ld. Raym. 620. of *Jan.*, twenty quarters of corn out of a ship into a barge, to be
 brought by the plaintiff to receive the said corn; and the plaintiff
 assign for breach, that the defendant did not deliver it 5th *Jan.*;
 it is good: for when one is obliged to deliver, and the other to
 accept, it shall be presumed that the plaintiff was there before
 the time, ready to accept the corn with his barge.

Sid. 307. If the breach be assigned after the action brought, it is ill; as,
Champion v. where in debt on an obligation for non-performance of covenants,
Shipweth; but the plaintiff replied, and assigned a breach in nonpayment of
 the reporter rent the 20th of *June*, 17 Car. 2., and the bill was filed Trin.
 says, that if the obligation be 17 Car. 2., which term ended the 14th of *June*; this was held ill.
 for payment of money, and the money become payable pending the action, this makes the action
 good; *secus*, where the condition is for performance of covenants; *vide Cro. Eliz.* 325. 4 *Leon*
 98. *Keb.* 106.

Sid. 30. It is said, that in an obligation for performance of covenants,
Jenkins v. the breach ought to be more precise and particular than in actions
Hancock, of covenant; but that yet if what is material, and the substance,
Cro. Eliz. 749. is alleged, it is sufficient; as, where the condition of an obligation
 was, that the defendant, a bailiff, should not let at large any pri-
 soner arrested without licence of the plaintiff, an under-gaoler;
 and the breach assigned was, that the defendant had let at large
 such a one, whom he had arrested at *Westminster*, without li-
 cence, &c. this was held sufficient, though the particular time
 and place were not set forth, the escape being the material part
 of the covenant or condition.

Cro. Jac. 264. If the replication be repugnant to the declaration, it makes the
Saund. 116. declaration ill, because the subsequent pleading falsifies the de-
 326. claration; as, if a man declares on a bond made 1 *Martii*, if the
 plaintiff

plaintiff replies, that the bond was delivered 30 *Martii*, this falsifies the declaration; because it could not be made the first: so if the rejoinder falsifies the bar, the bar is vitious.

A debt on a bond, with condition for performance of several things; the defendant pleads *quod conditio ejusdem facti nunquam infracta fuit per se ipsum, &c.* and held an ill plea; because for saving the bond it is necessary for the defendant to shew how he hath performed the condition; and this sort of pleading was never admitted. 2 Vent. 156.

So, if he had pleaded *performavit omnia*, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly. But, if the condition were for performance of covenants in an indenture, performance generally will be a good plea, if they are all in the affirmative. 1 Lev. 305.
1 Sid. 215.
Defendant cannot plead conditions performed, to the covenants.

a bond for performance of covenants, without oyer of the deed, which contains R. 1 Sid. 50. 97. 425. 1 Vent. 57. R. Al. 72. — And he must make a *profert in cur.* of the deed, otherwise it will be bad on a special demurrer. R. 1 Saund. 9.

¶ To debt on bond conditioned for performance of articles in an agreement referred to, a plea of performance generally was held bad on special demurrer, because it did not appear but that some of the articles might be negative or disjunctive. Earl of Kerry, v. Baxter, 4 East, Rep. 340.; *et vide* 1 Saund. 117. n.(1). (5th ed.)

And it seems doubtful whether the plea would have been helped by an allegation that none of the articles were *negative* or *disjunctive*.

So, where general performance was pleaded to debt on bond conditioned to perform covenants, and the plaintiff in his replication set out the indenture *verbatim*, and then demurred, shewing for cause that the defendant had not shewn how he had performed the negative covenants; the demurrer was held good. But, if the indenture set out in the replication had contained no negative or disjunctive covenants, the defect of the plea in not setting out the indenture would have been cured. Plomer v. Rain, 4 East, Rep. 344. n.

Debt on a bond conditioned to deliver goods on such a day; the defendant pleads, that he delivered them according to the form of the condition; the plaintiff demurred, because he ought to have pleaded expressly, according to the words of the condition, that he delivered them on the day; and the court inclined to that opinion. — (a) So, in debt on a bond conditioned to pay a sum of money at *D.* such a day, the defendant pleads payment at the day *secundum effectum conditionis*; the plaintiff demurred specially, because he does not say where he paid it: and it was held to be form at least; and the plaintiff having demurred specially had judgment. (b) And generally, where performance is pleaded, it ought to be pleaded in the words of the condition. Lev. 145.
Nels. Lutw. 268.

(a) 3 Lev. 245.
(b) 2 Salk. 520 pl. 22. 2 Ld. Raym. 1138. Salk. 208. pl. 8. 6 Mod. 157. 197.

[But, where the condition of a bond was, "that the defendant "should from time to time *render a just and true account* of all "monies received by him as treasurer of the parish of *B.*" &c. and the breach assigned was, that on the last account furnished by the defendant, there appeared to be due by him a large sum of money, Bache v. Proctor, Doug. 382.

money, which he had not *paid over*; the defendant demurred because the breach was not within the condition, which was only to *account*: but *per curiam*, the intention of the parties, and fair construction of the condition is, that the money should be paid; for to construe it a condition to enforce the making out a paper of items and figures is idle and nugatory.

African Company v. Mason, Gilb. Rep. 238. cited 2 Burr. 773. and 1 Str. 227.

Where the defendant, being appointed agent to the plaintiffs, gave a bond, conditioned for the payment of all sums of money by him received to the use of the Company; and the breach assigned was, "that the defendant had received from *J. S.* and "several other persons divers sums of money, which he had not "paid to the Company;" it was holden, that the assigning of the breach in the receipt of *divers sums* from *several persons*, was too general and uncertain, and therefore bad.

Cornwallis v. Savery, 2 Burr. 772.

But where, in debt on a bond as security for a person appointed agent to a regiment, the breach assigned was, "that the defendant had received several sums of money from the paymaster-general, for the use of the regiment, which he had not paid "over to the officers according to their respective proportions:" this breach was, on demurrer, holden to be well assigned; for the money was received from one person, (not from many, as in the last case,) and for one purpose, to pay the regiment; and the defendant's omitting to pay any part of it was a breach of the bond.]

Shum v. Farrington, 1 Bos. & Pull. 640.

|| So in debt on bond conditioned for *J. S.* rendering an account to the plaintiffs of all monies which he should receive as their agent; the defendant pleaded performance in the words of the condition; plaintiffs replied that *J. S.* received divers sums, amounting to 2000*l.*, belonging and relating to the plaintiffs' business, as their agent, and had not rendered an account of the said 2000*l.*, or any part thereof: this replication, being specially demurred to for generality, was held sufficient.

Barton v. Webb, 8 T. R. 459.

Where, also, to debt on bond conditioned that one *B. R.* should account for and pay over to the plaintiffs, as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity. The defendants pleaded performance generally. The plaintiffs replied, that *B. R.* had *received divers sums*, amounting to a large sum, *viz.* 100*l.*, *from divers persons, for divers voluntary contributions*, for the use of the said charity, which he had not accounted for, or paid over, &c. On special demurrer the replication was held sufficient.

Wilcocks v. Nicholls, 1 Price, 109., *et vid.* Com. Dig. tit. Pleader. c. 45.

So, in debt on bond conditioned to perform an award, and performance pleaded, it was held sufficient to assign a breach generally in the words of the award. ||

Jones v. Williams, Doug. 214. || But this case was overruled in the two foregoing cases, in 1 Bos. & P. 640., and 8 Term R. 459. ||

[In debt on a bond given as a security for the faithful service of a clerk, the breach assigned was, "that a large sum of money, " *viz.* 13*l.*, came to the clerk's hands on account of the plaintiff, " which he (the clerk) had spent and embezzled." This breach is ill assigned, inasmuch as it does not shew how and from whom the money so embezzled had been received.

The condition of a bond was, "that the plaintiff should furnish the defendant with ale and beer, to be used in his house, at such prices, and that he should take it of nobody else; but might take his other liquors from whom he pleased, malt liquors only excepted." The breach assigned was, "that such a quantity of *liquors* was drawn and unpaid for." On demurrer, it was holden, that the breach was improperly assigned, for it did not appear that the liquors unpaid for were *malt liquors*, which only the defendant was bound to take from the plaintiff.

Stibbs v. Clough, 1 Str. 227.

The defendant's wife, when sole, gave a bond to the plaintiff in the penal sum of 1200*l.* if she married *any other person* than the plaintiff, or refused to marry him within one month after her father's death. She married the defendant in her father's lifetime, upon which the plaintiff brought debt on the bond, and assigned her marriage as a breach: and it was holden to be good, (though it was insisted, that she might still perform one part of the condition by marrying the plaintiff after her father's death, as he might survive her husband;) for that by the breach of one of the conditions the bond became absolute.

Box v. Day, 1 Wils. 59.

A bond was for the payment of a sum of money by instalments; the condition was for the payment of these instalments, without the words *or any of them*. It was nevertheless resolved, that the obligee might, on default of payment of any of the instalments, bring his action on the bond.]

Hallett v. Hodges, Say. Rep. 29. || Judd v. Evans, 6 Term R. 599.; et vid. Talbot

v. Hudson, 2 Marsh, 527. Eastwood v. Hole, 3 Price, 219. ||

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place *paratus fuit* to pay the money, but that nobody was there to receive it; and held ill, on a general demurrer, for want of an *obtulit solvere*; for the tender only is traversable, not the *paratus*.

3 Lev. 104.

In debt on an obligation by a master of a ship against a merchant, for the performing of agreements in a charter-party; the declaration was, *et ad performance conventionum ex parte dicti mercatoris obligasset se dicto magistro*, &c. Adjudged insufficient, for want of the word *ipse*, or *ipse prædict. mercator obligasset*, &c.

Vent. 196. Cro. Eliz. 915. Salk. 26. pl. 15. et vide tit. Amendment and Jeofails.

In debt on a bond with condition, the defendant pleaded a collateral plea, which was insufficient; the plaintiff demurred, and had judgment without assigning a breach; for the defendant by pleading a defective plea, by which he would excuse his non-performance of the condition, saves the plaintiff the trouble of assigning a breach, and gives him advantage of putting himself on the judgment of the court, whether the plea be good or not. But, if the plaintiff had admitted the plea, and made a replication which shewed no cause of action, it had been otherwise. But, if the replication were idle, and the defendant demurred, yet the plaintiff should have judgment, without assigning a breach.

Lev. 55. 84. 3 Lev. 17. 24. Tryon v. Carter, 2 Burr. 944. S. P.

And in all cases of debt on an obligation with condition (that of a bond to perform an award only excepted), if the defendant pleads

Salk. 138. pl. 2. vide tit. Arbitrament.

pleads a special matter, that admits and excuses a non-performance, the plaintiff need only answer, and falsify the special matter alleged; for he that excuses a non-performance admits it, and the plaintiff need not shew that which the defendant hath supposed and admitted.

But, if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication must shew a breach; for then he has no cause of action, unless he shew it; and this difference will give the true reason, and reconcile the cases in the (a) margin.

Salk. 158. pl. 2.
Tryon v.
Carter,
2 Burr. 944.
(a) Lev. 55. 84.
226. Saund.
102. 159. 317.

3 Lev. 17. 24. Vent. 114. Cro. Eliz. 520. Yelv. 78.

Lev. 194. [Qu.
the passage in
Levinz? The
reference is
faulty.]

In debt on an obligation to pay for what goods an apprentice shall waste; the plaintiff in pleading need not shew what the goods were, for he is to recover the penalty of the bond: otherwise, in covenant.

Saund. 116.
2 Vent. 278.
Lev. 194.

Pleading the breach of a condition of a bond, *eo quod* it was not paid, &c. is a good affirmation; as in avowry, *et quia* the rent was arrear, is good: so, in all *assumpsits* on collateral promises to pay on request, *licet* such a day and place he requested, is an affirmation, and traversable.

2 Lev. 12. 75.
Saund. 275.

Pleading a bond by a *testatum existit* is not good, though it be with a *hic in curiâ prolat.*

Hudson v.
Spier,
3 Lev. 50.

Debt on an obligation conditioned to perform articles; the defendant demands oyer, and then pleads the articles and performance; the plaintiff prays they may be entered *in hæc verba*; and then demurs; because the defendant in pleading the articles omitted part; and the plaintiff had judgment; for perhaps he might have assigned the breach in those omitted, of which advantage he is by this means deprived.

Smith v.
Yeomans,
1 Saund. 316.

[Debt on bond for performance of covenants in certain indentures: the defendant demands oyer; and then pleads, that there are not any covenants in the indenture on his part to be performed: the plaintiff prays oyer of the indenture by the defendant brought into court, which is entered at large *in hæc verba*; and it appears, that there are several covenants in the indenture on the defendant's part, upon which the plaintiff demurs. It was insisted by the defendant's counsel, that the plaintiff had demurred too hastily, for he ought to have shewn a breach of one of his covenants to maintain his action; as, in debt on a bond to perform an award, if the defendant pleads no award made, it is not sufficient for the plaintiff to reply and shew an award made, but he ought likewise to shew a breach thereof: so, here, when the defendant pleads, there are no covenants in the indenture, the plaintiff ought not only to shew the covenants, but likewise to assign a breach on them. *Sed non allocatur*; and judgment was given for the plaintiff without any difficulty. And the reason seems to be, that when the defendant brings the indenture into court, and saith, that there are no covenants therein, on oyer thereof, the indenture is made part of the (a) plea; and it thereby judicially appears to the court, that he hath pleaded a false plea,

(a) Jeffery v.
White,
Dougl. 476. acc.

plea, and hath taken an averment against the truth of that which appears to the court by the very indenture which he himself hath brought into court; and so the plaintiff need not shew any matter of fact in a replication to maintain his action, as in the case of an award, but a demurrer was more proper. *Quod nota*, saith the reporter.]

¶ In an action on a bond conditioned for the payment of a separate maintenance to the obligor's wife, the declaration alleged that certain sums became due and owing from the defendant *to the obligee*. Judgment was arrested, because the breach should have alleged the money to be due *to the wife*.

To debt on bond, the condition of which was, that *A. B.* should deliver a true account of all monies received by him in pursuance of his office, the defendant pleaded performance generally. The plaintiff, in his replication, assigned for breach, that *A. B.* was requested to deliver a true account of all monies received by him in pursuance of his office, but refused so to do: held, on special demurrer, that this assignment of the breach was bad, in not alleging "that *A. B. had received* any monies by "virtue of his office."

Before the statute 8 & 9 W. 3. c. 11. (*a*), a plaintiff could only assign *one* breach upon a bond or penal sum for the performance of covenants; if he assigned several breaches, the declaration was bad for duplicity, because the bond was forfeited by one breach of covenant as much as by several. (*b*) But now, by that statute (which has been holden to extend not only to the non-performance of covenants and agreements secured by bonds, whether the agreement be in the bond or separate (*c*), but also to bonds, &c. for the payment of money by instalments (*d*) for the payment of an annuity, but not for payment of a sum on a certain day, or within a month after party's death (*e*), for the performance of an award (*g*), or for the performance of any other specific act, except the payment of a sum in gross, and except the cases of a bail-bond (*h*), replevin-bond (*i*), and the bond of a petitioning creditor (*k*),) the plaintiff, in an action in any court of record upon such bond or penal sum, *may* (which has been holden to be compulsory) (*l*) assign as many breaches as he thinks fit; and the jury are to assess not only such damages and costs as were usually given before the statute, but also damages for such breaches as on the trial the plaintiff proves to have been committed. And on judgment for the plaintiff on demurrer, by confession, or *nil dicit*, he *may* (*m*) suggest the breaches he complains of upon the roll, and prove the truth thereof, and assess his damages upon a writ of enquiry. And upon this branch of the statute it has been decided, that where the plaintiff only states the bond in his declaration, and the defendant pleads *non est factum* (*n*), or *non est factum*, and that the bond was obtained by fraud and covin (*o*), and issue is joined thereon, he may still enter an assignment of breaches on the record in making up the issue. The like judgment is entered on verdict for the plaintiff as before the statute was usually done; and upon payment by the defend-

Lunn v. Payne,
1 Marsh. 495.
6 Taunt. 140.
S. C.

Serra v. Fyffe,
1 Marsh. 441.
S. C. by name
of Serra v.
Wright,
6 Taunt. 45.]

(*a*) *Vide* tit.
Covenant (I),
vol. 2.
(*b*) 1 Saund. 58.
note (5th edit.)
(*c*) Hunt v:
Jennings,
5 Barn. & C.
650.
(*d*) Willoughby
v. Swinton,
6 East, 550.;
and see
2 W. Bl. 706.
958.
(*e*) Walcot v.
Goulding,
8 Term R. 126.
Cardozo v.
Hardy,
2 Moo. 220.
Murray v.
Earl of Stair,
2 Barn. & C. 82.
(*g*) Welch v.
Ireland,
6 East, 612.;
and see
1 Price, 109.
(*h*) Moody v.
Pheasant,
2 Bos. & Pul.
446.
(*i*) 2 Saund.
187.
(*k*) Smith v.
Broomhead,
7 Term R. 300.
Smithey v.

ant,

Edmonson,
5 East, 22.
(l) 5 Term R.
636. 538.
(m) *Ibid.*
(n) Ethersey
v. Jackson,
8 Term R. 255.
(o) Homfray v.
Rigby,
5 Maul. &
S. 60.; see
14 East, 401.
5 Taunt. 386.;
see 1 Saund.
58. a. (5th ed.)
2 W. Bl. 1190.
6 Term R. 303.

Tombs v.
Painter,
13 East, R. 1.;
sed vide
De la Rue
v. Stewart,
2 New R. 362.;
and see
5 Moo. 198.
Salk. 172. pl. 4.

Hanson v.
Boothman,
13 East, R. 22.

Baldee v. Eler,
5 Term R. 250.

ant, before execution, of his damages assessed, together with his costs, and charges, a stay of execution is to be entered upon the record; or if upon execution the plaintiff has been paid all the damages, costs, and the charges of the execution, the defendant's body, lands, or goods are to be forthwith discharged therefrom, which is likewise to be entered of record: but in either case *the judgment is to remain as a further security*, to answer any further damages the plaintiff may sustain by any further breach of covenant contained in the same instrument; — and for such breaches the plaintiff may have a *scire facias* against the defendant, his heirs, tenants, or executors or administrators, summoning him or them respectively to shew cause why execution should not be awarded upon the judgment, upon which there is the same proceeding as took place in the action of debt upon the bond for assessing the damages upon trial or writ of enquiry.

In debt on bond conditioned not to assault, molest, or injure the person of the plaintiff, the replication, alleging that defendant assaulted, &c. by beating and ill-treating plaintiff, was held a sufficient assignment of the breach of the condition, for which the jury were to assess damages on stat. 8 & 9 W. 3. c. 11. § 8., though such breach were not alleged in formal terms according to the statute. ||

In debt on a bond, with condition to exhibit an inventory to the ecclesiastical court before such a day, it is not enough for the defendant to plead, that there was no court held, but he must plead also that he was there ready; for he must shew that he has done all that could be on his side toward a performance. So, if the condition were to levy a fine *in Oct. Hil.*, by which the obligee is to sue out the writ of covenant; it is not enough for the defendant to plead, that no writ of covenant was sued out, but he must plead, that he was there ready at the day and no writ of covenant was sued out. So, if the condition were to pay money to *J. S.* at a certain time and place, it is not enough for the defendant to say, that the obligee came not, without saying that he was there ready and offered, &c.

|| But where an indenture contained covenants to sink coal-mines by a certain day, as far as could be accomplished, or, in default, to pay so much to the lessor as should be awarded. On default a sum was awarded to the lessor for the time past, and an annual rent for the time to come, until such coal-mines should be sunk. To an action on a bond conditioned to perform the award, it was held sufficient plea that the defendant paid the sum awarded, and that he had sunk for coal-mines, but that, on trial, there were none found fit to be worked. ||

[To debt on bond conditioned for the payment of a certain sum on a certain day, the defendant pleaded, that by articles of agreement between the plaintiff, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened: but, as the plea did not allege the payment of the interest accordingly, it was holden bad.]

In

In debt on a bond, the defendant may have several pleas in bar; as if the plaintiff sue as executor, the defendant may plead the release of the testator for part, and for the residue the release of the plaintiff; so, he may plead payment as to part, and as to the rest an acquittance.

Salk. 180.
[Bonds are within the act 4 & 5 Ann. c. 16. which allows the de-

fendant to plead double: therefore, where the condition was to marry on request, *non est factum*, and *never requested*, were allowed to be pleaded together. *Dunn v. Vacher*, 2 Stra. 908. So, *non est factum*, and a discharge by bankruptcy. *Atkinson v. Atkinson*, *Id.* 871. But not *non est factum*, and *solvit ad diem*, *Arnold v. Baas*, 2 Bl. Rep. 993.; or *solvit post diem*, *Fox v. Chandler*, *Id.* 905.; or *non est factum*, and a tender as to part. *Jenkins v. Edwards*, 5 Term Rep. 97.] || *Sed vide* 13 East, 255.||

In debt on an obligation, if not guilty be pleaded, and there be a verdict for the plaintiff, it is aided by the 16 & 17 Car. 2. c. 8. because being an ill plea, and a false one, the plaintiff ought to have his judgment, both because of the badness of the plea, and for its falsehood. But, had the verdict been for the defendant, yet the plaintiff should have judgment, because the declaration is not answered by the plea.

Noy, 56. Cro. Eliz. 773.
2 Jon. 184.

In debt on a bond conditioned for the payment of 105*l.* the defendant pleads payment of 100*l.*, *secundum formam effectum conditionis*; the plaintiff replies, *non solvit prædict.* 105*l.*: this is an immaterial issue, not aided by the statute; for the plaintiff has not traversed the same payment that is in the defendant's plea.

Cro. Jac. 585.
Cro. Car. 593.;
||see *Cobb v. Bryan*, 3 Bos. & Pul. 348.
Corporation
2 Moo. R. 91.||

of *Arundel v. Bowman*, 2 Moo. R. 91.||

In debt on an obligation, the defendant pleads payment of 50*l.* 14 Junii, 11 Jac. according to the condition; the plaintiff replies, *quod non solvit 50*l.* prædict.* 14 Aug. anno 11 supradict., *quas ad eundem diem solvisse debuisset, et hoc, &c.*; the verdict found, *quod non solvit prædict.* 14 Junii, *prout* the defendant had alleged. The objection here was, that no issue was joined; because they do not meet in the time the money was paid. But the word *August* was adjudged to be plainly surplusage; for when he said *quod non solvit prædict.* 14 die, it is a sufficient traverse, without the word *August*; and *August* is plainly repugnant to the word *prædict.*, for *prædict.* refers to *June*; and such surplusage, being a repugnancy to what was before material, was idle and void.

Cro. Jac. 549.
Sand. 282.286.

If one declared on a bond made 1 Martii, if the plaintiff reply, that the bond was delivered 30 Martii, this falsifies the declaration, because it could not be made the first, and is therefore vitious.

Cro. Jac. 264.
Sand. 116.226.

In debt on an (a) obligation the defendant cannot plead *nihil debet*, but must deny the deed by pleading *non est factum*; for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*.

Hard. 332.
Hob. 218.
[(a) So held on a general demurrer.

Anonymous, 2 Wils. 10.] But, if the debt be due by simple contract, then he may plead *nihil debet*; for it does not appear that there is any debt continuing. 2 Inst. 651. Hob. 218.

[On the plea of *non est factum*, only questions of fact can arise. Where, therefore, the condition is void in law, the defendant should prayoyer, and demur, if the illegal condition appears upon the face of it; if not, plead the special matter to avoid it.

Colton v. Goodridge,
2 Bl. Rep. 1108.
Pigot's case,
11 Co. 26. Thomson v. Leach, 2 Salk. 675.

Hence,

Colborne v. Stockdale, 1 Stra. 495.
Hinton v. Rofey, 3 Mod. 35.
¶ 6 Term R. 460. Where the consideration of the bond is illegal by the common law, or by statute, the bond must be avoided by a special plea; Colton v. Goodridge, 2 Bl. R. 1108. Harmer v. Wright, 2 Stark. Ca. 55. Harmer v. Rowe, 2 Chit. R. 334. Ferrall v. Shaen, 1 Saund. R. 295. a.; *sed vide contra* Thompson v. Rock, 4 Maul. & S. 358.: but where the bond is void by reason of something affecting its execution which renders it not the deed of the party, this may be given in evidence on *non est factum*, as that it was delivered as an escrow, or obtained by fraud, or made by a feme covert, Com. Dig. Pleader, 2 W. 18.; or made by a lunatic, Stra. 1104.; or by a drunken man, B. N. P. 172.; or avoided by erasure, 3 Camp. 181.; and see the learned note, 5 Coke's R. 119. b. (ed. 1826.)]

the consideration of the bond is illegal by the common law, or by statute, the bond must be avoided by a special plea; Colton v. Goodridge, 2 Bl. R. 1108. Harmer v. Wright, 2 Stark. Ca. 55. Harmer v. Rowe, 2 Chit. R. 334. Ferrall v. Shaen, 1 Saund. R. 295. a.; *sed vide contra* Thompson v. Rock, 4 Maul. & S. 358.: but where the bond is void by reason of something affecting its execution which renders it not the deed of the party, this may be given in evidence on *non est factum*, as that it was delivered as an escrow, or obtained by fraud, or made by a feme covert, Com. Dig. Pleader, 2 W. 18.; or made by a lunatic, Stra. 1104.; or by a drunken man, B. N. P. 172.; or avoided by erasure, 3 Camp. 181.; and see the learned note, 5 Coke's R. 119. b. (ed. 1826.)]

9 East, 422.
9 Barn. & C. 462.
Paxton v. Popham, 9 East, R. 408.
and see Lady Downing v. Chapman, 9 East, R. 414. n.; *et vide* Collins v. Blantern, 3 Wils. 41., and tit. Condition (K).

¶ And this may be done, although the matter alleged in the special plea be inconsistent with the condition of the instrument. Thus, to debt on bond conditioned for the payment of a sum of money which the condition stated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at *respondentia* interest, secured by a cargo of goods shipped from *Calcutta* to *Ostend*; it was held, that the defendant might plead that the bond was given to secure the price of goods sold by the obligees to the obligors in the *East Indies*, and illegally prepared by the obligees for shipment from thence to beyond the *Cape of Good Hope*, without the licence of the *East India* Company, without proceeding to state formally that the condition was colourable, to conceal the illegality of the transaction, and without negating that the bond was given for money *taken up, borrowed, and received, &c.* For the statement in the plea was rather explanatory of than absolutely inconsistent with the transaction stated in the bond; but, if it were inconsistent with it, the plea would still be good.

Pole v. Harrobin, 9 East, R. 417. n.

An officer cannot commute for money the services of an impressed man, nor let him go for money: therefore a bond given to secure the man's return on nonpayment of such money, may be avoided by plea disclosing the true transaction, and shewing that the man was illegally impressed.

Lightfoot v. Tenant, 1 Bos. & Pul. 551.

And where to debt on bond the defendant pleaded that the bond was given to secure payment of the price of goods agreed to be sold and delivered in *London* by the plaintiff to the defendant, to be by the latter shipped to *Ostend*, and from thence re-shipped for the *East Indies*, and there trafficked with clandestinely; this was held a sufficient bar to the action—the case being within the stat. 7 Geo. 1. c. 21., which avoids all contracts for supplying cargoes to foreign ships in such a trade.

Greville v. Atkins, 9 Barn. & C. 462.

So, where a bond, after reciting that *A. B.* was colonial secretary of *Tobago*, and had appointed *C. D.* to be his deputy, in consideration of his paying thereout to *A. B.* the annual sum of 450*l.*, was conditioned for punctual payment of that sum (without saying “out of the fees”), and defendant pleaded that the bond was given in pursuance of an agreement to pay that sum *at all events*, on which issue was joined and found for the defendant; it

was

was held, that, even supposing the agreement to be inconsistent with the language of the bond, it was competent to defendant to plead and prove it, in order to shew the illegality of the consideration; and the bond was held void by virtue of the 49 Geo. 3. c. 126. ||

If the defendant has paid the money before the day, he may, to debt on bond conditioned to pay *at a day certain*, plead *solvit ad diem*, and give in evidence payment *before* the day, as he could not plead it: for if the defendant were to plead payment before the day, the issue would be immaterial, as it would still leave the presumption open that there might be payment at the day. And therefore a difference is to be observed between pleading where the condition of a bond is to pay *at a day certain*, and where *at or before* such a day: for to the first, the defendant may only plead *payment at the day*, for the reason now given; besides, that the performance of a condition ought to follow the terms of it: but to a bond payable *at or before such a day*, the defendant may plead *payment before the day*, for it is within the condition. And therefore where it was so pleaded, and the defendant demurred to it as an immaterial issue, the court over-ruled the demurrer, and laid down the rule to be, "That where the defendant pleads performance of the condition, the plaintiff must assign an absolute breach, though it is not necessary where he pleads a collateral matter, as a release; and that, therefore, where the defendant had pleaded payment before the day, the plaintiff should have replied, that the money was not paid at the day mentioned in the plea, *nor at any time before, on, or after that day.*"

But a tender and refusal of principal and interest at a subsequent day cannot be pleaded in bar under the statute, as not being within the equity of it; for such construction would be prejudicial, as it would empower the obligor at any time to compel the obligee to take his money without notice.

A. gave *B.* a bond to secure an annuity, and, before any payment became due, *A.* lent *B.* a sum of money, on which it was agreed, that *B.* should retain the payments of the annuity, as they became due, till that sum was discharged; then *B.* became a bankrupt. The agreement to retain was holden to be a good plea to an action on the bond by *B.*'s assignees for the payments accruing after the bankruptcy; such agreement and retainer being equivalent to a plea of *solvit ad diem*.

If no interest has been paid on a bond for twenty years, it shall be in law presumed to be satisfied; and in such case the defendant may plead *solvit ad diem*, and rely on the presumption. Lord *Raymond* indeed left it to the jury on sixteen years, where there were circumstances to fortify the presumption. But without any circumstances a period of nineteen years and a half has been holden insufficient. (a)

ditional circumstance, as, an intermediate settlement of accounts between the parties, less than twenty years would not raise a presumption of payment. *Colsell v. Budd*, 1 Camp. 27. The presumption may be rebutted by proof of circumstances, accounting for no earlier demand having been made, as where the obligee resided abroad for twenty years. *Newman v. Newman*, 1 Stark. Ca. 101. ||

Winch v. Per-
don, Mich.
1 G. 1. Bull.
N. P. 174.

Tryon v. Car-
ter, 2 Str. 994.
Fletcher v.
Hennington,
2 Burr. 944.
1 Bl. R. 210:
S. C.

Underhill v.
Matthews,
Pesch. 1 G. 1.
C. B. Bull.
N. P. 171.

Sturdy v. Ar-
naud, 3 Term.
R. 599.

1 Burr. 434.
Cowp. 109.
Oswald v.
Legh, 1 Term
R. 270.

|| (a) But Lord
Ellenborough
held, that with-
out some addi-

Moreland v.
Bennett,
Stra. 652.

To a bond of thirty years standing the defendant pleaded *solvit ad diem*, and relied on the presumption: the plaintiff in answer could only prove payment two years after the time mentioned in the condition, but gave no evidence of any receipt or demand for twenty-eight years past. The Chief Justice was of opinion, that this plea of payment at the day was to be taken as strictly in this case, which went only upon the presumption, as in any other case; and the plaintiff having falsified the plea by shewing a payment of interest two years after, it was not sufficient to say the other twenty-eight years were enough to let in the presumption; because, to take advantage of that, the defendant should have pleaded upon the act for the amendment of the law, that he paid (a) the money *after the day*, in which case it would have been with him upon the evidence.

||(a) The obligor cannot plead that he tendered the money after the day.

1 Esp. Ca. 110.
10 Mod. 26.||

Fladong v.
Winter,
19 Ves. 196.

|| And the presumption of payment after twenty years may be repelled by evidence that the obligor had no opportunity or means of paying.||

Searle v. Lord
Barrington,
2 Stra. 826.
2 Ld. Raym.
1570. S.C.
|| 8 Mod. 279.
3 Bro. P. C.
593. S. C.||

To debt on a bond, the defendant pleaded *solvit ad diem*, and relied on the presumption of nonpayment of interest for twenty years: the plaintiff offered in evidence an indorsement on the back of the bond, being a receipt for interest on it ten years before the presumption accrued. This evidence was refused by the Chief Justice, on the ground, that it was the act of the obligee himself, and so inadmissible. But the court granted a new trial, for it was proper evidence to be left to a jury, whether the indorsement of the receipt of the money had not been made with the privity of the obligor, it being the constant practice for the obligee to indorse the payment of interest, and that for the sake of the obligor, who is safer by taking such an indorsement, than by taking a loose receipt. On a new trial the evidence was admitted, and the plaintiff recovered.

2 Str. 827.
In Barnes v
Ransom,
1 Barnard.
B. R. 432.
a similar
indorsement

But in *Turner v. Crisp*, B. R. Hil. 14 G. 2. the Chief Justice refused to let the indorsement of a receipt of part of the bond, made after the presumption had taken place, be given in evidence; for that it differed from the above case, where the indorsement appeared to be made before it could be thought necessary to be made use of to encounter the presumption.

seems to have been admitted, though made after the presumption had taken place. But in *Glyn v. Bank of England*, 2 Ves. 43., Lord *Hardwicke* took the same distinction as was done in the present case. In a copy of *Select Cases of Evid.* 152. (where this case is also reported), formerly in the possession of the late Mr. J. Wilson, but now in that of Mr. Nolan, the editor of *Strange's Reports*, it is stated, that "at the sittings after Michaelmas term at Westminster, 6 Geo. 3., Lord *Camden* said, he was never much pleased with the determination of *Searle v. Lord Barrington*; however, he said, it was law." || In *Rose v. Bryant*, 2 Camp. 321., Lord *Ellenborough* held that such indorsements were not evidence against the obligor to keep the bond on foot, unless shewn to be on the bond recently after their date, and at a time when their purport was contrary to the interest of the obligee. By 9 Geo. 4. c. 14. § 3. it is enacted, that no indorsement of payment on any promissory note, bill of exchange, or other writing by the party to whom such payment shall be made, shall be sufficient proof of such payment to take the case out of the statute of limitations; but this only applies to simple contracts.||

Moyle v. Lord
Roberts, cited

Where the plaintiff shewed two writs of *testatum capias* sued out by him before the twenty years run, but not served, because defendant

defendant could not be found; Lord *Mansfield* said, there was no ground for the presumption.] in 1 Term R. 271.

If the condition of an obligation be, that the defendant shall discharge or acquit, or free the plaintiff of or from such a bond, or rent, or action, or from any other particular thing ascertained in the condition, there the negative plea, *non damnificatus*, is not good, because the defendant hath undertaken to do an act in discharge of the plaintiff; but, where the condition is only to free, or to discharge or indemnify the plaintiff from any damage, or cost, or trouble which shall or may happen by reason of such bond, rent, or action, or other particular thing therein mentioned; in such case, the negative plea is sufficient, because it doth not appear that any damage hath happened to the plaintiff; and if no damages have happened, then it is impossible that the defendant should shew in the affirmative the manner how he had freed or discharged the plaintiff; therefore it lies on the part of the plaintiff, by way of reply, to shew wherein he was damnified. Carth. 375.

[To debt on bond to save harmless, the defendant can only plead, either that he has saved the plaintiff harmless, or, that if he has received any injury it was through his own default. Holland v. Malken, 2 Wils. 126.]

Where the defendant pleads that he has saved the plaintiff harmless, he should shew *how he has done so*. But as the saving harmless is the substance, and *how* matter of form, the plaintiff must take advantage of this defect in the plea by special demurrer. White v. Cleaver, 2 Stra. 681.

¶ *Non damnificatus* is not a good plea to debt on bond conditioned for the payment of a sum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity. Holmes v. Rhodes, 1 Bos. & P. 638.; *et vide* 1 Will. Saund. 117. note (1). (5th ed.)

To debt on bond conditioned that the defendant should not open a shop within a certain distance of premises demised in a lease, the defendant pleaded, that he opened a shop by the licence of the plaintiff: held that such plea was bad on general demurrer, on the ground that a licence after breach was not good unless by deed. Sellers v. Bickford, 1 Moor, 468.; *et vide* Thomson v. Brown, *ibid.* 358. and tit. *Covenant*, vol. 2.

To debt on bond, with a condition for the performance by *R. G.* of all the covenants on his part, mentioned in an indenture bearing even date with the bond, and made or expressed to be made between the plaintiff and *R. G.*, the defendant cannot plead in bar that the indenture was never executed; for he is estopped by the condition of the bond. Hosier v. Searle, 2 Bos. & P. 299.

The condition of a bond, after reciting that the defendant and one *Tuffnell* had delivered and indorsed to the plaintiff, who had discounted the same, a bill of exchange drawn by *Tuffnell*, and accepted by *Tyrrell*, was, that defendant and *Tuffnell*, or one of them, should pay to the plaintiff the sum mentioned in the bill within a month after it should become due, in case it should not be then paid to the plaintiff by the acceptor, according to the tenor of the bill. To an action on the bond, it was held not a good Murray v. King, 5 Barn. & A. 165.

good plea that the bill, when due, was not presented for payment to the acceptor, nor that due notice of the dishonour had not been given to the defendant and *Tuffnell*; for the condition was absolute to pay the bill, in case it was not paid by the acceptor within a month after it was due; and though the defendants would not have been liable on the bill without a presentment and due notice, yet their liability on the bond was not so qualified.

Kipling v.
Turner,
5 Barn. & A.
261.; *et vide*
Arlington v.
Merrick,
2 Will. Saund.
415. (5th ed.)
in a note to

Where the condition of a bond, after reciting that *A.*, *B.*, and *C.* had filed a bill in equity against *D.* and *E.*, was, that the obligor should pay all such costs as the court of Chancery should award to the defendants on the hearing of the cause; it was held by three justices (*Abbott C. J. dubitante*), that the death of *E.*, one of the defendants, before any costs awarded, could not be pleaded in discharge of the bond.

which case the decisions are collected as to securities being discharged by change of partners, or death of any of the parties for whose benefit they are made.

Jones v.
Woollam,
5 Barn. & A.
769.

To an action on a bond given to plaintiff, as treasurer of a friendly society, the defendant pleaded that the rules of the society had not been confirmed at the quarter sessions, pursuant to 33 Geo. 3. c. 54. On demurrer, the plea was held bad; for, as the statute does not expressly avoid securities not registered pursuant to it, the bond was good at common law. ||

[See further, tit. "COVENANT," Vol. II. p. 83., and tit. "SET-OFF;"] || tit. "CONDITIONS," and *Addenda* thereto. ||

END OF THE FIFTH VOLUME.



255457

Author Bacon, Matthew

Law
Eng
B129n

Title A new abridgment of the law. v.5.

DATE.

NAME OF

University of Toronto Library

**DO NOT
REMOVE
THE
CARD
FROM
THIS
POCKET**

Acme Library Card Pocket
Under Pat. "Ref. Index File"
Made by LIBRARY BUREAU

